

The role of the ECJ in the development of EU copyright law: an empirical experience

Marcella Favale*

1. Introduction

The influence of the Court of Justice of the European Union (CJEU) and in particular of this its higher Court, the European Court of Justice (ECJ) on all fields of European Law does not need to be demonstrated, as it has been extensively argued by legal doctrine. Divergence of opinion still persists on whether this influence is contained¹ and prudent² or innovative and activist,³ but it is widely accepted that rules produced, directly or indirectly, through interpretation of EU Law by the Court are mostly respected.⁴ Some political scientists argue that Member States elaborate European Policy at intergovernmental level, while other maintain that, given the difficulty in reaching consensus among EU Member States prompts a 'judicialisation' of the EU governance (neo-functionalism). According to the latter theory the Court sets legal principles that induce policy reforms, which in turn underpin further European jurisprudence, in a virtuous circle.⁵ Both these theories inform and enrich the discussion on the normative function of the Court, instrumental to European integration, already discussed by previous commentators of European law.⁶

In 2015, the author of this Chapter, together with her colleagues, undertook the study of the Court and its rulings, in order to assess its role in shaping European copyright law. However, we did so by

¹ Lisa Conant, *Justice Contained. Law and Politics in the European Union* (Ithaca, N.Y.: Cornell University Press 2002), 7-10. See Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice' (2008) 102(4) *American Political Science Review* 435-452, 450.

² Ulrich Everling, 'The Member States of the European Community before their Court of Justice' (1984) 9 ELR 215-241. Anna Bredimas, *Methods of interpretation and Community Law* (Oxford: North-Holland 1978) 145. For an examination of ECJ rulings in which the Court adjusts to the will of political institutions see Vassilis Hatzopoulos, 'Actively talking to each other: the Court and the political institutions', in Elise Muir, Mark Dawson and Bruno de Witte (eds) *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar 2013) 133.

³ See generally Alec Stone Sweet and Thomas L. Brunell, 'How the European Legal System Works: Override, Non-Compliance, and Majoritarian Activism in International Regimes' (SSRN 8 March 2011) <<http://ssrn.com/abstract=1780902>> accessed 13 March 2014. See also generally the first work suggesting ECJ activism: Jean-Pierre Colin, *Le gouvernement des juges dans les Communautés Européennes* (Paris: Pichon et Durand-Auzias 1965). Also generally Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Copenhagen: Martinus Nijhoff 1986) and Hjalte Rasmussen, 'Between Activism and Self-Restraint: a judicial Policy for the European Court' (1988) 13 ELR 28-39, 34. For a recent work indicating the limits of the teleological approach of the Court see generally Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: CUP 2014). The author argues that the Court's departure from most common interpretative approaches, eg the three-stage theory by D. Neil McCormick and Robert S. Summers in *Interpreting Statutes: a Comparative Study* (Dartmouth: Aldershot 1991) is not justifiable by the originality of the EU scenario, and it suggests methods of adaptation of traditional interpretative techniques to the ECJ case-law. See also Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75(1) *American Journal of International Law* 1-27, 25, arguing that the Court (its judges and AGs) in accord with the Commission create a constitution for Europe.

⁴ Conant (n 1) 39.

⁵ Alec Stone Sweet, 'The European Court of Justice and the judicialization of EU governance' (2010) 5(2) *Living Reviews in European Governance*, 7. However, others argue that the ECJ judges are sensitive to policy constraints from Member States. This thesis has been empirically demonstrated by Carrubba et al. (n 1).

⁶ Renaud Dehousse, *La Cour de Justice des Communautés Européennes* (Paris: Montchrestien 1997) 72.

implementing on this interesting area of studies an empirical approach never attempted before. First, we analysed the background of the judges, looking for specific competence and professional experience in Intellectual Property.⁷ Second, we studied the rulings of the Court and the Opinions of the Advocate Generals in order to understand which legal approach was more often used, and whether a pattern could be detected.⁸ Third, we processed the written observation of Member States in each copyright case before the Court, to identify and assess divergences and convergences, in order to highlight the most sensitive areas and eventually in order to discover the impact of each Country on the Courts' judgment.⁹

The present Chapter will tell this story, including the key steps, difficulties, and achievements of this empirical experience.

2. The Role of the ECJ in EU Governance

Member States are not always happy with the rulings of the Court, but either when they agree¹⁰ or not,¹¹ they seem to largely implement its jurisprudence. Overturning the Court's judgment in fact requires a modification of the Treaties¹² and in addition the Court enjoys support by legal and political entities.¹³ Moreover, it has been argued that the Court is trying to counter its own potential over-expansion by a careful choice of its own approaches.¹⁴

ECJ scholars are divided between those claiming that the Court represents the interest of the most powerful EU Member States (the Principal-Agent theory)¹⁵ and others claiming that the Court is impartial, independent, and conscious of its reputation and mandate, as many international courts

⁷ Marcella Favale, Martin Kretschmer and Paul C. Torremans, "Is there a EU Copyright Jurisprudence? An empirical analysis of the workings of the European Court of Justice" 79(1) MLR (2016) 31-75.

⁸ Ibid.

⁹ Marcella Favale, Martin Kretschmer and Paul C. Torremans, 'Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law'. Forthcoming on MLR.

¹⁰ Joseph H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors', (1994) *Comparative Political Studies* 510-534, 534. The author argues however that the conditions favouring this 'easy' acceptance of ECJ jurisprudence are changing, and the future might bring less easy compliance with the European judicial norms. See also Stone Sweet (n 5) 69, arguing that the Court does so by implementing a 'majoritarian activism'.

