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van Gompel, S.

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Copyright, Doctrine and Evidence-Based Reform

by **Stef van Gompel***

Abstract: Copyright lawmaking is conventionally embedded in a doctrinal tradition that gives much consideration to coherence and formal consistency with legal-theoretical foundations. This contrasts discernibly with the recent trend to base copyright policies and their elaboration into effective legal norms on empirical evidence. Recognizing that both approaches have their relative strengths and weaknesses, this paper explores how evidence-based pol-

icy can be reconciled with the traditional doctrinal approach to copyright lawmaking. It suggests that unproven doctrinal constellations that unnecessarily focus the legislative intention unequally on protecting copyright holders should be removed, but that lawmakers at the same time should also not stare blindly on economic evidence if legitimate claims based on fairness rationales are put forward, which also have to be weighed in as evidence.

Keywords: Copyright reform; lawmaking approaches; evidence-based policy; doctrinal underpinnings; economic evidence

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A. Introduction

1 In an ideal world, copyright law is based on sound, reliable and impartial evidence that thoughtfully and meticulously balances the full breath of often diverging or competing interests of all stakeholders involved.¹ This suggests that any new legislation must

be carefully prepared by assessing and taking into account all the different – legal, social and economic – dimensions of the proposed measure, including all relevant empirical facts. Additionally, the legislative process must be clear and open to public scrutiny, so as to ensure the legitimacy and public acceptability of the law. This requires adequate transparency about all the evidence considered, including how much it has weighed into the norm-setting, which information gaps nonetheless existed, and how these gaps have been filled or dealt with. Moreover, it must be clear how different interests of relevant stakeholders are balanced and eventually reflected in the law as adopted.

2 Despite best efforts and good intentions of law and policy makers, such an ideal norm-setting scenario hardly ever materializes in practice.² Often, it is

* Dr. S.J. van Gompel is senior researcher at the Institute for Information Law (IViR) of the University of Amsterdam.

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1 E. Derclaye, ‘Today’s Utopia Is Tomorrow’s Reality’ [2017] JIC 1.

2 See B.H. Mitra-Kahn, ‘Copyright, Evidence and Lobbyonomics: The World after the UK’s Hargreaves Review’ (2011) 8 *Review of Economic Research on Copyright Issues* 65, giving a number of reasons why policy makers are struggling to adequately ground copyright policy in evidence. See also I. Hargreaves,

difficult for legislators to draw up a full-framed picture of all relevant data that sheds light on the issue under consideration.³ Information may be scarce or unavailable and the reliability and validity of sources is not necessarily easy to establish,⁴ which renders it hard to make informed and balanced policy decisions.⁵ Moreover, even if legislators manage to gather sufficient evidence, they may face difficulties to bring it on a par with the doctrinal underpinnings of the law at issue. Especially in a domain such as copyright, which traditionally rests strongly on doctrinal foundations, it cannot be automatically presumed that evidence brought forward neatly fits the existing legal framework. In the current digital era, in particular, traditional copyright principles have increasingly come under attack due to the changes in the way people produce, disseminate, share and consume works. For legislators, this raises the arduous question of what to do with evidence that does not sit well with, or even contradicts, the legal-theoretical foundations on which copyright law is built.

- 3 This paper explores ways in which the current evidence-based policy approach can be reconciled with the traditional doctrinal approach to copyright lawmaking. To that end, the paper first juxtaposes the two approaches and examines their relative strengths and weaknesses. Next, it gives a number of concrete recommendations that aim to facilitate the current shift in copyright lawmaking from a classic doctrinal approach towards a more evidence-based approach. By enabling legislators to adopt evidence-based policy without requiring them to abandon doctrinal principles altogether, this paper aims to contribute to improving the quality of lawmaking in the field of copyright.

Digital Opportunity: A Review of Intellectual Property and Growth (London: IPO 2011), p. 19, giving examples of copyright measures that lawmakers have adopted, notwithstanding the availability of evidence opposing these measures.

