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JAN ROSÉN



# Striving for Coherence in EU Intellectual Property Law: A Question of Methodology

*Johan Axhamn\**

## I. Introduction

During the last decades, the field of intellectual property law has undergone a considerable process of *Europeanization* in the sense that it has been the subject of broad regulation and harmonization via EU secondary law. Indeed, no area of private law has been as “Europeanized” as intellectual property.<sup>1</sup> This Europeanization has brought with it not only “Europeanized” provisions, in the meaning that provisions in regulations and directives are given a specific “EU interpretation”,<sup>2</sup> but also *methodological challenges* – e.g. a method for establishing the content of “valid” law and reasoning from that

\* LL.M., MSc., LL.D. candidate in private law, Faculty of Law at Stockholm University. This article is based on lectures on “EU legal method” and “Autonomous concepts in EU law” that the author of this article has given on several occasions over the past few years, including as a “Christmas lecture” at the Institute for Intellectual Property and Market Law (IFIM), of which Jan Rosén is the chair, and Jan Rosén’s course on European Intellectual Property Law (advanced level), at the Faculty of Law at Stockholm University.

<sup>1</sup> Vogenauer, Foreword, in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013).

<sup>2</sup> Cf. Azoulai in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 165.

content to decisions on a particular issue.<sup>3</sup> Certain methodological challenges arise in relation to the obligation to interpret provisions of national law in the light and purpose of provisions in EU directives, because this obligation may impose norms and legal arguments that are different from established traditional methods of interpretation at national level.<sup>4</sup> As pointed out by *Rosén*,<sup>5</sup> the Court of Justice of the European Union (CJEU) has emphasized the need for independent and uniform interpretation of certain terms and provisions of European Union (EU) law:

“It must be born in mind that, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European union.”

The cited paragraph has lately been stressed by the CJEU in several cases in the area of intellectual property. Examples of concepts that the CJEU has deemed to require an *independent* and *uniform* interpretation include, for copyright, *reproduction*<sup>6</sup>, *distribution*<sup>7</sup>, *public*<sup>8</sup>, *parody*<sup>9</sup> and *fair remuneration*<sup>10</sup>. Examples from the area of trade mark law include *acquiescence*<sup>11</sup>, and from patents *human embryo*<sup>12</sup>. This development has occurred despite there being more or less a consensus – both at the Commission<sup>13</sup>, among the Member

<sup>3</sup> Pila in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 230 with references.

<sup>4</sup> Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 268.

<sup>5</sup> Rosén in *Svensk Juristtidning* 2013 p. 548 et seq.

<sup>6</sup> Case C-5/08 *Infopaq International*, ECLI:EU:C:2009:465, pp. 27–29.

<sup>7</sup> C-5/11 *Donner*, ECLI:EU:C:2012:370, p. 25.

<sup>8</sup> Case C-306/05 *SGAE*, ECLI:EU:C:2006:764, p. 31.

<sup>9</sup> Case C-201/13, *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132, pp. 14–17. The case is discussed and analysed by Cederlund in this volume.

<sup>10</sup> Case C-245/00 *SENA*, ECLI:EU:C:2003:68, pp. 21–24.

<sup>11</sup> Case C-482/09 *Budějovický Budvar*, ECLI:EU:C:2011:605, p. 37.

<sup>12</sup> Case C-34/10 *Brüstle*, ECLI:EU:C:2011:669, pp. 24–29.

<sup>13</sup> For example, the commission had previously suggested that “public” was a matter

States<sup>14</sup> and in legal scholarship<sup>15</sup> – that the definition of several or all of these concepts had been left to courts and legislators at national level, because the directives where they occur do not provide any definitions. The view that concepts in directives provide for great discretion at national level may be due to the fact that this has been the traditional view in relation to obligations emanating from international conventions in the field of intellectual property.<sup>16</sup>

Indeed, even in areas where there are references to national law in a directive – such as trade mark law, where the EU directive refers to national law in its preamble – over time the activities of the CJEU have resulted in almost total harmonization without referring to the “autonomous interpretation method”.<sup>17</sup> Furthermore, the CJEU has stressed the need of unity and coherence in the European legal order:

“[G]iven the requirements of unity of the European Union legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the European Union

for Member States. See Commission Staff Working Paper on the Review of the EC Legal Framework in the field of copyright, SEC (2004) 995, p. 15. See also Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernization, (2002) COM 654 final, at 14.

<sup>14</sup> See, e.g., the reasoning by the Swedish Government on the concept of “public” in the preparatory works on the implementation of the 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, Swedish Government bill (Regeringsproposition) 2004/05:110, p. 73.

<sup>15</sup> See, e.g., the reasoning by Hellstadius in *Embryonic Stem Cell Patents* (ed. Plomer & Torremans, 2009) on the interpretation and implementation of the concept of “human embryo” in article 6(2)(c) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, in the national laws of the Member States.

<sup>16</sup> Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), pp. 48 et seq. and 118, Roth in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), pp. 78 et seq., Dinwoodie in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 80 with references, Allot in *European Journal of International Law* 1999 p. 43, and Monday in *International and Comparative Law Quarterly* 1978 p. 50.

<sup>17</sup> Dinwoodie in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 76, and Arnold in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 30 et seq.

legislature has, in a specific legislative context, expressed a different intention.”<sup>18</sup>

The CJEU’s endeavours have led to it filling “gaps” or “lacunas” in or between directives,<sup>19</sup> or between a directive and a regulation.<sup>20</sup> However, the autonomous and uniform interpretations provided by the Court have led to lively debates among legal scholars, not least because the CJEU, through these activities (at least partly) removes national discretion, which may lead to *incoherence* or *uncertainty* in the national legal order.<sup>21</sup> This is so because the interpretations provided by the CJEU and the way it reaches these interpretations (the method it uses) differ from how certain concepts have been interpreted at national level or how national courts have reached their conclusions in specific cases. There has to date been little sustained consideration of the methodological aspects of this Europeanization of intellectual property law.<sup>22</sup> This is part of a general trend where relatively less attention has been given to the effect of secondary EU law at national level – i.e. the Europeanization of national law via secondary EU law – from a methodological perspective than to the effect of primary EU law on national law.<sup>23</sup>

<sup>18</sup> Case C-403/08 Football Association Premier League and Others, ECLI:EU:C:2011:631, p. 188.