¹¹ Weiler *ibid*, 530. The Court can achieve this result thanks to 'prudent' legal interpretation of EU law, which are not openly in contrast to member states policy and are likely to be accepted by national judiciaries.

¹² Stone Sweet and Brunell (n 33) 69.

¹³ Conant (n 1) 38. See also generally Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: CUP 2007).

¹⁴ John Bell, 'The Role of European Judges in an Era of Uncertainty' in Patrick J. Birkinshaw and Mike Varney (eds) *The European Legal Order after Lisbon* (Austin, Boston, Chicago, New York, The Netherlands: Kluwer Law International 2010) 289. See also Francis G. Jacobs, 'The Court of Justice in the Twenty-First Century: Challenges Ahead for the Judicial System?' in Allan Rosas, Egils Levits and Yves Bot (eds) *The Court of Justice and the Construction of Europe* (ebook: Asser Press Springer 2013) 56, advocating self-restraint of the Court when supporting the 'green light' theory. See also Dehousse (n 6) 16-17, arguing that the Court uses its 'policy-making' powers with discretion.

¹⁵ See generally Geoffrey Garrett, 'The Policy of Legal integration in the European Union' (1995) 49(1) *International Organizations*, 171-181, and generally Heiner Schulz, 'The European Court of Justice, national governments and Legal Integration in the European Union' (1998) 52(1) *International Organizations* 149-176.

(Trustee rather than Agent).¹⁶ Albeit not immune from policy influence and pressure, the ECJ often produces rulings that are both unexpected and uncontrolled by National Governments.¹⁷ The analysis of the above literature suggests that the evolution of the Court does not follow a linear path. In essence, the EU judges alternate in time legal innovation and conservative interpretation of EU law.¹⁸ This is true both for different subject matters and for different periods.¹⁹

All these reflections of copyright scholars -albeit to a different extent- convert in saying that the Court produces significant changes to EU policies.²⁰ In addition, the Court's thematic jurisdiction witnessed a gradual expansion, including highly technical subject-matters (for example, constitutional law, competition law, labour law, etc.). Nonetheless, not all these legal areas are represented within the professional backgrounds of the judges, nor there are in the ECJ (unlike the General Court) specialised chambers. On occasion, this has raised concerns about its credibility.²¹ In the specific field of copyright, for example, it has been suggested that the judgements of the Court step in where in European law are gaps and loopholes. According to some commentators this course of action of the Court appears to be motivated by an agenda aimed at harmonising the EU legal framework, to the detriment of rigorous subject-specific reasoning. It is nowadays largely accepted by current copyright scholarship that the Court builds up its own concepts of copyright law (for example the concept of 'new public' in relation to the right to communication to the public); it is debatable whether this is done intentionally to advance a harmonising or political agenda.²²

Unlike most legal system, the text of European law does not provide the criteria to interpret its own legislation and norms; therefore, thanks to the inherent indeterminacy of European law, the Court can use legal interpretation to transcend its traditional function. Hence, the jurisprudence of the Court, with its express guidance on interpretation but also with its most current practice, includes the directions on how the *acquis communautaire* has to be construed. A typical example of specific directions issued by the Court is detectable in the landmark case *CILIFT*²³, where the Court stated several principles: first, that Community legislation is drafted in several languages, all of which are authentic and which have to be compared; secondly, that Community law has its specific terminology; thirdly, that European law need to be put in context and interpreted according to the purpose of community law as a whole.²⁴

¹⁶ Alec Stone Sweet and Thomas L. Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization' (2013) 1(1) *Journal of Law and Courts* 61-88, 64.

¹⁷ Karen Alter, *The European Court's Political Power* (Oxford: OUP 2009), 237.

¹⁸ Clemens Kaupa, 'Maybe not activist enough? On the court's alleged neoliberal bias in its recent labour cases', in Elise Muir, Mark Dawson and Bruno de Witte (eds) *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar 2013) 74.

¹⁹ Commentators suggest that while the Court was innovative in areas where it could count on larger mobilization of juridical and political activism, it was more cautious on delicate areas where countries strongly claim their national supremacy. See Dehousse (n 6) 144, arguing that the Court adopted a lower profile since the end of the '80s, due to a strain on integration impulses. See also Conant (n 1) 38 for the role of activist mobilization; and on the same topic Alter (n 17) 63.

²⁰ Alter (n 17) 47. The author cites the liberalisation of telecommunications as an example.

²¹ Joseph H.H. Weiler, 'Épilogue: The Judicial Après Nice', in Gràinne De Búrca and Joseph H.H. Weiler (eds) *The European Court of Justice* (Oxford: OUP 2001), 221. Kaupa (n 18) 74.

²² Jonathan Griffiths, 'Constitutionalising or harmonising? – the Court of Justice, the right to property and European copyright law' (2013) 38 *ELR* 65-78; and Mireille van Eechoud, 'Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgments on Copyright Works' (2012) 3 *JIPITEC* 60. On the same point related to general EU Law see Stone Sweet and Brunell (n 3) 8.

²³ Case 283/81 *CILIFT* [1982] *ECR* 3415 (17-20).

²⁴ See Anthony Arnall, *The European Union and its Court of Justice* (Oxford: OUP 2006) 608. Also see Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon Press, 1993) 232.

3. Rules of procedure²⁵

Before starting the analysis of the Copyright Jurisprudence before the Court, a few notes on the rules of procedure are in order. This will help understanding what the role of written observations is and at what point in time they get to the attention of the Court.

