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KEYNOTE by Commissioner Mariya Gabriel

PANEL DEBATES: • Neighbouring right for publishers
• Platform Liability • Copyright on data

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Neighbouring Right for Publishers

The proposed press publishers' right: an actual solution?

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Abstract

Article 11 of the draft Directive on copyright in the Digital Single Market contains a provision that, if adopted in the form proposed by the European Commission, would introduce a new neighbouring right at the EU level in favour of press publishers for the digital use of their press publications.

The proposal has attracted significant commentary. This brief note discusses whether – from a copyright perspective – the idea of an EU-wide press publishers' right: is supported by an internal market rationale which justifies an intervention at the EU level; will grant press publishers broader and more certain protection than the one already enjoyed under the EU copyright acquis; will improve press publishers' 'bargaining position' as per the Commission's stated intention.

Overall, the answer appears to be in the negative. This contribution holds the view that – at best – a press publishers' right will not change the situation of its beneficiaries and – at worst – will increase the complexity of the legal system and distract the attention from other options that could be potentially more effective in supporting the European press publishing sector.

The content of the proposal

Under the umbrella of its Digital Single Market Strategy¹ and among a number of other legislative proposals, in the final part of 2016 the European Commission released a proposal for a new directive on copyright in the Digital Single Market² ('DSM Directive').

With the declared goal of helping press publishers "increase their legal certainty, strengthen their bargaining position and have a positive impact on their ability to license content and enforce the rights on their press publications"³, the draft DSM Directive contains a provision which, if adopted in the form proposed by the Commission, would introduce a new neighbouring right over press publications for their digital use. The rationale of the proposal stems from awareness of the difficulties facing press publishers when seeking to license their publications and prevent unauthorized uses by online services.⁴

Entitled 'Protection of press publications concerning digital uses', Article 11 of the draft DSM Directive would mandate upon Member States to provide publishers of press publications with the rights of reproduction and making available to the public, as envisaged by Directive 2001/29⁵ (the 'InfoSoc Directive'), for the digital use of their press publications. Such rights would leave intact and in no way affect – including by means of deprivation – any rights of authors and other

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¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final.

² Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593.

³ European Commission, Commission staff working document – Executive summary of the Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, SWD(2016) 302 final, 3.

⁴ European Commission, Commission staff working document – Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, SWD(2016) 301 final, 155.

⁵ 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, L 167, 10-19.

rightholders, in respect of the works and other subject-matter incorporated in a press publication. The duration of this new neighbouring right would expire 20 years after the publication of the press publication.⁶

Criticisms of the proposal

The Commission's proposal for a press publisher's right has been subject to extensive commentary and possibly even more extensive criticism, notably within academic circles.

Having already expressed critical views⁷ regarding the introduction of a press publishers' right at the EU level further to some national experiences – notably Germany (sections 87f, 87g and 87h of the Urheberrechtsgesetz, ie the German Copyright Act)) and Spain (Art. 32 of the Ley de Propiedad Intelectual, ie the Spanish Intellectual Property Law)⁸ – at the time (2016) of the Commission's Consultation on the role of publishers in the copyright value chain⁹, in early 2017 the European Copyright Society (ECS) referred once again to the proposal for a neighbouring right in favour of press publishers in negative terms. Overall sceptical regarding the actual achievement of its underlying goal (this being to support a struggling newspaper industry), the ECS also stated that an exclusive right to control the exploitation of press contents online would “not only negatively affect freedom of expression and information, but also distort competition in the emerging European information market.”¹⁰ The latter would be because of higher barriers of entry to the online news market that would make it more difficult for emerging businesses to access it.

The position of the ECS echoes similar views expressed in late 2016 by a group of 37 intellectual property professors based in the UK, and the Opinion the Centre for International Intellectual Property Studies (CEIPI) at the University of Strasbourg.