<sup>19</sup> See, e.g., the Case C-5/08 Infopaq International, ECLI:EU:C:2009:465, where the Court held that the term “work” should apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation, although the prerequisites for a “work” is only provided for in three directives, and for three specific categories of works, in the area of copyright.

<sup>20</sup> See, e.g., Case C-482/09 Budějovický Budvar, ECLI:EU:C:2011:605, on the interpretation of the concept of “acquiescence”, provided for both in the trade mark regulation and the trade mark directive.

<sup>21</sup> See, e.g., Axhamn in *Europarättslig Tidskrift* 2015 p. 839 et seq. (discussing the concept of “public”), and Axhamn in *Nordiskt Immateriellt Rättsskydd* 2009 pp. 144 et seq. (discussing the sui generis database right). Cf. some of the contributions to this volume, e.g. by Adamsson, Bengtsson, Cederlund, Domeij, Granmar, Kur, Levin, von Lewinski, Norrgård, Ohly, Riis & Schovso, Schønning, Schulze, Stamatoudi and Wolk.

<sup>22</sup> Vogenauer, Foreword, in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013). Cf. Eckes in *European Legal Method – towards a New European Legal Realism?* (eds. Neergaard & Nielsen, 2013), p. 163.

<sup>23</sup> Neergaard & Nielsen in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 132.

Against this background, this article will discuss the methodological implications of the CJEU's methods of interpretation of provisions of EU law, combined with the duty of consistent interpretation, for the coherence of intellectual property law at national level, with special focus on Swedish law. The article will also discuss some practical implications for certain actors in the national legal order – legislatures, courts and legal scholars.

The article is structured as follows. Section 2 will describe the general interface between national law and EU secondary law in the area of intellectual property. Section 3 will go into depth about the CJEU's methods of interpretation. Section 4 will focus on the duty of consistent interpretation. A concluding discussion will follow in section 5.

## 2. Interface Between National Law and EU Law

The EU Treaties – the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) – set out the distribution of competences between the Union and the Member States and establish the powers of the European institutions. Within the competences set out by the treaties, the EU may enact secondary sources of EU law such as regulations and directives, through which the integration process – in particular the internal market – may be realized.<sup>24</sup>

A *regulation* is by its very nature the most intrusive instrument for the Member States, by being “binding in its entirety and directly applicable in all Member States” and only leaving room for them to adopt implementing measures if so required by the regulation. A *directive* leaves more (procedural) discretion to the Member States, as it is binding “as to the result to be achieved” only, leaving the choice of ways and means to the Member States. In the case of minimum harmonization, Member States will also be left a certain level of substantive discretion. Generally speaking, one can say that these instruments aim at different levels of regulatory *intensity*, regulations

<sup>24</sup> Article 288(1) TFEU holds that “[t]o exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.”

often being geared towards *unification of law* and directives towards the *harmonization of national laws*.<sup>25</sup> While one could conceive of the regulation as an instrument akin to national laws, the directive has always been a quite distinctive “EU-proper” type of instrument, raising a lot of confusion and questions regarding its precise legal effects in the national legal orders.<sup>26</sup> Viewed in terms of jurisprudential function, EU directives might be read as an *intermediate form of legal source* between national and international law, confining more closely than international law but at the same time leaving some room for national variation.<sup>27</sup>

The Treaty provides for the establishment of an *internal market* and the institution of a system ensuring that competition in the internal market is not distorted. Harmonization of the laws of the Member States on intellectual property rights contributes to the achievement of these objectives. If intellectual property rights were solely governed by the particular law of each Member State and its effect limited to the territory of that state, it would be an obstacle to the common market in which goods are to circulate freely. This explains why the harmonization of intellectual property rights is to a large extent based on article 114 TFEU.<sup>28</sup>

The EU has enacted several regulations and directives in the area of intellectual property. Even with the adoption of these directives and regulations, which mainly serves the purpose of unifying or harmonizing national law, the implementation of directives and the interpretation of national rules or EU regulations in specific cases might result in *divergences* in the law between the Member States.<sup>29</sup> This might, at least to some extent, be explained by the fact that the EU legislative procedure<sup>30</sup> is carried out in the form of negotiations:

<sup>25</sup> Senden in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 228.

<sup>26</sup> *Ibid.* and Scheinin in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 120.

<sup>27</sup> Dinwoodie in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 80 with references.

<sup>28</sup> Smits & Bull in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), pp. 39 et seq.

<sup>29</sup> Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), p. 114.

<sup>30</sup> According to article 289(1) of the TFEU, the ordinary legislative procedure of the

negotiations between the Member States – often reflecting different national traditions<sup>31</sup> and legal cultures<sup>32</sup> – and between the Member States and the European Parliament and the Commission for the purpose of reaching compromises. In contrast to the Member States, the positions of the Parliament and the Commission often reflect an interest to *further integration*. The final text of a directive often reflects these compromises by including *vague, complex and ambiguous language* with a higher level of abstraction than what is normally used in legislation at a national level.<sup>33</sup> In addition, the final text of a directive is often also *seemingly incoherent* where, for example, one statement in an article is combined with a contradictory statement in a recital. In other words, the legislative procedure of the EU is not able to produce norms of the quality normally created at national level.<sup>34</sup> Much is thus left to interpretation – both at the stage of implementation and later in the interpretation by a national court.

As a result, harmonization exercises might end up replacing *explicit divergence*, i.e. a situation where there is no doubt that there is divergence between the laws of the Member States (in a specific area), with *conceptual divergence* – where national courts, practitioners and scholars believe they are referring to the same concept, since the label they are using is the same term, while they are in fact using

EU shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. The procedure is defined in article 294 TFEU.