The procedure of preliminary ruling is prompted by a reference from a national court of a Member State. The national court requires from the Court the interpretation of a point of European Law, which might indirectly involve the infringement of EU law from the Member State.²⁶ The reference is lodged with the Registrar's Office, which deals with the translation of the full text of the reference into the EU official languages. The Registrar also defines the category within which the case should be classified (e.g. the legal subject-matter, as for example 'social security' or 'citizenship' etc.).²⁷ The case is then transferred to the President of the Court and to the First Advocate General.

The President of the Court assigns the case to a chamber, and appoints a Reporting Judge within this chamber, whereas the First Advocate General assigns the case to an Advocate General. According to the procedural rules of the Court, no particular order, as for example a rotation order, is provided for the assignment of a case to a particular chamber. The only rule established by the procedure in terms of case assignment provides that particularly important cases can be entrusted to the Court in its formation as Grand Chamber.²⁸

The case assignment to the Reporting Judge and to the AG is made again without specific procedural rules (e.g. there is no rotation among Court Members). However, it is frequent that the same judges and the same AGs are responsible for cases relating to similar subject-matter.²⁹ Usually the AG to whom a case is assigned does not belong to the Member State involved in the litigation, or to the Member State of one of the parties in the case of a preliminary ruling.³⁰ However, this unwritten rule

²⁵ This section is published as an Annex of our previous research (n 9).

²⁶ For direct infringement a Breach Proceeding is brought by the Commission against the allegedly infringing Member State. These procedures are out of the scope of this work.

²⁷ The issue of categorization is not as trivial as it might seem. Defining a case as belonging to a subject matter can determine for example whether Member State decide to intervene in the process (by making observations). See Joxerramon Bengoetxea, Neil McCornick and Leonor Moral Soriano 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gràinne De Búrca and Joseph H.H. Weiler (eds) *The European Court of Justice* (Oxford: OUP, 2001) 43, 52.

²⁸ Article 60 Rules of Proceedings of the ECJ: 'Assignment of cases to formations of the Court:
1. The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute.
2. The Court shall sit as a full Court where cases are brought before it pursuant to the provisions referred to in the fourth paragraph of Article 16 of the Statute. It may assign a case to the full Court where, in accordance with the fifth paragraph of Article 16 of the Statute, it considers that the case is of exceptional importance. See the Rules of Procedure of the Court Of Justice, L 265/1 *Official Journal of the European Union*, 29.9.2012, at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:265:0001:0042:EN:PDF>> accessed 25 October 2016.

²⁹ Takis Tridimas, 'The role of the Advocate General in the development of Community Law: some reflections' [1997-12] 34(6) *Common Market Law Review* 1349-1387, 1355. See Noreen Burrows and Rosa Greaves, *The Advocate General and EC Law* (OUP 2007) 23.

³⁰ Burrows and Greaves *ibid*, 23.

is not always followed.³¹

Once a case has been assigned, the “interested parties” have two months, from the notification of the order from reference, to submit their written observations. These “interested parties” are: a) the litigants before the national court, b) the Member States, c) the EU commission, EU Parliament, the Council, the European Central Bank, d) in some cases, the other EEA states, the EFTA supervising authority or a non-member state which is party to an agreement providing its participation within determined subject-matters.³² Written submissions of such statements of case, defences, and observations by the parties and by any intervener are received by the Registrar and circulated among the panellist judges and the AG. The submissions are accompanied, where possible, by the relevant documentary evidence. After the parties have filed their submissions, the Reporting Judge writes a preliminary report, to be presented at the Court general meeting,³³ in which a summary of the case is made. The summary includes the main fact situation, the norms potentially applicable, previous referable case law, the questions referred by the national courts and the suggested answers of the parties and of the intervening Governments.³⁴ The Reporting Judge might also indicate points of national law that need further clarifications or even details of the fact situation that would need further measures of inquiry. He or she can suggest to which formation of the Court the case should be assigned and whether to dispense with the hearing or the opinion of the AG.³⁵

After the conclusion of the written part, a date for the hearing, if a hearing must be held, is fixed. At the hearing, the pleadings of the parties and any observation by interveners are heard by the panel of judges that forms the chamber. If a supplement of inquiry is necessary, also witnesses and experts are heard by the Court. In the procedure for preliminary ruling the parties do not have the chance to reply in writing to the introductory statements of their adversary, therefore they respond to their argument at the hearing.³⁶

After the parties have exposed their arguments, at a request of the president of the chamber, the Reporting Judge and the AG can ask for clarifications of the speakers. Finally, the Advocate General can issue his or her Opinion, but more often a date is announced for an opinion to be issued, around a month later.³⁷ In the Opinion, the AG exposes thoroughly any doctrinal and jurisprudential arguments underpinning her proposed solution of the case. Alternative draft opinions can also be submitted by the AG to the Court, supporting different arguments.³⁸ After the reading of the conclusions of the Opinion of the AG, the oral procedure is officially closed. However, the hearing can be reopened, after the submission of the AG, if further measures of inquiry are required.³⁹

Before the deliberation, the Reporting Judge circulates a note to the other judges to suggest a draft

³¹ Tridimas (n 29) 1356.

³² See the Notes of the Guidance of Counsel issued by the Court, Section 9 (online at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf> accessed 25 October 2016.

³³ Article 59 of the Court Rules of Proceedings (n 28). The meeting is normally held on Tuesday afternoon. See Burrows and Greaves (n 29) 24.