In a letter sent to the Copyright Policy Directorate of the UK Intellectual Property Office, a group of 37 professors from a number of UK universities considered that the Commission's proposal for a press publishers' right would be “unnecessary, undesirable, would introduce an unacceptable level of uncertainty and be unlikely to achieve anything apart from adding to the complexity and cost of operating in the copyright environment.”¹¹

⁶ The full text of Article 11 is as follows:

Article 11 Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

⁷ European Copyright Society, Answer to the EC Consultation on the role of publishers in the copyright value chain, 15 June 2016, available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2016/06/ecs-answer-to-ec-consultation-publishers-role-june16.pdf>.

⁸ For the content of these national legislative initiatives, see further E Rosati, 'Neighbouring rights for publishers: are national and (possible) EU initiatives lawful?' (2016) 47(5) IIC 569, 573-574.

⁹ European Commission, Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', 23 March – 15 June 2016, available at <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>.

¹⁰ European Copyright Society, General Opinion on the EU Copyright Reform Package, 24 January 2017, 6

¹¹ L Bently, Call For Views: Modernising the European Copyright Framework, 5 December 2016, available at <http://www.iposgoode.ca/wp-content/uploads/2016/12/IPOModernisingIPProfResponsePressPublishers.pdf>, 1.

With a similar tone, the CEIPI Opinion considers that the proposal for a press publishers' right would: fail to contribute to the construction of a Digital Single Market; be contrary to the interests of authors; be unsupported by a clear economic rationale; be detrimental to the public domain; apply to any publication, including those in respect of which the relevant press publisher's investment has not been substantial; and have an excessive duration.¹²

The Parliamentary debate

Further to the release of the Commission's proposal for a DSM Directive, the discussion moved to the European Parliament, where MEP Therese Comodini Cachia was appointed rapporteur on behalf of the Committee on Legal Affairs (JURI).

On 10 March 2017 a first draft of her report on the proposed DSM Directive was released.¹³ MEP Comodini Cachia appeared to take a rather radically different view regarding the desirability of having an EU-wide press publishers' right. In fact, she proposed that press publishers would be granted, not a neighbouring right over their press publications, but rather (and more simply) a presumption of representation of authors for the sake of rights enforcement (Amendment 52):

“Member States shall provide publishers of press publications with a presumption of representation of authors of literary works contained in those publications and the legal capacity to sue in their own name when defending the rights of such authors for the digital use of their press publications.

In mid-2017 MEP Comodini Cachia announced that she was renouncing her role at the European Parliament, and MEP Axel Voss was appointed new rapporteur on the proposed DSM Directive. The final version of the Report is scheduled for adoption in the final part of 2017.

In the meantime, other Parliamentary committees have expressed views for the Committee on Legal Affairs on the proposed DSM Directive. In its Opinion (Rapporteur: MEP Catherine Stihler) the Committee on the Internal Market and Consumer Protection (IMCO) held the view that there are no sufficient grounds that would justify the introduction of a press publishers' right.¹⁴ To ameliorate enforcement of rights, it would be sufficient to amend Article 5 of Directive 2004/48/EC¹⁵ (the 'Enforcement Directive') by means of a regulation that would make this provision also applicable to press publishers. The Opinion also holds the view that “[t]here are potentially more effective ways of promoting high-quality journalism and publishing via tax incentives instead of adding an additional layer of copyright legislation.”¹⁶

Other Committees have also proposed amendments to the original Commission's proposal, especially for the sake of clarifying the scope of the resulting right. In its draft Opinion (Rapporteur: MEP Marc Joulaud), the Committee on Culture and Education (CULT) deemed it necessary to clarify that non-commercial and private uses of professional¹⁷ press publications are not covered¹⁸, and that protection does not extend to acts of hyperlinking, or to the text fixating the hyperlink, where such acts do not constitute communication to the public under the InfoSoc Directive.¹⁹

¹² C Geiger – O Bulayenko – G Frosio, Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law, 28 November 2016, 2-3.

