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A new definition of platform liability is necessary to protect European authors and works effectively

With the internet and the technological developments that go with it, the world has undergone radical change. There are many examples which illustrate how rapidly globalised life is adapting to these new technologies.

One of these examples could be the almost limitless access to music, film and documents. Long past is the time when we would sit in front of the radio waiting for our favourite song finally to come on air to then record it on a cassette or tape. Or when we would go to music shops looking for our favourite selection of tunes on LPs and later on, CDs.

With the development of the internet and the Spotify or YouTube business model every favourite tune from any period in time is now available – and what's more, for free (YouTube) or in exchange for a monthly subscription (Spotify). Just one click is enough, and you spare yourself the trip to the music shop. Today the person who still buys LPs or CDs is almost "old fashioned" – now, entire evenings are filled with playlists of music streamed by the users. Access is possible anytime, anywhere.

From the user's point of view this is surely a positive development. And the platforms benefit tremendously too. YouTube's business model, whereby users can download and use nearly everything, is more successful than ever before, and Google is securing a market monopoly with it. The marketing of user and content data, as well as high advertising revenues, due to the attraction of being able to see nearly everything on YouTube, have become an extremely lucrative business.

What most people forget however is that if the originators of the music, films and documents have not agreed to publication on YouTube etc, these works should absolutely not be uploaded. This would constitute a copyright infringement by the user who uploads it.

But these uploads are not just classed legally as copyright infringements. They also cause incredible damage which threatens the existence of many artists.

Because often, the latter lose out. Songs which they might still have sold on CDs in music shops just a few years ago, are now offered for free on the net. Revenues collapse. New revenues self-generate on these platform pages, which make enormous profits, as access to all of these videos is given without them sharing these revenues fairly, if at all, with the artists.

Hence a (value)-gap has been created, a discrepancy between those who create the works and those who make money with them. This so-called value-gap has developed slowly but surely in the on-line universe. The greater the place taken up by the large platforms in the user's daily life, the greater this gap has become. Being a service provider has become a lucrative business and artists are battling for their survival. Because above all, profitability results from gains being made from works that others have created.

From a socio-political point of view this is unacceptable.

From a legal point of view, it has become difficult in all events. This is not just because the limits that have existed to date are being wiped away, it is also that with the so-called [eCommerce directive](#) platforms have established a base which offers service providers a possibility of avoiding all liability regarding content.

However, the value-gap does not just comprise two aspects, platforms and artists - to this we must add namely that most platforms are US American based companies. For us, the Europeans, this means that profits generated by creative works, are for the main part made in the USA.

2

EUROPEAN DIVERSITY AND CULTURAL IDENTITY

Hence the value-gap leads to a fundamental question: How much is our European cultural diversity, and therefore our European cultural identity worth?

This is an extremely complicated question, especially in view of an ever-integrating Europe, which politically, legally and in terms of its values, can be understood as a single unit, but whose cultural space could not be more different.

Consequently, we must accept – contrary to the USA – a more complicated set of rules for Europe. Whoever wants, hopes for and approves the upkeep of a space for cultural specificities and different cultural identities amongst the Member States, also has to accept that the otherwise legally desired unity of law and the market has reached its limits, i.e. it can lead to negative effects.

On the other hand, Europe has a major opportunity to shape the unity of the European market in the newly emerging legal field within the context of digitisation: this is particularly true in view of the resulting value-gap.

If we want to protect our European artists, we must reconsider the platforms' liability. Because until now the latter have taken advantage of the disclaimers included in the eCommerce directive. According to the latter, platforms only provide the infrastructure for the uploaded material and have to remove copyrighted works only when they are alerted to the fact. This is an invitation to misuse.

COPYRIGHT INFRINGEMENTS

In fact, users infringe copyright law as they upload their material. Considering the unimaginable mass of uploaded materials and the problem of the users' anonymity, the accountability of the business models is barely easier to manage from a legal point of view, since they almost provide an invitation to upload copyrighted, protected works (to raise the

attractiveness of the platforms and thereby to collate better data and make greater advertising revenues).

Hence platforms target massive profits and shelter behind the original user's infringements and the eCommerce directive to cover themselves legally and in terms of their liability.