³⁴ The Court Rules of Proceedings do not mandate the Judge Rapporteur to specifically provide an overview of all the written observations. The Preliminary references that we have reviewed in the course of this study mentioned most, but not all written observations presented by the “interested parties”.

³⁵ According to Article 20 (formerly Art.18) of the Statutes of the ECJ (<https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf> accessed 25 October 2016), as modified by the Nice treaty, ‘[...]Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General’.

³⁶ Burrows and Graves (n 29) 27.

³⁷ Ibid, 27.

³⁸ Tridimas (n 29) 1360.

³⁹ Ibid, 28.

ruling for the case. In this note she will state her agreement or disagreement with the opinion of the Advocate general. Any dissenting judge will normally circulate another note to express her views. If there is clear disagreement on a case within the Court, a meeting would be normally set to discuss the matter.⁴⁰ Dissenting opinions of any member of the panel are not cited in the judgement. Normally, the Opinion of the AG is not cited in detail within the judgement either. If the ruling disagrees with the opinion of the AG, it elaborates its own legal reasoning. In alternative, when the judges agree with the Opinion, they refer to it in full or in part, often without restating the arguments expressed therein.⁴¹

The AG, in her Opinion, analyses previous Court case law on the same issue and, if necessary, points out discrepancies and inconsistencies of the Court's previous legal reasoning. A comparative analysis of Member States legislation can also be included in the Opinion in order to support the arguments of the AG.⁴² Overall, the opinion of the Advocate General provides the most detailed and exhaustive analysis of the case, and it is often much more voluminous than the ruling. Interestingly, some Opinions offer an overview of the written observations submitted by the “interested parties” before proceeding to analyse the case, some don't. Even when they do, however, they do not necessarily cite all the written observations. Also, the Preliminary Report from the Judge-Rapporteur, which routinely displays an overview of the submissions before the Court, sometimes overlooks some written observations.

4. The legal approaches used by the Court and the legal background of the judges

The legal interpretative approaches (or *topoi*) of the ECJ have been reported by EU law commentators and broadly reflect the European legal tradition: they are divided in semantic/semiotic, contextual/systematic, and teleological/dynamic. In addition, peculiar canons specific to the EU (*effet utile*, proportionality principle, uniform application, etc.) must be considered. The literature does not dispute the number and classification of these legal approaches, but it debates around their use. Some studies on European judiciary argue that the Court favours teleological canons to semantic interpretations and therefore shows an arbitrary lack of balance in the weight assigned to such *topoi*.⁴³ Other commentators disagree with this construct. For example, Bengoetxea and Beck in their respective research, argue that semantic arguments are preferred by the Court whenever the text of the law is clear, detailed, and univocal (especially in different translations). These scholars maintain that whenever the Court gives to semantic arguments less weight than most high courts, this is because of the inherent ambiguity of European law.⁴⁴

To summarise: The literature review identified the following problematic issues in the approach of the ECJ in interpreting and applying European law:

- a) the Court is said to over-use teleological interpretation in order to carry out its harmonising agenda;
- b) the rulings of the Court do not reveal a consistent and foreseeable pattern, apart from the consolidation of European law;
- c) this happens in particularly with relation to subject-specific areas, where the Court relinquish specialist doctrine in favour of a European agenda.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Tridimas (n 29) 1360.

⁴³ See for example the respective works of Griffiths and van Eechoud (n 22).

³³ Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford/New York: Clarendon 1993); Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing 2012).

The first empirical study related in this Chapter has explored how the Court of Justice of the European Union has dealt with copyright cases and in particular whether it is true that: (i) that the Court did not develop a coherent copyright jurisprudence following its lack of specialised expertise, (lack of copyright specific reasoning, and therefore predictability); (ii) that the Court has pursued an activist, harmonising agenda by using the teleological approach way above the needs of its remit.

The study implemented different measures to assess each of these claims. First, it tried to identify specific pre-existing (in their professional background prior to joining the Court) judicial expertise in the area of copyright and related rights to discuss and ascertain the suspected lack of a coherent copyright jurisprudence. To this end, the biographical data about members of the Court, available on the Court website, were analysed. We found that the members of the European Court of Justice are mainly ex-academics, civil servants, judges, or all these things. Prior to joining the Court, they have mostly a professional career in European Law or Public Law. Some subject-specific competences (criminal matters, family law, competition and commercial law) are present in the background of some judges, especially the one appointed more recently, but not all areas are covered. Interestingly for our case, any of the examined curriculum displays a specific copyright expertise, despite the increasing workload of the Court on these matters.

However, the recurrent assignment of copyright cases to the same judges suggested that Court attempts to compensate for this lack of specialisation by enabling 'judicial learning'. The allocation of cases to Chambers, Reporting Judges and Advocates General in fact reveals that this pattern of consistent allocations is statistically significant, and can only be explained by a deliberate intention by the Court to overcome this lack of pre-existing expertise with the creation of *de facto* specialist chambers.

The claim of lack of a coherent jurisprudence was measured in the study by looking for unpredictable patterns of reasoning. The content analysis carried out in the study suggests for example that despite the interpretation of the concept of 'communication to the public' prompted different outcomes in different cases, according the coding all the above cases are grounded on a semantic interpretation of the law, confirmed by a teleological interpretation and by a systematic interpretation. All the *topoi* are used in all the cases. However, when applying quantitative analysis to the use of specific arguments within *topoi* (for example, the balance of rights, or a high protection for the author), we find that the reasoning of the most frequently appointed judge in copyright cases, judge Malenovský (*rapporteur* in twenty-four of forty copyright cases) differs from that of the other judges. This may be an indicator of judicial learning. We are fully aware of the methodological limitations of quantitative analysis carried out on a relatively small sample. However, the study is meant to be scalable, and potentially applicable to a larger sample: the same pattern on a larger sample would be significant.