¹³ Committee on Legal Affairs, Draft report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 2016/0280(COD).

¹⁴ Committee on the Internal Market and Consumer Protection, Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, <RefProc>2016/0280</RefProc><RefTypeProc>(COD), 4.</RefTypeProc>

¹⁵ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), OJ L 195, 16-25.

¹⁶ Committee on the Internal Market and Consumer Protection, Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, cit, 4.

¹⁷ Committee on Culture and Education, Draft opinion <CommissionResp>of the Committee on Culture and Education</CommissionResp> <CommissionInt>for the Committee on Legal Affairs</CommissionInt> on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, <RefProc>2016/0280</RefProc><RefTypeProc>(COD)</RefTypeProc>, Amendment 24.

¹⁸ Ibid</RefTypeProc>, Amendment 18.

¹⁹ Ibid, Amendment 24.

In a similar fashion, the Opinion (Rapporteur: MEP Zdzisław Krasnodębski) of the Committee on Industry, Research and Energy (ITRE) recommended the inclusion of a new recital that would state that “[t]he rights for press publishers should apply without prejudice to the rights of individuals for the reproduction, communication or providing links or extracts of a press publication to the public for private use or not-for-profit, non-commercial purposes.”²⁰

Three questions

While awaiting further developments at the level of EU legislature, this note will only consider whether – from a copyright perspective – the idea of an EU-wide press publishers’ right:

- is supported by an internal market rationale which would justify an intervention at the EU level;
- will grant press publishers broader and more certain protection than the one already enjoyed under the existing *acquis*;
- will improve press publishers’ ‘bargaining position’.

Overall, the answer appears to be in the negative. While this brief note does not touch upon potential issues connected with fundamental rights (notably freedom of expression and information) and competition law, it holds the view that the adoption of a press publishers’ right is unlikely to change the situation of press publishers. It could however increase the complexity of the legal system and distract the attention from other options that could be potentially more effective in supporting the European press publishing sector.

(1) An internal market rationale?

Similarly to the other EU copyright directives, the legislative basis for the proposed DSM directive is Article 114 of the Treaty on the Functioning of the European Union (TFEU), ie the realisation of an internal market where the free circulation of goods and services based on or incorporating copyright content is ensured. All this is premised upon the idea that differences in Member States’ laws are such as to raise barriers to such free circulation. As in all cases of shared competence, such as copyright and – more generally – intellectual property, the directive must also satisfy the requirements of subsidiarity (Article 2(2) TFEU) and proportionality (Article 5 of the Treaty on European Union).

With regard to the proposed press publishers’ right, neither the draft directive nor the accompanying Impact Assessment (‘IA’) provide a satisfactory explanation as to why intervention at the EU level is needed. In particular, the IA provides contradictory inputs. It recalls that a number of Member States has already intervened to remedy or reduce – whether by means of *ad hoc* initiatives or as part of broader arrangements – the negative impact of reduced revenue in the press publishing sector. Such copyright-related initiatives include: the introduction of neighbouring rights (as is the case in Germany); provisions on collective works; provisions on presumption of transfer; copyright protection of the typographical arrangement of published editions; and mandatory fair compensation requirements (as is the case in Spain).²¹

Focusing specifically on the German and Spanish experiences, ie recent initiatives specifically designed for the benefit of press publishers, the IA itself acknowledges that these have been somewhat “ineffective”, and links such ineffectiveness to “the lack of scale of national

solutions.”²² While it appears that such initiatives have failed to achieve their underlying goal, no support is provided as regards the existence of a direct connection between their alleged ineffectiveness and lack of cross-border or EU-wide effect.

In this sense, the internal market rationale of the proposal remains obscure. The IA and the proposed DSM Directive also fail to clarify in what sense the introduction of an EU-wide neighbouring right would satisfy the additional requirements of subsidiarity and proportionality.

(2) A broader and more certain protection?