- <sup>31</sup> Ohly in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), pp. 260 et seq. and Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 263 with references.
- <sup>32</sup> Jääskinen in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 460.
- <sup>33</sup> Prechal & Roermund in *The Coherence of EU Law* (eds. Prechal & van Roermund, 2008), p. 5, Senden in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), p. 367, Ohly in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), pp. 260 et seq., Gerards in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 28, van Gestel & Micklitz in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 67, Azoulai in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), pp. 165 et seq. and Handing in *IIC 2009* p. 674.
- <sup>34</sup> Hugenholtz in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 67 and Ohly in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), pp. 260 et seq.

diverging concepts.<sup>35</sup> Conceptual divergence often lurks below the surface and is neither immediately perceptible nor entirely deliberate. There is thus an illusion of convergence in terminology and presumably a fair amount of conceptual overlap, but somewhere at the conceptual level undesirable divergence remains. If this happens as the result of a harmonization effort aiming at removing costs of an existing explicit divergence, then it will instead merely replace such costs with new ones related to legal uncertainty.<sup>36</sup>

The problem of conceptual divergence in the area of intellectual property harmonization has been identified by the European Commission, which held in a Green Paper that European legal concepts “are not always being applied uniformly, in particular because the national courts tend to interpret [the European provisions] in the light of previous [national] solutions.”<sup>37</sup> Examples where legal scholarship has identified divergences at national level although reference is made to the same concept in EU law are “originality”<sup>38</sup> in copyright law and “human embryo”<sup>39</sup> in patent law. The situation is complicated by the fact that legal sources in EU law are often developed on the basis of legal materials from the Member States, in the forms of concepts and categories, before being molded and transformed into EU sources.<sup>40</sup>

On a general level, the problem of conceptual divergence could be considered as a “symptom” of a broader question on the relation-

<sup>35</sup> Chirio & Larouche in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 464.

<sup>36</sup> Chirio & Larouche in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), pp. 463 et seq., and Jääskinen in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 460.

<sup>37</sup> Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernization, (2002) COM 654 final, at 14.

<sup>38</sup> Karnell, “European Originality: A Copyright Chimera”, in *Intellectual Property and Information Law – Essays in Honour of Herman Cohen Jehoram* (eds. Kabel & Mom, 1998), pp. 201–209.

<sup>39</sup> Hellstadius in *Embryonic Stem Cell Patents* (ed. Plomer & Torremans, 2009).

<sup>40</sup> Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 262, Azoulai in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 168, and Ohly in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 264.

ship between EU law and national law: Are we talking about one EU legal system distinct from and in addition to the national legal systems (the 28 + 1 model), or is EU law merely an aspect of Member States' legal systems (the 28 model), or is there one single EU legal system of which Member States' national legal systems and international law are a kind of sub-systems (the one Big System model)?<sup>41</sup>

Related to this are essential methodological questions: How do we decide what the law is in situations where the legal sources seem to come from more than one authority?<sup>42</sup> Some have described this as a *postmodern*<sup>43</sup> paradigm characterized by *pluralist post-national rule-making*.<sup>44</sup> Thus, from a Swedish perspective, if twenty years ago

<sup>41</sup> See Dickson, How many legal systems? Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union (2008). See also Neergaard & Nielsen in European Legal Method – Paradoxes and Revitalisation (eds. Neergaard, Nielsen & Roseberry, 2011), p. 148, Reichel in European Legal Method – Paradoxes and Revitalisation (eds. Neergaard, Nielsen & Roseberry, 2011), p. 264 with references, Nielsen in European Legal Method – in a Multi-Level EU Legal Order (ed. Neergaard & Nielsen, 2012), p. 91, Eckes in European Legal Method – towards a New European Legal Realism? (eds. Neergaard & Nielsen, 2013), pp. 163 et seq., Pila in The Europeanization of Intellectual Property Law (eds. Ohly & Pila, 2013), p. 28 and Sand in European Legal Method – towards a New European Legal Realism? (eds. Neergaard & Nielsen, 2013), p. 217. The discussion on “how many legal systems” is related to the discussion on the political definition of the European Union. After more than fifty years of European integration and enlargement it is still unclear what the European Union is politically. There is no general consensus among politicians and scholars about whether the European Union is a mere form of inter-governmental cooperation, a quasi-federal state or a peculiar cosmopolitan community. For a discussion, see, e.g., Postigo in European Legal Method – towards a New European Legal Realism? (eds. Neergaard & Nielsen, 2013), pp. 44 and 107.

<sup>42</sup> Patterson in European Legal Method – Paradoxes and Revitalisation (eds. Neergaard, Nielsen & Roseberry, 2011), p. 227, and van Gestel & Micklitz in European Legal Method – Paradoxes and Revitalisation (eds. Neergaard, Nielsen & Roseberry, 2011), p. 57.

<sup>43</sup> Ohly in The Europeanization of Intellectual Property Law (eds. Ohly & Pila, 2013), p. 255.

<sup>44</sup> van Gestel & Micklitz in European Legal Method – Paradoxes and Revitalisation (eds. Neergaard, Nielsen & Roseberry, 2011), p. 67, Nielsen in European Legal Method – in a Multi-Level EU Legal Order (eds. Neergaard & Nielsen, 2012), p. 90 with references, Eckes in European Legal Method – towards a New European Legal Realism? (eds. Neergaard & Nielsen, 2013), p. 165, and Vogenauer, Foreword, in The Europeanization of Intellectual Property Law (eds. Ohly & Pila, 2013).

Swedish law could be described as generally based on legal sources from one single legal order, the Swedish one, the situation is quite different today. Europeanization has brought about a legal landscape with a multitude of legal sources with at times unclear positions in the formerly ordered hierarchy of legal sources.<sup>45</sup>

However, just as any other legal order, the EU legal order requires a special kind of coherence, namely *convergence* – the perception of *movement towards (virtual) unity*. Thus, by necessity, there needs to be one single final authority.<sup>46</sup> It is here that the CJEU has come to play an increasingly important role.<sup>47</sup> The CJEU is the highest judicial authority of the EU, which – according to article 19(3) of the TEU – shall give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions. For this purpose, article 267 TFEU holds that national courts may, and sometimes must, turn to the CJEU and ask that it clarify a point concerning the interpretation of Union law. It is generally accepted that the primary purpose of the preliminary ruling procedure is to enable national courts to ensure uniform interpretation and application of European law in all the Member States.<sup>48</sup> The procedure is based on the idea of cooperation – not hierarchy – between the CJEU and the national courts.<sup>49</sup>

The preliminary ruling procedure has been enormously important in the area of intellectual property law.<sup>50</sup> Some scholars have

<sup>45</sup> Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 262 with references.

<sup>46</sup> Prechal & Roermund in *The Coherence of EU Law* (eds. Prechal & van Roermund, 2008), pp. 1 et seq.

<sup>47</sup> See, e.g., the contribution by Bernitz to this volume.