- 3 J. de Beer, 'Evidence-Based Intellectual Property Policy Making: An Integrated Review of Methods and Conclusions' (2016) 19 *The Journal of World Intellectual Property* 150. See also E.R. Gold, J.-F. Morin & E. Shadeed, 'Does intellectual property lead to economic growth? Insights from a novel IP dataset' (2017) *Regulation & Governance*, [online] doi: 10.1111/rego.12165.
- 4 In the field of copyright in particular, a serious knowledge asymmetry may exist as a result of information not being publicly controlled but privately owned by stakeholders, including copyright industries, collective rights management organisations, internet intermediaries, online platforms, or other entities.
- 5 See M. Kretschmer & R. Towse (eds), *What Constitutes Evidence for Copyright Policy?* (Digital proceedings of ESRC symposium, CREATE Working Paper, no. 1, January 2013).

B. Approaches to copyright lawmaking

I. Doctrinal versus evidence-based approaches to lawmaking

- 4 In copyright law, there is a growing trend to base new legislation on empirical evidence.⁶ To remain a key instrument of innovation, cultural and growth policies, copyright law constantly needs to adapt to societal changes caused by the emergence of new digital technologies. This requires a careful balancing of the interests of creators, rightholders, users, and end-consumers. Policymakers around the world increasingly acknowledge that, for reasons of sound policy and better lawmaking, copyright policies and their elaboration into effective legal norms should be based on empirical evidence that allows measurable economic objectives to be balanced against social goals.⁷
- 5 To give a few examples, at the international level, the World Intellectual Property Organization (WIPO) has been integrating economic research in its work program to enable evidence-based policymaking by monitoring the effectiveness and managing the accountability of treaty norms.⁸ In the EU, law and policy initiatives, including on intellectual property, are preceded by impact assessments that aim to provide transparent, comprehensive and balanced evidence on the nature of the problem to be addressed.⁹ National governments typically demand the same. Probably the best example is the UK, where the Intellectual Property Office has adopted rules on good evidence for policy,¹⁰ following recommendations by the Hargreaves report.¹¹ All this shows a shift towards a more evidence-based lawmaking approach.

6 See P. Samuelson, 'Should Economics Play a Role in Copyright Law and Policy?' (2003-2004) 1 *U. Ottawa L. & Tech. J.* 1, p. 21, already predicting 'that economic analysis will have greater impact on copyright in the future.'

7 See e.g. the recommendation in Hargreaves, *op. cit.*, pp. 8 and 20.

8 WIPO, The Economics of IP, <http://www.wipo.int/econ_stat/en/economics/>.

9 European Commission, Impact assessments, <https://ec.europa.eu/info/law-making-process/planning-and-proposing-law/impact-assessments_en>.

10 UK Intellectual Property Office, *Guide to Evidence for Policy* (Newport: Concept House 2014). For a critical comment on the approach taken by the UK Intellectual Property Office, see T. Dillon, 'Evidence, policy and "evidence for policy"' [2016] *Journal of Intellectual Property Law & Practice* 92.

11 Hargreaves, *op. cit.*, pp. 8 and 20.

6 Today's copyright law, however, is clearly the result of a more doctrinal approach. In continental Europe in particular, the justification of copyright law is traditionally based in a potent mixture of personality-based arguments and private property doctrine.¹² The narrative has been – and still is – to emancipate authors from patrons and publishers by granting them exclusive rights to protect their economic and moral interests. Illustrative of the strength of the property rights rhetoric is the Charter of Fundamental Rights of the EU, which in its section on private property explicitly sets out: “Intellectual property shall be protected”.¹³ Such a narrative reflects the doctrinal roots of copyright lawmaking that is dominant in continental Europe, but also elsewhere in the world.