Despite extensive criticisms, the scope of the proposed press publishers’ right is not broader than the protection already available under existing legislation. Not only will the rights of reproduction and making available to the public be akin to those already envisaged under the InfoSoc Directive and relevant case law of the Court of Justice of the European Union (CJEU), but the new neighbouring right will be also subject to relevant copyright exceptions and limitations under national copyright regimes (Recital 34 of the proposed DSM Directive), further to Article 5 of the InfoSoc Directive.

There is probably no need to recall that the latter provision has been criticised extensively for failing to establish a harmonised system of copyright exceptions and limitations across the EU.²³ The optional nature of Article 5 exceptions and limitations (with the exclusion of the exemption for temporary copies), together with the different language, conditions and – therefore – resulting scope of exceptions and limitations at the national level, is such that the substantive scope of copyright protection across the EU varies.²⁴ In this sense, the resulting press publishers’ right would not be different, including with regard to the application of the national exceptions (specifically mentioned at Recital 34 of the draft DSM Directive) for quotation and news reporting.

(3) A stronger bargaining position?

Declining revenues in the press publishing sector are not a new phenomenon (in some Member States the decline began with the advent of television). However, they have become particularly problematic since the early 2000s²⁵, with some indicating the internet and news aggregation services as primarily responsible for such phenomenon. These considerations have been the main factor supporting the adoption of a (waivable) neighbouring right in Germany and the reform of the quotation exception, by means of the introduction of a (non-waivable) fair compensation requirement, in Spain.²⁶

Considering both current practices (notably the fact that employed journalists do not usually own the copyright to the articles they author and freelance journalists are regularly asked to assign the copyright in their own contributions) and existing national arrangements, one could wonder whether a specific press publishers’ right is really needed at the EU level. It appears that a presumption of transfer of rights (as proposed by MEP Comodini Cachia) would be sufficient to achieve the goal of easier rights enforcement, if this remains the principal objective of a legislative initiative in favour of press publishers.

It is unlikely that either initiative, ie a neighbouring right or a presumption of representation, would help press publishers have a stronger bargaining position or recoup part of the revenue lost to the Web. With particular regard to the latter, from the data provided by the press pub-

²⁰ Committee on Industry, Research and Energy, Opinion <TitreType></TitreType><CommissionResp>of the Committee on Industry, Research and Energy</CommissionResp> <CommissionInt>for the Committee on Legal Affairs</CommissionInt> <Titre>on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 2016/0280</RefProc><RefTypeProc>(COD), Amendment 18.</Titre>

²¹ European Commission, Commission staff working document – Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, cit, 188 .

²² Ibid, 161.

²³ PB Hugenholtz, ‘Why the Copyright Directive is unimportant, and possibly invalid’ (2000) 22(11) EIPR 499, 501. In the same sense, see MC Janssens ‘The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation’, in E Derclaye (ed) Research handbook on the future of EU copyright (Edward Elgar:2009), 332, and bibliography cited in it. For similar criticisms, expressed at the proposal stage, see M Hart ‘The proposed directive for copyright in the information society: nice rights, shame about the exceptions’ (1998) 20(5) EIPR 169, 169-170.

²⁴ See further E Rosati, ‘Copyright in the EU: in search of (in)flexibilities’ (2014) (2014) 9(7) JIPLP 585, 590-594, questioning to what extent diverging implementations of Article 5 exceptions and limitations are allowed by the InfoSoc Directive.

²⁵ G Price, Opportunities and challenges for journalism in the digital age: Asian and European perspectives (2015) Chatham House--The Royal Institute of International Affairs, available at http://www.asef.org/images/docs/FinalC_hathamH_ouseM_onograph-ERT7-20150825.pdf, 3.