<sup>48</sup> Case C-166/73 *Rheinmühlen Düsseldorf mot Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1974:8. See also Court of Justice, “Information note on references from national courts for a preliminary ruling”, [2005] OJ C143/01, p. 1 and Lenaerts & Corthout in *The Coherence of EU law* (ed. Prechal & Roermund, 2008), p. 500.

<sup>49</sup> Senden in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), pp. 381 et seq., and Neergaard & Nielsen in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 146.

<sup>50</sup> Vogenauer, Foreword, in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013).

even referred to the CJEU as an “activist”<sup>51</sup> or “law making”<sup>52</sup> court due to its tendency to harmonize “by interpretation,”<sup>53</sup> “through the back door”<sup>54</sup> or by “stealth.”<sup>55</sup> On the other hand, it has been held that the need of the CJEU to develop *autonomous concepts* is related to the fact that the EU legal order lacks “context” in the sense of legal culture, history, traditions or theories – such as an underlying theory on intellectual property law – developed over a significant period of time at national level.<sup>56</sup>

Similarly, and with reference to the EU legislative process (described above), it has been submitted that it is an inherent element in EU law, with its own legal language, and multi-language regime, that *concepts in EU law often crystallize only over a certain period of time, usually with the substantial assistance of the CJEU*.<sup>57</sup> In other words, it is held that conceptual vagueness is a natural feature of EU law due to the EU’s legislative process, and it would be an illusion to think that conceptual convergence can be fully achieved at the legislative level.<sup>58</sup> Also, the reason for autonomous interpreta-

<sup>51</sup> Synodinou in *Codification of European Copyright Law* (ed. Synodinou, 2012), pp. 4 et seq., Hugenholtz in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 64, Ohly in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 258 and Halpern & Johnson, *Harmonising copyright law and dealing with dissonance* (2014), pp. 99 et seq.

<sup>52</sup> Vousden in *WIPO Journal* 2010, p. 210 and Strowel & Kim in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 126.

<sup>53</sup> Hugenholtz in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 62.

<sup>54</sup> Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), p. 118.

<sup>55</sup> Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), p. 99 with reference to Bently, “Harmonisation by Stealth: Copyright and the ECJ”, *Fordham Conference* 2012.

<sup>56</sup> Azoulai in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), pp. 175 et seq. and Dinwoodie in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), pp. 96 et seq. Cf. Scheinin in *Constitutionalism: New Challenges, European Law from a Nordic Perspective* (ed. Nergelius), 2008.

<sup>57</sup> Senden in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 367. Cf. Lenaerts & Corthaut in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), p. 505 and Pila in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 250.

<sup>58</sup> Senden in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), p. 367 and Synodinou in *Codification of European Copyright Law* (ed. Synodinou, 2012), p. 4.

tion may be a practical one. In some cases, the CJEU has indicated that an autonomous definition is necessary to achieve an interpretation of the provision that fits in well with the aim and purposes of the directive or regulation as a whole.<sup>59</sup>

The existence of the CJEU and the effect of its case law thus make the relationship between norms in directives and national law fundamentally different from the relationship between norms in international treaties and national law.<sup>60</sup> With regard to international treaties, there is no guarantee for a truly autonomous and uniform interpretation of the instrument as long as there is no institution which is competent to give an authoritative interpretation, which is combined with effective enforcement at national level.<sup>61</sup>

Indeed, as indicated above, many EU Member States, when implementing the various intellectual property directives, appear to have largely assumed that directives and provisions and the concepts within them are guides for the national legislature that comprise quite a considerable margin of discretion in much the same way that the wording of international conventions is a guide for the minimum standards they set out. However, the CJEU is interpreting concepts of directives more precisely and in a manner leading to much greater uniformity. By assuming an interpretational monopoly over EU legal terms – combined with its jurisdiction to review the legality of community acts by actions of annulment (article 263 TFEU), the possibility of infringement proceedings against a Member State (article 258 TFEU), and of bringing actions for damages (article 340 TFEU) – the CJEU has been able to ensure the *effective-*

<sup>59</sup> Gerards in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), pp. 44 et seq.

<sup>60</sup> Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), p. 118.

<sup>61</sup> Roth in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), pp. 78 et seq., Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), pp. 48 et seq., Dinwoodie in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 80 with references, Allot in *European Journal of International Law* 1999 p. 43, and Monday in *International and Comparative Law Quarterly* 1978 p. 50. For a discussion on “compliance mechanisms” related to WIPO treaties and TRIPS, see Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), pp. 51 et seq.

ness of EU law *vis-à-vis* national law.<sup>62</sup> In other words, the European Treaties, by attributing jurisdiction to the CJEU in these cases, provide for an enforcement mechanism that is meant to lead to a uniform and consistent application of EU law.<sup>63</sup> The conceptual autonomy and the autonomy of the EU legal order are thus two sides of the same coin.<sup>64</sup>

Also, and as submitted in legal doctrine, there is a *strategic interest* in giving autonomous definition to concepts. If the CJEU can provide its own and final interpretation of certain concepts, which is binding for the national authorities, it can more easily establish itself as the final interpreter. This makes it highly valuable for the CJEU to adopt an EU definition, rather than refer back to the law of the member states.<sup>65</sup>

It follows that case law from the CJEU in the area of intellectual property has become an ever more important source of EU law and, through the principle of obligation of consistent interpretation, also a source of law at national level. Further, the legal method made use of by the CJEU has also increased in importance, especially the fact that the Court indicates that certain concepts in EU secondary law on intellectual property should be given an autonomous and coherent interpretation throughout the Union.<sup>66</sup> As submitted by *Rosén* in his latest overview on copyright case law over the last few years:

<sup>62</sup> Bengoetxa in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 428, and Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), p. 99.

<sup>63</sup> Chirio & Larouche in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), p. 479, and Gerards in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), pp. 43 et seq.

<sup>64</sup> Azoulai in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 170.

<sup>65</sup> Gerards in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 44. Other legal regimes, such as the ECHR, have taken similar routes, assuming the right of autonomous development of the law. For a discussion, see Eckes in *European Legal Method – towards a New European Legal Realism?* (eds. Neergaard & Nielsen, 2013), p. 176.