Regarding the second claim, that the Court has pursued an activist, upwardly harmonising agenda, the study attempts to measure indications for such an agenda by exploring the possible prevalence of a teleological interpretation of European law within the document examined (by content analysis of all copyright judgments in the data sample). The analysis shows in fact a clear prevalence of teleological *topoi*, however, the full picture showed a complex patterns of accumulation (e.g. cumulative use of several approaches without a hierarchical order). This suggests that possibly a more complex explanation is required, especially if we add to the picture the fact that the outcomes of the judgments do not (systematically) expand copyright protection.

In answer to the overall research question posed by this study 'Is there an EU copyright jurisprudence?' its findings paint an intriguing picture. The research suggested that there are attempts by the Court to create in effect specialist chambers. Also, albeit the analysis suggests the presence of recurrent patterns of reasoning, the outcomes from these very reasoning remain unpredictable; this is especially evident when less copyright-experienced members of the Court are charged with the ruling. In conclusion, what this study and its pioneer empirical approach (with all its

limitations) seems to suggest is that while the Court's jurisprudence is more performant than its critics suggest, more can be done to improve its legitimacy.

At the end of its analysis the study attempted to examine possible policy solutions to assist the Court to form a more coherent copyright jurisprudence. These were the recommendations we elaborated at the conclusion of this study: "The most straightforward solution might introduce specialised (copyright or intellectual property) professionals into the European Court system in order to increase domain competence and predictability. Short of forming a specialist Court, interventions might include (i) reforming the rules of procedure by making criteria for the assignment of cases more explicit (enabling the systematic allocation of cases to certain chambers where new members might shadow reporting judges that have developed domain specific experience), and (ii) supporting judicial learning when members first join the Court (for example through training of *référéndaires* in specialist domains). Exploring such options seriously would require the Court (and the European institutions that invented its governance) to look in the mirror, hold the gaze and recognise what they see. Empirical reflection may yet improve doctrine."⁴⁵

5. The impact of written observations of Member States on the Rulings of the Court

The Court of Justice of the European Union (CJEU) is quite unique among international courts in that it is involved in what has been called "a notable juridification of the European policy process".⁴⁶ In a time in which European Union unity is challenged by allegations of inefficiencies of the system, it particularly crucial to understand how the European judges perform their role in a contested political environment. To this end, we should not assume the legal autonomy of the Court from the influence of Member States but, more realistically, we should put the behaviour of the CJEU in context and investigate the process by which a decision is reached, within its full picture.

In fact, political scientist focusing on the study of EU governance, are sceptic on the assumption of autonomous action of the Court. It has in fact suggested that the Court's decisions are influenced by the anticipated reactions of national governments.⁴⁷ The empirical approach of this third study focuses on the analysis study of Member States' written observations to investigate the impact that the stance of individual governments on copyright cases has on the jurisprudence of the Court.

In her precursor research on the behaviour of Governments before the Court, Marie-Pierre Granger⁴⁸ argued that carrying out a study to measure the impact of Governments' written observations was not feasible. It true that the 'written observations' are treated as 'confidential', and are no longer published in the Court proceedings, and therefore this task is particularly difficult. When planning this third empirical study however, it was decided that was essential to overcome these obstacles if we wanted to make a significant advance in understanding the role of national governments in relation to the Court of Justice.

With the assistance of supportive Agents before the Court, the Court Registry, fellow academics and, in the most difficult cases, with the support of Freedom of Information requests (both under Regulation 1049/2001 and national legislation), I have been able to collect a nearly comprehensive

⁴⁵ Favale et al (n. 7) 75.

⁴⁶ Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan, 1998) 177.

⁴⁷ Carrubba, Gabel and Hankla (n 1).

⁴⁸ Marie-Pierre Granger, 'When governments go to Luxembourg . . . the influence of governments on the Court of Justice' 39 *E.L.Rev.* (2004) 1-31, 1. See also generally Marie-Pierre Granger, 'Les stratégies contentieuses des Etats devant la Cour' in Pascal Mbongo and Antoine Vauchez (eds), *Dans la fabrique du droit européen* (Bruylant, 2009 Bruxelles).

database of governments' written observations and in 42 copyright cases before the ECJ. This includes the observations of the EU Commission. Thanks to the coding and subsequent analysis of this precious material the study was able to draw a picture on whether and how Member States and the Commission are influencing the Court in a specific subject domain.

Political science research has been preliminarily studied to identify previous approaches employed to answer this question. In particular, empirical socio-legal research has suggested that various organisations try to implement strategic litigation by pushing preliminary references to steer judicial policy,⁴⁹ Member States can use their written observations to the same end.⁵⁰ According to some scholars, governments intervene in European litigation to try to obtain decisions in line with their own policies,⁵¹ because they understand the value of well-written and well-argued observations in the context of political strategies.⁵² On the other hand, Member States have realised that with successful interventions before the Court they can reverse some of the European policies that they opposed without success in the EU Council.⁵³ In this context, it needs to be added the theory by which the European judges are conscious in their rulings of the possibility of overturning or disapplication from the referring Member State, and they act accordingly.⁵⁴

While the overall research question of the study is: "who is steering copyright jurisprudence?" a number of sub-questions need and have been empirically addressed:

- i. *What are the most contested legal concepts in EU Copyright Law?*
- ii. *Who are the Governments interested in shaping copyright jurisprudence and, specifically, on which legal concepts are they intervening?*
- iii. *What interests are Governments supporting (e.g. rightholders' or users')?*
- iv. *To what extent are Governments successful in steering the Court towards their interpretation of legal concepts?*

To this end, we recall, the study has used document analysis (coding), qualitative methods (structured questionnaire followed by an unstructured feedback on our preliminary findings) and basic statistical computation of the data.