²⁶ See further, Rosati, ‘Neighbouring rights’, cit, 569-570 and 573-574.

lishing industry and included in the Commission's Impact Assessment, it cannot be inferred that the positive trends associated with growth of digital revenue are due to the existence of a copyright environment in which press publishers benefit from an *ad hoc* right.²⁷

Conclusion

From the brief analysis conducted above it would appear that the Commission's proposal on a press publishers' right is not firmly supported by an internal market rationale. It is also unlikely to improve the position of press publishers substantially, possibly with the exception of enforcement scenarios in which a less pervasive measure, eg a presumption or representation, would suffice.

Lacking a clear basis that justifies the introduction of a new neighbouring right at the EU level from a copyright perspective, other types of solutions – also indicated in the various parliamentary committees' opinions – could be explored to support the press publishing sector, whether at the national or EU levels.

The proposed publishers' right in press publications: an evidential mistake

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Introduction¹

One of the most controversial features of the European Commission's proposal for a Directive on copyright in the Digital Single Market is the provision introducing a related (or 'ancillary') right for publishers of press publications (art. 11 CDSM proposal).² As it is currently proposed, this provision would grant publishers of press publications a set of broad exclusive rights of reproduction and communication to the public to authorise digital uses of their press publications until 20 years after first publication, subject to the same exceptions and limitations that apply to copyright works. Effectively, it would mean that, unless an exception or limitation applies, prior authorization would have to be obtained from publishers for any digital reproduction (direct or indirect, temporary or permanent, by any means and in any form) and any making available of their press publications, in whole or in part, including possibly the smallest snippets.³ This right is offered in addition to existing copyrights protecting the content (articles, photographs, illustrations, etc.) of newspapers, magazines, journals and other periodicals.

In the past year, fierce criticism has been raised against the proposed publishers' right, both by academics,⁴ independent publishers⁵ and other stakeholders, including creators in the news publishing industry.⁶ In this contribution, the key points of criticism will be analysed and discussed in the light of the EU's objective for 'better regulation'. After a short introduction into the background of the proposal, the paper will elaborate on four main objections against the proposed publishers' right. It will conclude that, in view of the evidence available, it is clear that the proposal is ill-suited to address the problems that press publishers are facing. Therefore, the proposed publishers' right should at best be removed from the legislative agenda or at worst be replaced by a presumption that publishers represent the authors' copyright in press publications and have the right to sue in their own name against digital infringement of that copyright, as was proposed in the draft report of the European Parliament's JURI committee of 10 March 2017.

²⁷ European Commission, Commission staff working document – Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, cit, 175-176.

¹ The research for this paper was conducted in the framework of the research programme Veni with project number 451-14-033 ('The challenge of evidence-based intellectual property law reform: Legal pragmatism meets doctrinal legal reasoning'), which is partly financed by the Netherlands Organisation for Scientific Research (NWO).

² 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. 11.

³ See the Impact Assessment accompanying the proposal (SWD(2016) 301 final, Brussels, 14 September 2016), p. 157 (n. 485), referring specifically to the CJEU's *Inforpaq I* judgment (Case C-5/08), in which it was held that capturing 11-word text fragments of newspaper articles constitutes a reproduction in part of these works under art. 2(a) Directive 2001/29 'if the elements thus reproduced are the expression of the intellectual creation of their author.'

⁴ See e.g. '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_Reform_24_02_2017.pdf>, p. 3-5 and the references to independent studies and opinions contained therein.

⁵ See e.g. News Now, 'Common Position Statement on the proposed EU Directive on Copyright in the Single Market', 28 February 2017, available at: <<http://www.newsnow.co.uk/eu-link-tax/publishers-position-statement.html>>.

⁶ See e.g. Platform Makers, Response to the internet consultation on modernising EU copyright of the Ministries of Economic Affairs, of Education, Culture & Science and of Security & Justice in the Netherlands, 1 December 2016, available at: <https://www.internetconsultatie.nl/modernisering_eu_auteursrecht_dsm/reactie/59245/bestand>, p. 3-5.