<sup>66</sup> Gerards in *European Legal Method – in a Multi-Level EU Legal Order* (eds. Neergaard & Nielsen, 2012), p. 43 with references, and Sand in *European Legal Method – towards a New European Legal Realism?* (eds. Neergaard & Nielsen, 2013), p. 217.

“The CJEU has in several cases demonstrated the possibility of applying a common and consistent terminology, even though the different directives in the field of copyright concern different objects. The CJEU tends to claim that the words and expressions used in Union legislation must be perceived in the same way, regardless of where the legislator has employed them, provided no distinct definition has in fact been given.”<sup>67</sup>

The CJEU, thus, takes a central role in interpreting Union law and thereby in developing a European *legal method*. The next section will describe the methodology of EU law, as developed by the CJEU in relation to concepts in directives, in more detail.

### 3. The Methodology of Interpretation of Secondary EU Law, as Developed by the CJEU

As mentioned, article 19(3) of the TEU provides that the CJEU shall give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions. However, the Treaties contain no provision for which legal method the CJEU shall apply when interpreting the Treaties or secondary law. In addition, there is no explicit mention of uniformity of EU law in the wording of article 267 TFEU (on preliminary rulings). The idea that article 267 TFEU has something to do with ensuring uniformity in the interpretation of EU law is a product of the CJEU’s teleological and systematic interpretation of that article.<sup>68</sup>

Among the methods of interpretation used by the CJEU in relation to directives and other instruments of secondary law are the *literal*, *systematic* and *teleological* methods. They are usually regarded as traditional methods of interpretation in civil law countries.<sup>69</sup> Nev-

<sup>67</sup> Rosén in *Svensk Juristtidning* 2013 p. 548.

<sup>68</sup> Neergaard & Nielsen in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 130.

<sup>69</sup> Roth in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), pp. 76 et seq., Lenaerts & Gutiérrez-Fons, *To say what the law of the EU is: methods of interpretation and the European Court of Justice*, 2013, and Neergaard & Nielsen in *European Legal Method – towards a New European Legal Realism?* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 166.

ertheless – as the court has pointed out in its CILFIT judgment<sup>70</sup> – the interpretation of community law presents some characteristic features (and particular difficulties), such as

- its multilingual nature whereby the different languages have to be regarded as equally authentic,
- the use of concepts that are peculiar to community law, and
- the need to interpret traditional national concepts in the light of the specific objectives of community law so as to give them a different autonomous meaning.

The method of interpretation of secondary law differs somewhat from the method used for interpretation of primary law, where the CJEU – at least traditionally – has put more emphasis on the systematic and teleological interpretation.<sup>71</sup> One important reason for this is the difference in *drafting style*, e.g. level of detail in the legislation, and the availability of preparatory works – which is high for secondary law but for a long time was virtually non-existent for primary law.<sup>72</sup>

As stated in the cited paragraph at the beginning of this article, in cases where the terms of a provision of a directive make “no express reference to the law of the Member States for the purpose of determining its meaning and scope”, the CJEU has held that “it follows from the need for uniform application of European Union law and from the principle of equality” that such terms “must normally be given an autonomous and uniform interpretation throughout the

<sup>70</sup> Case C-77/83, CILFIT, ECLI:EU:C:1984:91.

<sup>71</sup> Neergaard & Nielsen in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 133. There is wide agreement that the customary international law on the interpretation of treaties as set out in articles 31 et seq. of the Vienna Convention on the Law of Treaties of 1969 does not apply to community law; some justify this result by pointing out the character of community law as an independent legal order, as has been recognized by the CJEU. From this also follows that “subsequent practice” of the Member States normally have no relevance for the CJEU when interpreting a provision of EU law. For a discussion, see Roth in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 78.

<sup>72</sup> Lenaerts & Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 2013.

European Union.”<sup>73</sup> This is the so-called requirement of autonomous interpretation, by which the CJEU establishes autonomous EU concepts.

If the concept to be interpreted is not defined in the directive of which it forms part, it must be defined having regard to the wording (*literal interpretation*) and context (*systematic interpretation*), where reference to the concept is made, and in the light of both the overall objectives (*teleological interpretation*) of that directive and *international law*.<sup>74</sup>

An interpretation based on the *wording* of a concept in a directive might be complicated because the directive exists in 24 authentic, equally ranked, legally binding *language versions*.<sup>75</sup> Accordingly, in principle, the interpretation of a provision of community law requires a comparison of all these language versions.<sup>76</sup> The need to

<sup>73</sup> See, e.g., Case C-5/08 Infopaq International, ECLI:EU:C:2009:465, pp. 27–29, C-5/11, Donner, ECLI:EU:C:2012:370, p. 25, Case C-306/05 SGAE, ECLI:EU:C:2006:764, p. 31, Case C-245/00 SENA, ECLI:EU:C:2003:68, pp. 21–24, Case C-482/09 Budějovický Budvar, ECLI:EU:C:2011:605, p. 29, and Case C-34/10 Brüstle, ECLI:EU:C:2011:669, pp. 24–29.

<sup>74</sup> See, e.g., Case C-5/08 Infopaq International, ECLI:EU:C:2009:465, p. 32, Case C-306/05 SGAE, ECLI:EU:C:2006:764, p. 34, Case C-245/00 SENA, ECLI:EU:C:2003:68, p. 23, Case C-482/09 Budějovický Budvar, ECLI:EU:C:2011:605, p. 29, and Case C-34/10 Brüstle, ECLI:EU:C:2011:669, p. 31. In addition, the CJEU has submitted that “where several fundamental rights are at issue”, the Member States must, when transposing a directive, ensure that they rely on an interpretation of the directive which allows a *fair balance* to be struck between the applicable fundamental rights protected by the European Union legal order. Then, when implementing the measures transposing that directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that directive but also ensure that they do not rely on an interpretation of it which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality. See Case C-275/06 Promusicae, ECLI:EU:C:2008:54, p. 68, and Case C-314/12 UPC Telekabel Wien, ECLI:EU:C:2014:192, p. 46. For a discussion, see the contribution by Bengtsson in this volume.

<sup>75</sup> Article 21 of the Charter explicitly prohibits discrimination based on “language.” In the same way, article 4(1) TEU states that “[t]he Union shall respect the equality of Member States before the Treaties.”