First, doctrinal analysis was used to identify groups of preliminary references demanding clarifications from the Court on the same copyright concept (for example, 'communication to the public'). The dataset, consisting of 78 copyright cases registered between 1998 and 2015 (and concluded before the Court) was clustered based on the main legal concept examined within each preliminary reference. The analysis showed that most preliminary references were filed on only five recurrent concepts, which therefore received more attention from the CJEU.

⁴⁹ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, 1986) 270.

⁵⁰ Granger (n 48) 1.

⁵¹ Thomas H. H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

⁵² Anthony Michael Collins, 'Representation of a Member State before the Court of Justice of the European Communities: practice in the United Kingdom' 27 *E.L.Rev.* (2002) 359.

⁵³ Granger (n 48) 9.

⁵⁴ See Carrubba et al. (n 1) 9. On the same topic of the impact on CJEU decisions of possible Member States non-compliance see also Geoffrey Garrett, Daniel Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' 52(1) *International Organization* (1998) 149-176.

Secondly, content analysis (expert coding) was employed. Preliminary references include a number of questions from the national court to the ECJ. Each submission argues for a number of prospective responses to these questions. The coding identified:

- a) the questions (reformulated to require a Yes/No answer) b) the suggestions argued in the written observations from governments and EU institutions (mostly the EU Commission);
- b) their acceptance or rejection of these suggestions in the final ruling of the Court.

Thirdly, the study used statistical analysis to establish relationships between the outcome of the case and the written observations. It assesses

- a) the interests of governments in a particular legal concept (e.g. number of submissions that intervene on this concept);
- b) the correlation between the suggested interpretation of individual copyright concepts within each submission and the interpretation of these concepts in the decision in each case.

To this end, the occurrence of government submissions, when the same country is the origin of the preliminary reference, was measured. Then, the number of 'successful' arguments was computed in order to measure the potential influence that each submission had on the ruling. The main limit of this approach is that the study only looked at the suggested answer to each question and did not deal with the reasoning (which in practice may diverge) argued in each submission and in the rulings.

To explore possible explanations for the observed patterns, finally, these findings have been circulated among Court Agents in order to collect their reactions and feedback, which have been incorporated in the Conclusion. The feedback was largely positive and there was no objection by the Agents (as the methodological limits were pre-emptively already discussed in the study).

In the specific area of copyright law, the study shed new insight to explain the forces moving the ECJ jurisprudence. It was found that copyright interventions revolve mainly around some specific and recurring legal concepts through the whole sample of cases. The analysis of recurrent legal issues before the Court of Justice confirms that there are areas of copyright law vulnerable to strategic litigation, arguably because of a normative void.

The study found that through written observations, Governments aim to steer the Court towards rulings in line with their respective policies. Member States most invested in copyright law are the dominant litigators of the *acquis communautaire* in general although there are other Member States that invest disproportionately in shaping the evolution of copyright law.

Interestingly, the study has revealed that the impact of a written observation on the ruling of the Court is not only determined by critical mass, such as the number of submissions or the size of the country. More important appears to be the quality of the legal reasoning, as the relative success of countries investing less in strategic litigation.

Despite all its limits, therefore, the above empirical effort delivered unprecedented insights in the European jurisprudential production, and deserves to be further exploited, corrected, pursued.

6. The Confidentiality Issue

To fully understand the difficulties of carrying out this particular empirical study, an important issue should probably be addressed. The story of the bumps on the road of document collection are integral to the difficulties related to legal empirical research, and therefore deserve to be reported.

Documentary material for this research consists of case documents of the Preliminary References included in the relevant sample. In particular, the Ruling, the Opinion, and the written observations from Governments are needed to the study. While the Ruling and the Opinion for each case are available on the CJEU website,⁵⁵ Government Submissions are not publicly available. They are treated as 'confidential'.

First, the Court Registry was contacted in order to apply for accessing these documents, although aware that the Court is not mentioned among the EU institutions currently subject to the current EU regulation to access public documents.⁵⁶ I thought we could rely on a number of factors: a) our purpose to access for scientific research; b) the promise to keep the document confidential; c) the justification for exclusion of judiciary documents in current EU and national regulations (which in my opinion does not apply to our case).

The Registry responded that they cannot grant access to the submission because the Government Submissions are confidential. This is not the place to fully argue what we call 'the confidentiality issue' of the submissions before the CJEU. However, we thought it would be useful to explain as much as possible the factor c).

In EU Member States, Freedom of Information acts (FOIA) or equivalent laws allow the fundamental freedom to access administrative documents, in order to promote citizen participation to the democratic process. These documents normally refer to the deeds of the public administration. In many cases, these regulations provide for a number of exclusions, normally to protect the public interest, or trade secrets, or privacy. In some of them⁵⁷ judicial proceedings are not excluded per se, but only when the proceeding could be endangered by the disclosure. The British FOIA for example excludes access to administrative documents when justified by the need to preserve the administration of justice.⁵⁸ The French corresponding law excludes the documents whose disclosure would harm judicial proceedings.⁵⁹ In both cases, it is arguable that possible harm can only occur during the proceeding, not after. Moreover, not all FOIAs mention judicial proceedings among the exclusions.⁶⁰

The EU has its own version of a FOIA in the form of Regulation 1049/02, which allows access to the documents issued by the three main EU institutions: The Parliament, the Council and the Commission. Since the CJEU is formally excluded by this Regulation, it has issued at the end of 2012 a Decision⁶¹ that largely borrowed from the norms and principles of the Regulation. However, with

⁵⁵ <<http://curia.europa.eu/>>

⁵⁶ REGULATION (EC) No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJEC L 145/43 31.05.2001* (hereinafter 'Regulation').