II. Relative strengths and weaknesses

7 The shift towards evidence-based lawmaking, although it may certainly complement the current doctrinal approach, does require a change of attitude and a new way of thinking about copyright reform. Under a doctrinal approach, the lawmaker's primary concern in reform initiatives is to maintain normative coherence and formal consistency with legal-theoretical and ideological underpinnings of established rights. A doctrinal approach thus invites systematic legal reasoning aimed at logically sound laws.¹⁴ In its ultimate manifestation, this may result in overly legalistic and formalistic law and might even establish tunnel vision in legislative efforts.¹⁵ A strong advantage of a doctrinal approach is, however, that it creates legal certainty.¹⁶ Generally speaking, reform decisions based on established reasoning and principles tend to be foreseeable and require less explicit balancing of interests, thus making them

politically easier to achieve.¹⁷

8 By contrast, an evidence-based lawmaking approach expects the legal implementation of copyright policies to be based on testable assumptions and instrumental impacts in the future. Rather than focusing chiefly on coherence and formal consistency of norms with legal-theoretical foundations, legislators must apply practical reason to make rational policy-decisions within the confines of the best evidence available.¹⁸ In its ultimate manifestation, an evidence-based lawmaking approach may potentially lead to more ad hoc and unprincipled decision-making and thus to less predictable law.¹⁹ Yet, it also has the advantage of better accommodating the law to a societal context than an approach that largely rests upon untested and essentialist doctrinal assumptions.

C. Reconciling evidence-based lawmaking with copyright's doctrinal foundation

9 The above comparison between doctrinal and evidence-based lawmaking approaches suggests that, in order to create better law in the field of copyright, the two approaches somehow need be reconciled. Ideally, a practice emerges that enables legislators to build on the strengths while curtailing the weaknesses of both approaches. This would require a shift in mindset and practices on different levels. On the one hand, lawmakers need to create adequate room for evidence-based copyright reform by removing any doctrinal constellations that are unnecessary and unproven and by preventing political capture by norms contained in the international copyright framework. On the other hand, they must also accept that certain doctrinal principles based on fairness rationales ought to be considered, which may sometimes even prevail over economic evidence if there is a clear need to protect specific interests of authors. A broader definition of evidence that extends beyond the purely economic would arguably lead to a better and more nuanced understanding of the potential to use evidence in copyright lawmaking. If fairness or personality-based arguments are used to justify particular copyright policies, however, it would be reasonable to demand evidence that those policies

12 M. Buydens, *La propriété intellectuelle: évolution historique et philosophique* (Bruxelles: Bruylant 2012).

13 Art. 17(2) Charter of Fundamental Rights of the EU, *OJ EU C* 364/1, 18 December 2000.

14 See e.g. J. Bengoetxea, 'Legal System as a Regulative Ideal' in H.J. Koch & U. Neumann (eds), *Praktische Vernunft und Rechtsanwendung/ Legal System and Practical Reason* (ARSP-Beiheft 53, 1994), pp. 65-80, at pp. 70 et seq., discussing some of the systematizing features of legal doctrine in creating norm-propositions in law.

15 Compare the criticism voiced against overly-formalistic law by proponents of legal realism in the United States in the early twentieth century. See e.g. M. White, *Social Thought in America: The Revolt Against Formalism* (rev. edn, Boston: Beacon Press 1957), pp. 15-17.

16 This function of the law is also recurrently emphasized by proponents of legal positivism. See e.g. H.L.A. Hart, *The Concept of Law* (2nd edn, Oxford: Clarendon Press 1961), p. 127; S.J. Shapiro, 'On Hart's Way Out' (1998) 4 *Legal Theory* 469, p. 494, speaking about the 'essential guidance function of law'.

17 A. Peczenik, *On Law and Reason* (Dordrecht: Springer Science + Business Media 1989), pp. 177-178.

18 In this manifestation, evidence-based lawmaking bears some resemblance to theories of legal pragmatism that also strongly adhere to empiricism. See T.F. Cotter, 'Legal pragmatism and Intellectual Property Law' in S. Balganesch (ed), *Intellectual Property and the Common Law* (Cambridge: Cambridge University Press 2013), pp. 211-229.

19 Peczenik, *op. cit.*, p. 178.

are effective in achieving them.²⁰ In the end, the purpose of copyright law is to create an effective and balanced system of protection addressing the interests of creators, rightholders, users, and the general public in a manner that reflects empirical reality, while taking account of specific needs that may exist on the different sides of the copyright spectrum.