Background to the proposal

A central point that the Commission wishes to address by the introduction of the press publishers right is the future sustainability of the quality press, which according to the Impact Assessment is in jeopardy. As this 'would be prejudicial for the media pluralism, good quality information and the role [press publishers] play in democratic societies',⁷ the Commission believes that legislative intervention at EU level is needed.

In a nutshell, the problems that press publishers are facing stem from the fact that they have been struggling to cater to the two-sided market of readers and advertisers in the digital environment.⁸ In recent years, press publishers have seen a significant decline in print readership due to structural changes in consumer behaviours. In the past, it were traditional outlets such as newspapers, radio and TV channels that brought news to the people, but nowadays, most news is consumed on the internet, through different digital formats and online sources. Data provided by the press publishing sector show a steady decline in print circulation of daily newspapers in eight EU Member States, although the differences between countries are noticeable, varying from an 8% decline in Belgium, to an 18% decline in the UK and a 52% decline in Italy in the period 2010-2014.⁹

Concomitantly, press publishers have seen structural changes in advertising markets. Advertising takes place where audiences can best be reached. As a consequence, online advertising has grown at the cost of traditional off-line advertising. This has affected news publishers in particular, as advertisers tend to favour search engines, social media and other channels over news media.¹⁰ News publishers have also lost their position in the advertising market for jobs, housing, (used) cars and tourism, which on the internet is controlled predominantly by specialised platforms and online marketplaces.

As a result of these developments, news publishers have witnessed a persistent decline in turnover over the past years, both in terms of sales and advertising revenues, which is expected to continue in the near future.¹¹ This has already caused news publishers to close down or reduce editorial staff,¹² thus leading to a decline of quality of the free and pluralist press. If, due to their poor financial situation, press publishers can make less resources available to conduct quality journalism, they may indeed lose 'gatekeeping' power. This threatens the traditional function of the press as a 'public watchdog'¹³ and may put citizens' access to information at risk. Ultimately, such state of affairs could be detrimental to public debate and the proper functioning of a democratic society.¹⁴

To ensure the sustainability of a free and pluralist quality press, news publishers have called for a new 'ancillary right' that enables them to (a) take legal action against online infringements of their publications, and (b) license their publications to online service providers, such as social media, news aggregators and search engines, which currently provide unauthorized access to press publications made freely available online by news publishers. This has resulted in the proposed press publishers' right, which is aimed at protecting the investments of publishers in producing press publications.¹⁵

⁷ Impact Assessment, *op. cit.*, p. 161.

⁸ M.M.M. van Eechoud, 'A publisher's intellectual property right: Implications for freedom of expression, authors and open content policies', study conducted on commission from OpenForum Europe, January 2017, par. 2.3.

⁹ Impact Assessment, *op. cit.*, Annex 13A.

¹⁰ Van Eechoud 2017, *op. cit.*, p. 14.

¹¹ Impact Assessment, *op. cit.*, Annex 13A.

¹² *Id.*, p. 156 (reporting on outcomes of the 2016 public consultation on the role of publishers in the copyright value chain).

¹³ The European Court of Human Rights has consistently emphasized the role of the press as "public watchdog". See D. Voorhoof et al & T. McGonagle (ed. sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights* (IRIS themes, vol. III), Strasbourg: European Audiovisual Observatory 2016.

¹⁴ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 31.

¹⁵ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 32.

Key objections against the proposal

Objection 1: A publishers' right is unnecessary as press publications are already protected

It is somewhat awkward that the Commission is proposing a new related right in press publications, the content of which normally already benefits from copyright protection. Most press articles, photographs, illustrations, etc. are protected by copyright, which is usually transferred to press publishers before publication. Accordingly, press publishers often enjoy copyright protection in their press publications due to a transfer of rights by journalists, photographers, illustrators, etc.¹⁶ Press publishers nevertheless complain that licensing and enforcement in the digital environment is complex and inefficient, as they are not recognised as rightholders in their own right.¹⁷ But this raises the question: Why would existing copyright not be a good enough instrument to protect the interests of press publishers? And why would they be helped by the introduction of an additional layer of rights, which essentially grants a similar type of protection?