⁵⁷ Since a comprehensive analysis of the confidentiality issue is not the object of this chapter, we cannot provide data for all the EU Member States.

⁵⁸ s.31(1)(c) of the Freedom of Information Act 2000, online at <<http://www.legislation.gov.uk/ukpga/2000/36/contents>> accessed 29 August 2016.

⁵⁹ Art L 311-5 1(f) III Livre of the Code des relations entre le public et l'administration available at <https://www.legifrance.gouv.fr/affichCode.do;jsessionid=EC81FBDD47E7DFC61E67FA6722180535.tpdila09v_2?idSectionTA=LEGISCTA000031367696&cidTexte=LEGITEXT000031366350&dateTexte=20160830> accessed 30 August 2016.

⁶⁰ Italy, for example, does not include judicial proceedings per se among the exceptions listed in Art 24, L. n. 241/1990 ("Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi") Gazzetta Ufficiale del 18 agosto 1990 n. 192, as modified by L. 15/2005. The law is available online at <<http://www.altalex.com/documents/codici-altalex/2014/12/09/legge-sul-procedimento-amministrativo>> accessed 29 August 2016. Other countries, such as the Scandinavians, grant full access to all public documents, including Court proceedings, unless a superior interest is endangered.

⁶¹ DECISION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION of December 2012 concerning public access

this Decision the Court grants access to the documents it holds “in the exercise of its administrative function”. This principle would exclude the documents held for the purpose of its judiciary function.

Also, these European FOIAs include a number of exceptions⁶² to the freedom to access administrative documents. The Regulation for example excludes a number of cases where the disclosure would undermine the protection of commercial interest, court proceedings or legal advice.⁶³ These exceptions however are subject to limits. In particular, they do not apply if there is an overriding public interest to the disclosure.⁶⁴ Even more interestingly for our study, limits to the access to the Court documents are limited to the time frame during which this prohibition is justified.⁶⁵

Importantly, our application to access Government submissions only relates to cases already concluded; and otherwise our access to these documents would not affect any of the specific interests mentioned above, either by the national or European regulations. In fact, the exclusion of court proceedings in the above-mentioned regulations either affects those that protect a sensitive interest (public interest, personal or sensitive data, trade secrets), or those whose disclosure would affect the proceeding itself.

The CJEU in its own jurisprudence considered the excludability of court pleadings from disclosure in *Sweden v. API*, and concluded that judicial deeds can be excluded *per se*, because of the need to preserve the ‘serenity of judgements’⁶⁶ and the ‘equality of arms’.⁶⁷ This case is interesting because the Court argues the rationale of the EU legislation (from the TFEU⁶⁸ to the Regulation) for the exclusion of judiciary deeds (‘pleadings’) from the freedom of access. The CJEU specifies that its documents are rightly excluded from the Regulation ‘while those proceedings remain pending’.⁶⁹

to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2013/C 38/02) (hereinafter “Decision”). Article 1. Scope 1. “The present decision shall apply to all documents held by the Court of Justice of the European Union, that is to say, documents drawn up or received by it and in its possession, as part of the exercise of its administrative functions”.

⁶² Decision, « Exceptions: 2. The Court of Justice of the European Union shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property, — court proceedings and legal advice, — the purpose of inspections, investigations and audits”.

⁶³ Art 4.2 of the Regulation, which excludes, among others ‘court proceedings and legal advice’.

⁶⁴ Decision, Art 4. “The exceptions set out in paragraphs 2 and 3 shall not apply if there is an overriding public interest in disclosure of the document concerned”.

⁶⁵ Art 7 Regulation and Art 6 Decision « The exceptions as laid down in paragraphs 1, 2 and 3 shall apply only for the period during which protection is justified on the basis of the content of the document. ...”

⁶⁶ See joined cases C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533 para 93, where the CJEU states “exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings”. It needs to be specified that the case at hand regards a disclosure of Commission’s documents under Reg1049/02 not access to Governments written observation

⁶⁷ *Ibid*, para 87 “In addition, such a situation could well upset the vital balance between the parties to a dispute before those Courts – the state of balance which is at the basis of the principle of equality of arms – since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure.” In this ruling however the Court considers the disclosure of submissions from the EU commission; it argues that the principle would be trumped because only one party (the Commission) would be bound to disclosure, and not the others. We however required the disclosure of all submissions, hence respecting the principle of “equality of arms”.

⁶⁸ Article 255 EC.