Today this can no longer be held valid. Liability regulations must also adapt to digitisation. We must also be able hold liable the party who aims to make profits with his business model on the backs of others. Hence the eCommerce directive can no longer legally serve as a gauge for this type of "active" platform.

Differently, copyright law is also threatened politically by another stakeholder: the "digital do-gooders"!

THE DIGITAL DO-GOODERS

Those who consider the internet as a borderless area, which therefore opens up another dimension for the freedom of opinion, call for free access to everything on offer, tolerate absolutely no "monitoring" and thereby, no control over what can be uploaded.

At the beginning of the platform era (around 2005) it was impossible to foresee the dimension whereby platforms would be used to offer all types of transaction, together with the impact this would imply for artistic works. Liability for content on the platforms was rejected, hence the legal disclaimer in the eCommerce directive. The development of the platforms into what we know today, no longer justifies this kind of understanding. Both general security and the massive infringement of third parties' rights demands a different way of thinking. Service providers must gradually become more accountable for what is taking place on their platforms – and this does not just apply to invitations to terrorism, "fake news" and "hate speech", but also to legal infringements of a different kind, and therefore, when copyright law, hence property rights of other people are affected.

What we all understand to be data protection for personal data must also apply to copyright on artistic works.

We cannot and should not acquiesce to creativity being of lesser economic importance than the platform structure which offers worldwide access. Of course, this is linked to money and value added. Europe can rightly assert that it is the Content-Continent, but we have to realise that the disproportionate majority of added value lies with the platforms. Especially since the present internet structures are developing into monopolies and so there is a market power, which single-handedly, is dictating its conditions. We cannot allow this to happen.

In fact, the internet platforms could make the works that are protected by copyrights available to all and enhance the European creative industry in a fantastic manner. Some would create the content and others would disseminate them via their digital structures and access to the internet the world over. But unfortunately, this ideal symbiosis is intrinsically impaired because those who earn a fortune with creative content, do not want to pay fairly the people who create the content. Authors, musicians, singers, poets, artists and actors are simply excluded.

This applies equally to the manufacturing and marketing structures which run the economic risk of winning recognition for the works of authors, singers, poets, artists and actors. Because to date, publishing houses, record labels and film producers took care of the marketing and dissemination of creative content. Today however (free) distribution is undertaken via the internet platforms. But this will not remain without consequence.

The cross-subsidising of lesser works via extremely successful ones will stop when artists can no longer live from their ideas and art, or when their distribution structures no longer function. And how can authors, journalists, musicians, singers, poets and actors expect to earn anything if they do not have publishing houses, record labels and film producers? The internet platforms would continue to distribute their works free of charge, at their expense.

If in Europe we do not start to protect artistic and creative property, along with their distribution

structures, there will be less artistic and literary diversity. We ought to prevent this creative bankruptcy for Europe's sake!

THE COPYRIGHT REFORM

The [European copyright reform](#) aims to provide an answer to this imbalance. A European solution is meaningful therefore, since the present legal situation is no longer adapted to the digital world and the new possibilities of exploiting all copyrighted material. And there is not much point if we leave this matter in the hands of the individual Member States. We need a single European regulation to provide effective protection and economic worth to material within and outside of the EU. The added value of European content must therefore occur in Europe and it must not be the reserve of the platforms.

Hence a question is raised in article 13 of this reform, about who exactly should be liable for the illegal uploading of material. Here, we have but one unequivocal answer to give: the platforms, who earn massive profits precisely with these illegally uploaded materials.

With the reform of article 13 we would like the platforms, which have built their business model on the distribution of copyright-protected content to also pay for these. Hence, we would like a licence requirement to be introduced. It is unacceptable for artists to walk away largely empty handed.

For platforms like this our premise therefore is more liability for the copyright-protected material on their platforms. To ensure that not all service providers, which also might carry one or two copyright-protected works on their platforms, are affected by this, we have only defined the really active platforms that are to come under art.13, in light of the [ECJ's case law](#) art 2. Subsequently, only those platforms whose aim it is to save copyright-protected works that have been uploaded by their users, in order to then make these open to public access, are affected. When these platforms then optimise this content organisationally, we can

assume, according to the ECJ's case law, that they are fully aware of the copyright that covers their content.