<sup>76</sup> In light of article 55 TFEU, the texts of the Treaties in each of the twenty-four official languages are equally authentic. Article 342 TFEU states that “the rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union,

give a concept in a directive “autonomous interpretation” is thus a way to ensure compliance with the principle of *linguistic equality*, which the court underlines with its reference to the “principle of equality”.<sup>77</sup> A comparison between different language versions may show linguistic discrepancies, either where different terms with different meanings are used, or even where the same term is used in all versions, but with different meanings.<sup>78</sup> In such a case, the general tendency of the CJEU is to focus more on the systematic and teleological interpretation.<sup>79</sup>

*Systematic (contextual) interpretation* may be examined from two different, albeit complementary, perspectives. *Internally*, contextual interpretation focuses on the purely normative context in which the EU law provision in question is placed. This method of interpretation assumes that the EU legislator is a *rational actor*; each provision of EU law must be interpreted in a way that guarantees that there is no conflict between the individual provision and the general scheme of which it is part.<sup>80</sup> *Externally*, contextual interpretation examines the (legislative) decision-making process that led to the adoption of the EU law provision in question. Thus, it makes use of the prepara-

be determined by the Council, acting unanimously by means of linguistic regulations.” By adopting Regulation 1/1958, the Council decided to implement the “principle of linguistic equality”, which entails full multilingualism. That is why there is a legal obligation to publish acts adopted by EU institutions in each of the twenty-four official languages of the EU. For a discussion, see Lenaerts & Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 2013.

<sup>77</sup> Lenaerts & Gutiérrez-Fons *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 2013.

<sup>78</sup> It has, however, been questioned in legal doctrine whether language equality can be a realistic proposition in practice. See, e.g., Nielsen in *European Legal Method – in a Multi-Level EU Legal Order* (ed. Neergaard & Nielsen, 2012), p. 99: “Some of the EU-languages are not as necessary as others. It is for example clearly possible to do very good research in EU law without being able to read the small language versions of the legal texts. The major languages (French, German and English) are much more important and hence mandatory. The French language has a particularly important position because it is the working language of the CJEU. Consequently, the French version of a judgment from the CJEU is the only one which all the participating judges have accepted as an expression of their views.”

<sup>79</sup> Lenaerts & Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 2013.

<sup>80</sup> *Ibid.*

tory works<sup>81</sup> – a method of interpretation sometimes referred to as *historical interpretation*.<sup>82</sup>

*Teleological interpretation* takes into account the objectives of a certain provision. This could be inferred from, *inter alia*, the fact that it follows from article 296 TFEU that a directive shall state the reasons on which it is based. These reasons are usually contained in the recitals within the preamble of the directive and present an important means of interpretation, while not being part of the operative rules of the directive.<sup>83</sup>

As regards *interpretation in coherence with international law*, the CJEU has consistently held that “by virtue” of article 216(2) TFEU, “where international agreements are concluded by the [EU], they are binding upon its institutions and, consequently, they prevail over acts of the European Union.”<sup>84</sup> This means that international agreements concluded by the EU enjoy supra-legislative status.<sup>85</sup> From this follows an obligation to interpret provisions in a directive in conformity with public international law, especially in cases where the directive in question is “intended specifically to give effect to [such] an international agreement.”<sup>86</sup> In addition, the incorporation of an international agreement into EU law may take place in accordance with the theory of succession, where the EU has “assumed, and thus had transferred to it, all the powers previously exercised by the Member States that fall within the [international agreement] in question.”<sup>87</sup> Thus, for example, although some scholars have

<sup>81</sup> Ibid.

<sup>82</sup> Hesselink in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 202.

<sup>83</sup> Accordingly, if, in an exceptional case, a recital were to conflict with an operative provision, it must not be taken into account.

<sup>84</sup> See, e.g., Case C-366/10 *Air Transport Association of America and Others*, ECLI:EU:C:2011:864, p. 50.

<sup>85</sup> Lenaerts & Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 2013.

<sup>86</sup> See, e.g., Case C-456/06 *Peek & Cloppenburg*, ECLI:EU:C:2008:232, pp. 29 to 32, Case C-5/11 *Donner*, ECLI:EU:C:2012:370, p. 23, and Case C-403/08 *Football Association Premier League and Others.*, ECLI:EU:C:2011:631, p. 189.

<sup>87</sup> See, e.g., Case C-366/10 *Air Transport Association of America and Others*, ECLI:EU:C:2011:864, p. 63. For a discussion, see Lenaerts & Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 2013.

stressed that the EU is not a party to the Berne Convention and therefore should have no competence to interpret it,<sup>88</sup> it follows from general EU law that the CJEU has this competence.<sup>89</sup>

When interpreting relevant international obligations, the CJEU has held that even though the EU is not a party to the 1969 Vienna Convention on the Law of Treaties, this treaty codifies principles of customary international law which, as such, are incorporated into the EU legal order. An international convention should thus be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.<sup>90</sup>

None of the methods of interpretation applied by the CJEU should be examined in isolation. Where the EU law provision in question is ambiguous, obscure or incomplete, all the methods of interpretation employed by the CJEU operate in a mutually reinforcing manner. A literal interpretation of an ambiguous EU law provision may be confirmed by its context and purpose. Similarly, to determine the objectives pursued by an EU law provision, the CJEU may have recourse to its drafting history or its normative context.<sup>91</sup>

As indicated above, the CJEU has, through its case law, *de facto* harmonized important areas of intellectual property that had been left largely untouched by harmonization directives. This harmonization has been achieved directly through the Court's interpretation of specific concepts in intellectual property law – such as *reproduction*, *distribution*, *public*, *parody*, *fair remuneration*, *acquiescence* and *human embryo*. We can probably expect that the CJEU will continue to provide autonomous interpretation for central concepts in intellectual property.<sup>92</sup> In addition, through its interpretations, the

<sup>88</sup> Koelman in *Tijdschrift voor Auteurs-, Media-, & Informatierecht* 2009 pp. 198 et seq. See also Vousden in *WIPO Journal* 2010 p. 206, Rosén and Granmar in *Svensk Juristtidning* 2015 pp. 347 et seq. and Rosén in *Nordisk Immateriellt Rättsskydd* 2014 pp. 660 et seq.

<sup>89</sup> See, e.g., Case C-13/00 *Commission v Ireland*, ECLI:EU:C:2002:184, p. 20. For a discussion, see Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance* (2014), p. 107.