⁶⁹ *Ibid*, para 94 “It is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those

Moreover, Government submissions are not documents produced by the parties of the judicial controversy. They are mere legal opinions on points of law raised before the Court by the Referring national court. One may wonder whether they could not be considered as the “third party documents” mentioned by Article 9 of the above-mentioned Court Decision. According to this article, when the Court is required to disclose a document received by a third party (which can include a Member State) it will have to consult said third party before granting access to the applicant.⁷⁰

Many CJEU commentators and practitioners have called for reform of the Statutes regulating the Court towards greater transparency.⁷¹ Some argue that the very case law of the Court in terms of access to documents of the European Institutions calls for a revision of Regulation 1049/2001.⁷²

Among EU institutions, the Council of Europe is actively pursuing a policy of transparency for EU public institutions. For example, the Council issued an international convention that needs yet two ratifications in order to enter in force.⁷³ Moreover, In a Recommendation on access to administrative documents,⁷⁴ the Council lists ten possible limitations to this right to access.⁷⁵ One of these applies to our case: the equality of parties concerning court proceedings. This limitation, according to the guidance of the Council, would “allow a public authority to refuse access to its own documents so as not to weaken its position during proceedings to which it is a party”.⁷⁶ Now, in this study’s sample of preliminary references the Government is never a party. The intervention of a Government in these

proceedings remain pending.”

⁷⁰ Art 4.4 Regulation and Art 9 Decision quoted “Third party documents 1. The Court of Justice of the European Union shall not grant access to third party documents in its possession until it has received the consent of the third party concerned. 2. For the purposes of the present article, ‘third party’ shall mean any natural or legal person or body external to the Court of Justice of the European Union, including the Member States, the other institutions, bodies, offices and agencies of the European Union and non-member States. 3. When the Court of Justice of the European Union receives an application for access to a third party document, the competent authority shall consult the third party concerned in order to ascertain whether the third party opposes release of that document, unless it decides of its own motion to refuse to release the document on the basis of one of the exceptions set out in Article 3”.

⁷¹ As an example of academic concerns see generally Alberto Alemanno ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy (2013) *European law review* 39(1):72-90. As an example of practitioners concerns see generally the intervention of Michael Patchett-Joyce, Barrister at the Hearing on the Reform of the Court of Justice of the European Union 24 April 2013 Brussels, available at <<http://www.europarl.europa.eu/document/activities/cont/201305/20130521ATT66428/20130521ATT66428EN.pdf>> accessed 20 August 2016.

⁷² See two notes by Prof. Henry Labayle requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, “L’ accès du public aux documents de l’Union européenne, état du droit à l’instant de la révision du règlement 1049/2001 », PE 393.287, 2008 and « Les documents classifiés à la lumière du traité de Lisbonne », PE 425.616, 2010.

⁷³ Council of Europe convention on access to public documents, available at <<http://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/205>> accessed 20 August 2016. The convention has been ratified by 8 countries. It will enter into force with 10 ratifications.

⁷⁴ Recommendation Rec (2002)2 of the Committee of Ministers to member states on Access to Official Documents (Adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers’ Deputies) <http://www.coe.int/t/dghl/standardsetting/cddh/Publications/DocAccess_Guide_en.pdf> accessed 29 August 2016.

⁷⁵ Ibid, 27. Possible limitations are for: i. national security, defence and international relations; ii. public safety; iii. the prevention, investigation and prosecution of criminal activities; iv. privacy and other legitimate private interests; v. commercial and other economic interests, be they private or public; vi. the equality of parties concerning court proceedings; vii. nature; viii. inspection, control and supervision by public authorities; ix. the economic, monetary and exchange rate policies of the state; x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

⁷⁶ Ibid, 15.

preliminary references, not featuring said Government as a party, can be assimilated to an *amicus curie*: a legal opinion from a third party. Accessing these legal opinions, after the ruling has been issued, can hardly weaken the position of a party in that proceeding.

Finally, these legal opinions from Governments, as this study confirms, are strategically used by Member States to shape the legislation through jurisprudence. They could therefore assimilate in nature more to proposals in a legislative process than to pleadings in litigation between parties; and as we know the European legislative process is subject to the highest standard of transparency.

7. Conclusion:

These two empirical studies on copyright jurisprudence of the ECJ were initially motivated by the need to gain an understanding of the working of the ECJ and the influence and impact it has on the production of European legal framework. At the same time, there was the ambition to look at the EU jurisprudence (in this pilot stage limited to copyright law) from another point of view, different from the usually employed tools of black letter legal research. During every stage of this long and exciting adventure my colleagues and I have always been aware of the important limitations of this approach: transforming the convoluted nuances of legal reasoning in data point is certainly one of the most difficult challenges. These difficulties, moreover, are exacerbated by the fact that this is the first work of this kind undertaken on European jurisprudence. In time, the methodology could be adjusted and corrected, and it could provide an exceptional contribution to legal research.

When the first study⁷⁷ revealed unexpected aspects of the workings of the Court, it became clear that the empirical approach would have much wider theoretical implications.

Measuring the influence of Member States on the evolution of jurisprudence in a specific subject domain opens a new perspective on the making of transnational law. This empirical method, applied to this particular subject-matter but potentially expandable to all areas of law, makes it possible not only to construct the influence of Member States on the Court but also to identify jurisprudential relationships between Member States and cross-country litigation strategies (do Member States team up to reach a certain result?).

Of course, Legal Empirical research has limits. They are quite obvious: legal reasoning is complex and full of nuances whereas empirical coding overlooks the details and can produce false positives. On the other hand, traditional legal research cannot handle large volume of information, for obvious reasons of time limits and costs. However, these two approaches are not mutually exclusive. On the contrary, if applied to the same subject-matter (ideally to the same sample) the traditional research can assist the empirical research to identify its inaccuracies and to correct its route. In exchange, empirical research can provide processing tools for a large share of information, which can enlarge the picture of legal analysis in ways never imagined before. We opened the gate leading to this avenue: the road is long, but I believe it worth pursuing.

⁷⁷ Favale, Kretschmer and Torremans (n 7) 201.