I. Remove unnecessary and unproven doctrinal constellations

10 If law and policy makers in the area of copyright want to give evidence-based lawmaking a fair chance, they must first eliminate all doctrinal constellations based on untested or unproven assumptions, which may unwillingly frame their mindsets towards a specific predetermined position. A clear example of such unnecessary and undesirable doctrinal constellations can be found in various EU directives on copyright, including the InfoSoc Directive.²¹ Taking, as the starting point, that copyright fosters creativity and innovation, recital 9 proclaims that “[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.” In the same way, recital 11 assumes that “[a] rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.”

11 Such direct references to a “high level of protection” and a “rigorous, effective system” of copyright and related rights unmistakably focuses the legislative intention too unevenly on protecting creators and rightholders.²² This also has effects on the interpretation of the copyright framework by the Court of Justice of the EU (CJEU), which has consistently confirmed that the InfoSoc Directive grants to authors and rightholders a set of broadly defined exclusive rights,²³ from which only the

exhaustively listed and strictly defined exceptions or limitations may derogate.²⁴ Such doctrinal logic does not help to preserve the delicate balance between protecting authors and rightholders and safeguarding the interests of users and it certainly does not aid evidence-based decision-making.

12 Generally speaking, aiming for a high level of copyright protection must never be a goal in itself, as it does not necessarily contribute to enhanced creativity and innovation. In reality, too little protection may have a negative impact on creativity and innovation, but so does an overly strong protection.²⁵ What the optimal level of protection is, by which sufficient incentives are provided to authors, while innovation and creation by users and subsequent creators is not suppressed, is practically impossible to determine.²⁶ In effect, rather than striving for a “high level of protection”, the starting point of any copyright lawmaking effort should always be the equilibrium that needs to be maintained between the interests of creators, rightholders, users and the public at large,²⁷ however uncertain and delicate that equilibrium might be, and however difficult it is to situate it.

II. Prevent political capture by international copyright norms

13 In a similar vein, to enable lawmakers to adapt copyright law to new economic, societal and technological challenges, it must be ensured that

distribution right).

24 The exhaustive list of exceptions and limitations in art. 5 InfoSoc Directive is strictly observed (Case C-351/12, *OSA v Léčebné lázně Mariánské Lázně* [2014] ECLI:EU:C:2014:110, paras 22-41; Case C-275/15, *ITV v TVCatchup* [2017] ECLI:EU:C:2017:144; Case C-138/16, *AKM v Zürs.net* [2017] ECLI:EU:C:2017:218, paras 31-43). In general, copyright exceptions and limitations must be interpreted strictly (Case C-5/08, *Infopaq v Danske Dagblades Forening* [2009] ECR I-6569), whilst securing their effectiveness and permitting observance of their purpose (Case C-201/13, *Deckmyn v Vandersteen* [2014] ECLI:EU:C:2014:2132; Case C-117/13, *TU Darmstadt v Ulmer* [2014] ECLI:EU:C:2014:2196; Case C-174/15, *VOB v Stichting Leenrecht* [2016] ECLI:EU:C:2016:856).

25 Dreier, *op. cit.*, pp. 139-140.

26 See e.g. N. Elkin-Koren & E.M. Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (London & New York: Routledge 2013).

27 Admittedly, in the framework of the EU InfoSoc Directive, recital 31 also asserts that “[a] fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded”. However, because recitals 9 and 11 put the objectives of creating a high level of protection and a rigorous, effective copyright system first, they provide an imbalance to begin with, as they suggest that ultimately the rights and interests of authors and rightholders must prevail.

20 See e.g. R. Giblin, ‘Reimagining copyright’s duration’, in R. Giblin & K. Weatherall (eds), *What if we could reimagine copyright?* (ANU Press, 2017), pp. 177-211.

21 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, *OJ EU L* 167/10 of 22 June 2001.

22 T. Dreier, ‘Thoughts on revising the limitations on copyright under Directive 2001/29’ [2016] *Journal of Intellectual Property Law & Practice* 138, p. 139.