<sup>90</sup> See, e.g., Case C-386/08 *Brita*, ECLI:EU:C:2010:91, pp. 40 et seq.

<sup>91</sup> Lenaerts & Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 2013.

<sup>92</sup> Halpern & Johnson, *Harmonising Copyright Law and Dealing with Dissonance*

Court has filled “gaps” in or between the directives, or between directives and regulation. In this way, the court seeks to create a coherent EU legal order. To which extent this coherent order will manifest itself at national level is to a large extent depending on whether the national courts fulfill their duty of *consistent interpretation*.

#### 4. The Duty of Consistent Interpretation

As mentioned above, directives – in contrast to regulations – are binding only on the Member States, and they cannot impose obligations on an individual. Whereas provisions in a directive may, under certain conditions, be applied *vertically* (in the relationship between the individual and the state) in favor (but not to the disadvantage) of an individual, a directive cannot be directly applied *horizontally* as between individuals. Partially to compensate for this, the CJEU has developed the obligation of national courts, and indeed all national authorities, to *interpret* national law in conformity with the goals and provisions set forth in a directive. This obligation – sometimes referred to as an obligation of *consistent interpretation* or *indirect effect*<sup>93</sup> – is to some extent derived from article 288 TFEU, and it has in the past also been based on the general duty of a Member State, set forth in Article 4(3) TEU, “to take all appropriate measures, whether general or particular,” to achieve the result envisaged by the directive. Based on this, the CJEU has held that “... when applying national law, ... the national court has to interpret that law ... as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of (now article 288.3 TFEU).”<sup>94</sup> The obligation on national courts to interpret national law in accordance with a directive becomes an effective instrument for enforcing European Union law in a uniform manner if taken

(2014), p. 117. Cf. Hugenholtz in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), p. 64.

<sup>93</sup> Neergaard & Nielsen in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 161.

<sup>94</sup> See, e.g., Case C-106/89 *Marleasing v Comercial Internacional de Alimentación*, ECLI:EU:C:1990:395, p. 8.

together with the preliminary reference procedure.<sup>95</sup> Thus, the point of departure of EU law is that a legal right (following from EU law) must be protected at national level because it exists. This perspective is quite different from the traditional Swedish perspective – coherent with (traditional) Scandinavian realism – according to which the “existence” of a right is conditioned on its capability of producing procedural and executive consequences.<sup>96</sup>

The CJEU, in a number of judgments, has taken the view that national courts are bound by the interpretative methods recognized by national law and that European Union law cannot serve as the basis for an interpretation of national law *contra legem*.<sup>97</sup> Thus, in practice, the contrast between a direct application of a directive provision and its indirect effect by way of interpreting national law in accordance with the directive becomes crucial only in cases where a *contra legem* interpretation of national law is barred by national law.<sup>98</sup> One could argue that this is a capricious divide leading to arbitrary results. In fact, it is merely the consequence of the existence in the EU legal order of normative instruments with less than full legal effect: imperfect legal instruments create imperfect outcomes. There is a constitutional difference between regulations and directives.<sup>99</sup>

<sup>95</sup> Roth in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 88.

<sup>96</sup> Andersson, *Rättsskyddsprincipen*, 1997, p. 170, Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), pp. 249 et seq., and Nielsen in *European Legal Method – towards a New European Legal Realism?* (eds. Neergaard & Nielsen, 2013), pp. 76 and 111 et seq.

<sup>97</sup> See e.g. Case C-12/08 *Mono Car Styling*, ECR 2009, ECLI:EU:C:2009:466, p. 61: “That obligation to interpret national law in conformity with Community law concerns all the provisions of national law and is limited by the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*”.

<sup>98</sup> Roth in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), pp. 87 et seq., and Lenaerts & Corthaut in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), p. 513.

<sup>99</sup> Lenaerts & Corthaut in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), pp. 513 et seq.

## 5. Discussion and Conclusions

An important effect of the CJEU's case law is that it resolves some of the conceptual divergences that are an unavoidable outcome of the EU legislative process, thus furthering conceptual convergence. In addition, and on a more general level, the fact that the Court is explicit in its legal methodology and does not simply provide preliminary rulings in an *ad hoc* manner, furthers not only *conceptual* convergence but also *systematic coherence* within the EU legal order. At least in theory, the national courts' duty of consistent interpretation should lead to similar coherence at national level – the tendency of the CJEU to fill gaps (or “lacunas”) in or between the directives with the purpose of creating coherency, should be applied also by national courts. In practice, such a development at national level might meet with resistance both from national courts and legal scholars, who might make efforts to try to “isolate” the “EU law elements” from the “equilibrated” law at national level.

Thus, if one takes the view that “valid law” needs a “factual element”, the legal practices at national level need to adapt to give full effect to the norms provided by the EU legislator and through case law of the CJEU. These practices are reflected in the activities carried out by the national legislatures, national courts and legal scholarship.

As regards *national legislatures*, it has been recognized in the legal literature that the traditionally high importance of the preparatory works in Sweden<sup>100</sup> has diminished – at least in relation to national legislation implementing directives<sup>101</sup> – although it is still practiced. Even though national preparatory works have been accepted by the CJEU as a permissible way of implementing an annex to an EU directive (under certain circumstances),<sup>102</sup> the CJEU has stressed that the general obligation on a national court of consistent interpretation applies “notwithstanding any contrary interpretation which

<sup>100</sup> Ekelöf in *Scandinavian Studies in Law* 1958 pp. 75 et seq., Peczenik, *Principer i det svenska statsskicket*, 1999, p. 123 and Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory*, 2008, p. 120.

<sup>101</sup> Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 252.

<sup>102</sup> Case C-478/99 *Commission v Sweden*, ECLI:EU:C:2002:281. Cf. Case C-143/83 *Commission v Denmark*, ECLI:EU:C:1985:34.

may arise from the preparatory works for the national rule.”<sup>103</sup> This has also been recognized by the Swedish legislature.<sup>104</sup> Thus, the decreased importance of the activities of the national legislature is a direct result of the increased importance of the national courts following from the duty of consistent interpretation.