The Commission maintains that the introduction of a self-standing intellectual property right in press publications is needed to tackle the legal uncertainty that press publishers face when licensing and enforcing rights in the online environment.¹⁸ But that argument cannot convince. Although it may be easier for press publishers to negotiate licenses if they have their own right, they can already license on the basis of the copyright that is contractually obtained from journalists and other content creators. To the extent that press publishers face difficulties to prove that they own the copyright in press articles (i.e. to establish the chain of title of all rights in their publications), the legal uncertainty they face is unmistakably the result of a lack of adequate rights administration and not of a market failure. This could simply be cured through improved rights administration and does not warrant the introduction of a new press publishers' right.

Objection 2: The proposed right does not fix the problems of the press

Although sometimes met with scepticism, the problems that news publishers are facing with the transition from print to digital are real and should be taken seriously.¹⁹ They might warrant legislative action, but the idea that introducing a press publishers' right would help to cure the existing problems of print media in the digital environment is mistaken. Clearly, neither the behaviour of news consumers nor the advertising market will change as a result of the introduction of a press publishers' right. Accordingly, the proposal by no means addresses the key underlying drivers of the problem.

Moreover, while the Commission assumes that the proposed press publishers' right will have a positive effect on media pluralism,²⁰ the relationship between the two is unclear. In general, it is difficult to establish a causal effect between intellectual property rights and incentives to invest in content creation,²¹ let alone to demonstrate that a publishers' right will aid media pluralism. Even if it would yield additional income for publishers, it cannot be automatically assumed that the money will be invested in journalistic efforts. Hence, there is no evidence that the introduction of a press publishers' right will result in better news coverage or the creation of more diverse media content.

The proposal may even have adverse effects on media pluralism, as it is uncertain how online service providers will respond to the introduction of a press publishers' right. If they will refuse to engage in licensing negotiations with publishers and stop providing access to newspaper contents, as Google News and other news aggregators initially did in Germany and Spain where

¹⁶ 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: <http://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf>, p. 73-83.

¹⁷ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 31.

¹⁸ Impact Assessment, *op. cit.*, p. 160.

¹⁹ R. Danbury, 'Is an EU publishers' right a good idea?', Final report on the AHRC project: Evaluating potential legal responses to threats to the production of news in a digital era, University of Cambridge, 15 June 2016, available at: <https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/danbury_publishers_right_report.pdf>, p. 11.

²⁰ Impact Assessment, *op. cit.*, p. 161.

²¹ 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.

similar, though narrower, rights in press publications have been introduced,²² this may have negative effects on the accessibility of news online and will certainly lead to a fall in referral traffic to newspaper websites. This may be harmful for small press publishers, in particular. A 2017 study shows that, after the introduction of the obligation to pay compensation for online use of news articles in Spain, the traffic to Spanish newspaper websites fell by a 5.3% decline in visits on average, with a decline of 4.9% for large newspapers, 6.3% for medium-sized newspapers, and 12.6% for small newspapers.²³ As a result, press publishers attract significantly less advertising revenue, which in Spain is estimated to be around 9-18 million annually in the short term.²⁴

The EU legislator should not take such effects lightly, but examine them seriously before even considering to introduce a press publishers' right. This is particularly important in light of new business models in online news publishing, which are still in development, as the Commission also acknowledges.²⁵ Caution is warranted, as it is uncertain how the introduction of a press publishers' right will affect traditional as well as future business models, including the B2B licensing market for online news publications.

Objection 3: The proposed right is possibly bad for authors of press publications

An additional concern is that the proposed press publishers' right might have a negative impact on journalists, photographers, illustrators and other creators, whose works are included in news articles. Although the proposal clearly states that the press publishers' right 'shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication',²⁶ it cannot be excluded that it will nevertheless affect them.