23 See e.g. Case C-145/10, *Painer v Standard Verlags* [2011] ECR I-12533, para 96 (on the reproduction right); Case C-610/15, *Stichting Brein v Ziggo* [2017] ECLI:EU:C:2017:456, para 22 (on the right of communication to the public); Case C-516/13, *Dimensione v Knoll* [2015] ECLI:EU:C:2015:315 (on the

they are not needlessly bound by age-old rules that are bedrocked in the international copyright framework. Simply stated, an argument that contends that a copyright rule cannot be changed because it is a norm laid down in international treaties cannot convince and must certainly not serve as an excuse for ignoring evidence. This is not to say that the framework of international copyright law is in need of a complete overhaul, but it certainly is time for a critical and structural rethink of some of the key elements of which it is comprised.²⁸

- 14 The Berne Convention indeed does not consist of unchangeable cast-in-stone copyright norms and was never meant to be understood as such. In the end, just like any other law or treaty, it is a man-made political compromise that ought to be subject to change over time. In fact, the Berne Convention was always meant to be revised as needs arose,²⁹ on condition that such a revision has the objective of introducing amendments designed to improve the system of the Berne Union.³⁰ This arguably can be understood in a broad sense,³¹ as long as the revised convention keeps protecting “in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”³²
- 15 In reality, however, a revision of the Berne Convention is a next to impossible task, as it requires unanimity of all contracting parties.³³ This virtually gives any of the (presently 174)³⁴ Berne Union countries the power to veto a change to the convention. Moreover, since the key provisions of the Berne Convention are incorporated by reference into the TRIPS Agreement and the WIPO Copyright Treaty,³⁵ these treaties would also need to be revised in parallel with each other, in order to be able to effectuate any change of international copyright norms. This in turn renders international copyright

reform hard to accomplish.

- 16 However difficult it may be to change international copyright law, policymakers should not abandon constructive attempts to improve the existing treaties. Any future revision should of course be subject to careful deliberation and supported by sufficient evidence that takes full account of the equilibrium, which copyright law seeks to establish.

III. Include doctrinal principles among the evidence to be considered

- 17 Other than providing leeway in the doctrinal domain to accommodate evidence-based copyright reform, there is also need to liberate evidence-inspired policymakers from adopting a too narrow economic approach.³⁶ For one thing, merely relying on economic evidence entails the risk that reform initiatives are rendered futile in cases where such evidence is unavailable or hard to obtain, while giving a strategic advantage to persons and organizations that possess relevant economic data to disclose or conceal such data according to their own interests and needs.³⁷ As importantly, lawmakers also need to recognize that certain doctrinal principles are simply part of the copyright framework and therefore ought to be taken into consideration in reform decisions.
- 18 This becomes especially clear when looking at the rationales for copyright protection, which are not merely economic by nature, but are also comprised of personality-based justifications. Indeed, copyright not only aims at encouraging innovation and creativity by providing incentives to create, thus contributing to the dissemination of knowledge and the advancement of culture, or at regulating trade by providing legal instruments to prevent counterfeiting and unfair competition (economic and cultural arguments based on incentive rationales). It also aims to give authors a fair reward for their creative efforts and to protect the personality or individuality of authors by granting them moral rights (social and justice arguments based on fairness rationales).³⁸

28 See e.g. D.J. Gervais, *(Re)structuring Copyright: A Comprehensive Path to International Copyright Reform* (Cheltenham, UK & Northampton, USA: Edward Elgar 2017).

29 C. Masouyé, *Guide to the Berne convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Geneva: WIPO 1978), p. 121.

30 Art. 27(1) Berne Convention (Paris Act, 1971).

31 See e.g. *Records of the intellectual property conference of Stockholm (June 11 to July 14, 1967)*, vol. 1 (Geneva: WIPO 1971), p. 80, indicating that improvements to the system of the Berne Union “should include not only the enlargement of the protection granted to authors by the creation of new rights or by the extension of rights which are already recognized, but also the general development of copyright by reforms intended to make the rules relating to it easier to apply and to adapt them to the social, technical and economic conditions of contemporary society.”