As regards the role of *national courts*, when the national legislation falls short of providing sufficient conceptual clarity, it will often be up to the national court to ensure compliance with European concepts, as interpreted by the CJEU or through the same legal method as developed by the CJEU.<sup>105</sup> Indeed, by imposing the duty of consistent interpretation upon national courts, the CJEU has actually presumed that national legal systems allow for a *dynamic development* of the law and an active role on the part of the national judge. The obligation to interpret national law “as far as possible” in conformity with European law would serve little purpose if the national judge did not have any discretion in his interpretation of the law. Even though the national judge is not obliged to give a *contra legem* meaning to the national law, he may be required to give a different meaning to this law than the usual one.<sup>106</sup> As mentioned above, this “new role” of courts at national level in the Europeanized areas of Swedish law, such as intellectual property, has evidently affected the relationship between the courts and the legislator – even though there is a tendency to not acknowledge this development too openly.<sup>107</sup> It has, for example, been stressed that although Swedish courts have not been reluctant to assume the task of protecting EU law in Sweden, the methodological choices are not always made explicit, with the legal craftsmanship performed in a more cautious and subtle manner.<sup>108</sup>

<sup>103</sup> Case C-371/02 Björnekulla Fruktindustrier, ECLI:EU:C:2004:275, p. 13.

<sup>104</sup> See Swedish Government bill (Regeringsproposition) 1994/95:19 p. 529. Cf. Swedish Government bill (Regeringsproposition) 2001/02:121 p. 193.

<sup>105</sup> For a general discussion from a Swedish perspective, see, e.g., Lundius in *Europarättslig Tidskrift* 2015 pp. 864 et seq. Cf. Calissendorff in *Europarättslig Tidskrift* 2015, p. 21.

<sup>106</sup> Senden in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 368.

<sup>107</sup> Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 256.

<sup>108</sup> Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 271 with references.

However, it is one thing to state that the national court has to act this way; whether it is actually going to proceed to such dynamic interpretation is quite another matter. The national judge *must be aware* that there is a problem of EU law in a case before him, for instance he must know that the rule or concept under consideration has an EU origin; he must have *sufficient knowledge* of how to deal with this problem, both as regards the substantive aspects of the law and as regards methodological aspects such as the doctrine of consistent interpretation; and he must *be willing* to act as a community law judge and be prepared, if necessary, to seek assistance from the CJEU in the framework of the preliminary ruling procedure. Whereas the first two issues can be overcome by providing training, the last one is more difficult. This may to some extent require fundamental changes in judicial culture and practice. How far national courts will go in this application, and in interpreting their national law so as to converge with EU law, will depend primarily on the way in which the *trias politica* is understood in a Member State and how the role of the judiciary is perceived in relation to that of the legislator. The views on this vary considerably between Member States and even within states. What is regarded as creative interpretation in one legal system may be regarded as wholly unacceptable or an error in law in another. The capacity of a national legal system to *smooth out* conceptual problems will thus depend greatly on the extent to which it is capable of addressing and overcoming these problems.<sup>109</sup>

National courts may also refer, or abstain from referring, with a view to protecting the national interest of upholding – their own interpretation of – the national law.<sup>110</sup>

A related question is how much is left to be decided upon by the national courts. The CJEU, on preliminary references at least, only answers questions on points of law; it leaves much work to be done by national courts. Treatment of an issue as a question of fact or law dictates the ability of the CJEU to ensure high levels of uniformity

<sup>109</sup> Senden in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), pp. 368 et seq. Cf. Reichel in *European Legal Method – Paradoxes and Revitalisation* (eds. Neergaard, Nielsen & Roseberry, 2011), p. 272.

<sup>110</sup> Senden in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 392. Cf. Lundius in *Europarättslig Tidskrift* 2015 pp. 864 et seq. and Calissendorff in *Europarättslig Tidskrift* 2015 p. 21.

throughout Europe. However, as highlighted by *Rosén*, drawing the line between answering legal questions (the province of the CJEU) and application of law to facts (which remains a matter for national courts) is not easy:

“The CJEU states, almost as a matter of course, that it is for the national court to give final judgment in a matter that itself was submitted to the CJEU for a preliminary ruling. In principle, the question is of constitutional nature and on such a basis the autonomous status of the national court is considered a given. Yet the CJEU is increasingly giving such precisely defined directives in its own rulings that it can appear as if the national court has very little or no scope for its own assessment.”<sup>111</sup>

With preliminary references becoming ever more detailed, there is a risk that the boundary between law and fact may get exceedingly blurred.<sup>112</sup> The ability of the CJEU to control the development of EU intellectual property principles no doubt depends in part on where the line is drawn.<sup>113</sup>

As regards the impact on *legal doctrine*, it has been held that the legal profession represents one of the main driving forces for *maintaining* divergence, especially, under the pretense of “legal culture”. The legal profession can then protect and perpetuate its “monopoly” on its legal “culture”. This could also explain the lawyers’ asymmetric attitude towards “importing” foreign legal rules, as compared to “exporting” their own legal solutions.<sup>114</sup>

To sum up: Whereas the preliminary rulings by the CJEU and its methodology over time will create a greater coherency within the EU legal order in the area of intellectual property, its factual fulfillment at national level will be very much dependent on the activities of national courts and their ability and willingness to adapt to this situation. From a Swedish perspective, the proposed system of a cen-

<sup>111</sup> Rosén in *Svensk Juristtidning* 2013 p. 549.

<sup>112</sup> Lenaerts & Corthaut in *The Coherence of EU Law* (eds. Prechal & Roermund, 2008), p. 502.

<sup>113</sup> Dinwoodie in *The Europeanization of Intellectual Property Law* (eds. Ohly & Pila, 2013), pp. 93 et seq.

<sup>114</sup> Chirio & Larouche in *The Coherence of EU law* (eds. Prechal & Roermund, 2008), p. 470 with references.

tralised Patents and Market Court (Patent- och Marknadsdomstol) and related Appeals Court (Patent- och Marknadsöverdomstol) in the areas of intellectual property and market law, combined with capacity building in these areas – including aspects of Europeanization of the law – will likely further the development at national level.<sup>115</sup>

The legal obligation of consistent interpretation is already there – it follows from the Treaties and case law from the CJEU which Swedish courts are bound to follow – but its factual fulfillment may be dependent on factors outside the legal order, such as education and culture. Legal scholars can play an important role in furthering this process, very much in the same way that *Jan Rosén* has done in his research.

<sup>115</sup> For a discussion, see the contribution by Bernitz in this volume.