In other words, most of the platforms on the internet do not come under art. 13., even if they carry some copyright-protected works. For these platforms, the current law applies and this will not be changed by art. 13.

The argument that is constantly put forward, whereby start-ups and smaller platforms would be endangered by art. 13, is legally invalid. In the same way that innovative, smaller restaurants must respect all hygiene rules, there can be no legal exemption on the internet. However, since the reality of digitisation is often subject to other correlations, before their last [vote on 12th September 2018](#), the European Parliament included an exception for micro and small businesses together with the "*intent to make profit*" clause in the text defining platforms.

This was the result of some political wrangling that occurred before the summer in the European Parliament, which was to result in the rejection of the agreement over the ongoing negotiations regarding the Legal Committee's conclusions on the copyright reform with the Council and Commission. In the original text the Parliament wanted to introduce so-called measures with art. 13 so that platforms, after an unequivocal definition of their liability, might be given the possibility to improve their management of this.

Then an unprecedented campaign, initiated by the major internet platforms and tech firms, erupted against art. 13, in the shape of slogans, filters, upload-blockers and censorship machines that was blindly and violently taken over by the internet community. This just shows how the internet giants can influence political outcomes anytime, anywhere. Even if one deems all of this legitimate, it simply remains for me to say that the internet community, in my opinion, was misused by the internet platforms to their own ends, because the latter are in fact defending themselves against their own liability.

ANCILLARY COPYRIGHT

To this we might add a further controversial theme of the copyright reform: the so-called ancillary copyright for the press and news agencies. Critics of this law have outbid each other in their arguments.

However, the outcome is similar to that of the value-gap. Big platforms earn a great deal of money with the newspaper articles and the underlying data harvesting of others, whilst publishers get nothing, although economically they bear the economic and structural risk.

But there remains one unanswered question: if journalism continues to have societal or even democratic value – then do the newspaper publishers possibly need our political support as they transit into the digital world? And if this is so, how far should this support go?

The situation has become more acute in the media area. It is extremely worrying, since the press is an important indicator in terms of our democracy and our freedom of opinion. The increasing dependency of their economic survival on major search engines and their corresponding market power is disturbing, in the same way that currently emerging technological possibilities only channel information and opinions that are tailored to match what we think, and therefore provide the possibility of manipulating everyone's opinion, thanks to a corresponding prior selection of information. Hence, we must create a framework to give the newspaper publishers, especially the smaller ones, the possibility of challenging these market powers on a more equal footing.

When newspaper articles, which are in fact press services, are touted and made partially available on the net by the major search engines, with the aim of making major profits, and the former still go away empty handed, then something has gone seriously awry. This in fact means that the authors (journalists and publishing houses) are not being remunerated correctly and that the long-term financing of the

newspaper publishing houses is in danger. Publishing houses are no longer able to conclude licence agreements, in other words demand money for their content from the powerful on-line platforms, which take the major share of the ad revenues. The work of the publishing house is however important for pluralism, the quality of the information, cultural diversity, and for democracy as a whole.

The introduction at least of a so-called ancillary copyright law for the publishers will become inevitable. A tougher approach would of course be the introduction of a liability tax, which perhaps is not appropriate just yet, to enable publishers to continue shaping their own business model. This publishing law constitutes a more effective legal means to protect press content from unauthorised duplication and unauthorised public access in the digital world and to recognise its economic worth again, likewise placing newspaper publishers, the publishing houses of film and record producers on an equal footing. They all bear responsibility for a structure that first enables artists to publish their works and thereby to earn their livelihood. Hence, they are also worthy of protection in the digital environment.

The ancillary protection law should, amongst other things, prevent the internet platforms from using

parts of press article free of charge. Whether this is meaningful or not, and whether it will work, is arguable. But there seem to be no better ideas right now.

Hence publishers would be placed on a level with authors, film producers and radio stations. The idea is to put them on an equal footing with the on-line platforms. This would not just cover search engine operators like Google, but also the social media, like Facebook and Twitter, or sites that aggregate news. They should all pay for content produced by the publishing houses and their authors.

And so, finally, it is simply about the possibility, and therefore the right, to face off the on-line platforms. It is up to them whether they use this law or not. Generally, in Europe they should use it.

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