32 Preamble of the Berne Convention (Paris Act, 1971).

33 Art. 27(3) Berne Convention (Paris Act, 1971).

34 See the full list at: <<http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>>.

35 Art. 9(1) TRIPS Agreement; art. 1(4) WIPO Copyright Treaty.

36 Dillon, *op cit.*, pp. 96 et seq.

37 See the introduction of this paper and the sources mentioned there.

38 See e.g. F.W. Grosheide, *Auteursrecht op maat: beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context* (Deventer: Kluwer 1986), pp. 127-143; J.-L. Piotraut, ‘An Author’s Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared’ (2006) 24 *Cardozo Arts & Entertainment Law Review* 549; J.C. Fromer, ‘Expressive Incentives in Intellectual Property’ (2012) 98 *Virginia Law Review* 1745.

- 19 This suggests that lawmakers must be receptive to including more than just economic evidence in their deliberations when initiatives for copyright reform touch upon social and fairness principles. There may be reason, for example, to give particular attention to moral rights considerations when introducing new copyright limitations, or to recognize the position of the author as a weaker party in contract negotiations with publishers and producers when introducing new rules on authors' contract law. Take the introduction of a right that entitles authors to receive fair compensation in return for a transfer of rights in exploitation contracts. Although, economically speaking, such a right might be regarded as an empty shell, since the fairness of compensation cannot straightforwardly be determined,³⁹ doctrinally speaking, such a right can nonetheless serve as a necessary stick for authors to defend themselves if they are offered an unfair deal.⁴⁰ In such a case, doctrinal observations may ultimately prevail over a well-reasoned economic position.⁴¹
- 20 If and to what degree there is need to give social and fairness principles priority in other areas is much more contentious. One example is the value-gap proposal,⁴² which builds on the claim that, to ensure a just economic balance in the digital marketplace, it would be fair if authors and performers would get a share of the income that online services make through the sale of advertisements, which accompany the content that users upload on their platforms,⁴³ a narrative that others claim to be somewhat misleading.⁴⁴ Another example is calls for making copyright protection conditional on formalities, for which there may be good economic reasons,⁴⁵ but which is often opposed by the argument that it is unfair if authors lose protection due to a failure to complete formalities.⁴⁶
- 21 How much weight such fairness arguments hold, depends of course on the position that one takes in the debate and, for lawmaking purposes, on the objectives to be achieved. Generally speaking, lawmakers should refrain from prioritizing any type of evidence in advance, but carefully weigh and balance all the evidence available, including economic evidence and doctrinal arguments in favour or against a reform proposal.⁴⁷
- 22 As a matter of principle, legislators must however be cautious that fairness arguments are not misused, where in fact interests other than those of authors prevail. In practice, it is often not the creators that benefit mostly from copyright protection, but publishers and producers to which copyright exploitation rights have been transferred.⁴⁸ This has to be taken into account whenever fairness claims are made in the legislative process. A plain example where the lawmaker failed to recognize this is the EU directive extending the term of protection of related
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- Reform_24_02_2017.pdf>, p. 6, arguing that “[t]he idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis”.
- 39 See J.P. Poort, ‘Billijke vergoeding in recht en economie’ [2015] *AMI* 157; J.P. Poort & J.J.M. Theeuwes, ‘Prova d’Orchestra: een economische analyse van het voorontwerp auteurscontractenrecht’ [2010] *AMI* 137, pp. 143-144.
- 40 P.B. Hugenholtz, ‘Dirk en Pippi’ [2015] *NJB* 1143.
- 41 J.P. Poort, *Empirical Evidence for Policy in Telecommunication, Copyright & Broadcasting* (dissertation, Vossiuspers UvA – Amsterdam University Press 2015), p. 269: “This leads to a paradoxical observation: an economist would not just have to take a normative position, but a paternalistic one as well, to object to legislation aimed at protecting authors and creators and advocated by a majority of them. Here, an economist should rest his case [...]”
- 42 European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14 September 2016, COM(2016) 593 final, art. 13.
- 43 ALAI, Resolution on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means, Paris, 18 February 2017, available at: <<http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf>>.
- 44 ‘EU Copyright Reform Proposals Unfit for the Digital Age’, Open Letter from European Research Centres to Members of the European Parliament and the European Council, 24 February 2017, available at: <http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_
- 45 See e.g. W.M. Landes & R.A. Posner, ‘Indefinitely renewable Copyright’ (2003) 70 *University of Chicago Law Review* 471; and H. Varian, ‘Copying and Copyright’ (2005) 19 *Journal of Economic Perspectives* 121, p. 128, arguing that: “Given today’s technology, the creation of a ‘universal’ copyright registry, perhaps in exchange for some incremental benefits to authors, would be highly attractive.”
- 46 See e.g. J.C. Ginsburg, ‘The US Experience with Copyright Formalities: A Love-Hate Relationship’ (2010) 33 *Columbia Journal of Law and the Arts* 311, p. 342. See also O. Alter, ‘Reconceptualizing Copyright Registration’ (2016) 98 *Journal of the Patent and Trademark Office Society* 930, supporting this with an analysis in behaviour economics.
- 47 See Dillon, *op cit.*, arguing that the challenges in accommodating evidence-based policy in lawmaking efforts are not necessarily situated in the types of evidence to be considered, but rather in facilitating due process.
- 48 See M. Kretschmer & P. Hardwick, *Authors’ Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers* (Poole, UK: Centre for Intellectual Property Policy & Management 2007); Europe Economics, L. Guibault, O. Salamanca & S. van Gompel, *Remuneration of authors and performers for the use of their works and the fixations of their performances* (Brussels: European Commission – DG Connect 2015), available at: <<https://www.ivir.nl/publicaties/download/1593.pdf>>; Europe Economics, L. Guibault & O. Salamanca, *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works* (Brussels: European Commission – DG Connect 2016), available at: <https://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf>.

rights in sound recordings.⁴⁹ Despite the availability of evidence that a term extension would chiefly benefit the recording industry and not the position of performers,⁵⁰ the directive was still adopted with the aim of improving the performers' income at the end of their lifetime.⁵¹ There probably is no better example of a lawmaking exercise that disregarded economic evidence without reason.⁵²

- 23 As a final point, if lawmakers on the basis of all evidence considered nevertheless come to decide that doctrinal principles must prevail over economic evidence, then they must be fully transparent about such a decision and the reasons behind it, in order to ensure democratic accountability and to secure the social legitimacy of copyright law.

D. Conclusion

- 24 In order to create an environment that allows for evidence-based reform, while keeping up with some of the guiding doctrinal underpinnings of copyright law, it is essential that lawmakers adopt a sufficiently open approach that allows them to be receptive of both economic and doctrinal evidence. This requires a change of mentality on the part of the legislator. For one thing, they must abandon certain doctrinal assumptions that guided copyright lawmaking previously, but find no support in empirical evidence, such as the idea that copyright requires a high level of protection. Moreover, the international copyright norms should not be treated as incontestable sacred rights, but subjected to change (however difficult that is) if new circumstances so dictate. At the same time, it must be acknowledged that, in copyright lawmaking, pure economic reasoning may not always be agreeable either, especially where legitimate fairness claims are in question.
- 25 Transformations in lawmaking practice, as the ones described here, require a stepwise and gradual approach. They do not happen overnight. In the end, any modernisation of copyright must begin with a

clear vision on where the law should be heading, including specific objectives to be achieved. These can vary from short to mid-term objectives for national legislators, to long-term objectives for international policymakers. To keep in line with evidence-based policy, it would be desirable if these objectives were inspired by empirical facts and reflected a balanced approach between creators, rightholders, users, and the public at large, without *ex ante* privileging one particular position over another.

49 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, *OJ EU L* 265/1 of 11 October 2011.

50 See e.g. N. Helberger, N. Dufft, S.J. van Gompel & P.B. Hugenholtz, 'Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea' [2008] *EIPR* 174; M. Kretschmer et al., "'Creativity stifled?' A joint academic statement on the proposed copyright term extension for sound recordings' [2008] *EIPR* 341.

51 See recital 5 of Directive 2011/77/EU.

52 Hargreaves, *op. cit.*, p. 19; A. Vetulani-Cegiel, 'EU Copyright Law, Lobbying and Transparency of Policy-Making: The cases of sound recordings term extension and orphan works provisions' [2015] *JIPITEC* 146.