This is especially the case for journalists, photographers, illustrators and other creators who work as freelancers. To establish a name and reputation, which is crucial for their work and business, freelancers need maximum exposure of their work online. A press publishers' right might hinder that. As Van Eechoud explains: 'If the operation of the proposed publisher's right were to lead to a decline in referrals, shares, snippet-linking or the ability to blog about a journalist's works, this would directly harm the journalist's visibility, and thus opportunity to sell future work.'²⁷

Also, the proposal may worsen the bargaining position of journalists and other content creators. There is no guarantee that, after the press publishers' right is introduced, more money will become available to compensate for the online use of press articles. If the pie would grow, the surplus will presumably be taken by press publishers in the exercise of their related right. If the pie remains the same, there is a reasonable chance that press publishers on the basis of their related right will demand a larger share of it, in which case journalists, photographers and other creators would need to take a loss.

²² §87f-h German Copyright Act grants press publishers a one-year exclusive right to prohibit the use of 'snippets' (not being individual words or the smallest of text excerpts) by search engines and news content aggregators; Art. 32(2) Spanish Intellectual Property Act contains an obligation for content aggregators to pay compensation to news publishers for the use of 'snippets' of press publications.

²³ NERA Economic Consulting, *Impact on Competition and on Free Market of the Google Tax or AEDE fee*, Report for the Spanish Association of Publishers of Periodical Publications (AEEPP), 2017, available at: <http://www.aepp.com/pdf/Informe_NERA_para_AEPP_%28INGLES%29.pdf>, p. 59.

²⁴ *Id.*, p. 62.

²⁵ Impact Assessment, *op. cit.*, p. 157.

²⁶ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, art. 11(2) and recital 35.

²⁷ Van Eechoud 2017, *op. cit.*, p. 5.

Objection 4: The proposal is overly broad

Apart from the questionable assumptions that underlie the proposal, there are further ambiguities, in particular regarding its beneficiaries and scope. Even if the proposal would aid press publishers, it goes way further than what is required to protect the quality press. The definition of 'press publication' (art. 2(4) CDSM proposal) is so broad that it covers virtually all content published periodically under a heading of news. The beneficiaries of the proposed right are thus not only the quality press, but all periodical media, including newsletters, blogs, glossies, social media, etc. It goes without saying that not all these media play an equally important role in democratic societies and they certainly are not in a similar situation of crisis as the quality press.

In respect of its scope, it is unclear why the proposal affects all online users of news, including consumers and other legitimate users, if the real intention is to target the use of press articles by social media, news aggregators and search engines. Furthermore, do press publishers really need broad exclusive rights, if they merely seek 'to participate in the advertising revenues generated by their content on third parties' websites'?²⁸ And why is a 20-years term of protection proposed, if the commercial life span of most press articles is no longer than a day, a week or a month at most? These are all questions to which the Commission's proposal does not provide adequate answers.

The proposal further leaves unanswered what exactly will be protected: would the right protect press publications, *including* the content they comprise, or merely the fixation of press publications as identifiable media items? In the latter case the right seems useless, as online service providers seldom reuse or provide access to media items as a whole, but rather offer snippets to their content. If the right would also protect the *content* of a press publication, however, then this might extend the scope of protection beyond that of copyright protection. Brief and simple news items that contain little expression apart from facts, such as 'news of the day' or 'miscellaneous facts having the character of mere items of press information' are outside the scope of copyright,²⁹ but would arguably be protected under the proposed press publishers' right.³⁰ Not only would this be contrary to the Berne Convention, but it would also impair the free flow of information.

Conclusion

The proposal for a related right for publishers of press publications is flawed. Although the problems that print media are facing in the online environment are real, there is no evidence that a press publishers' right will meaningfully contribute to addressing these problems. Also, there is genuinely no need for a new right in press publications, as news publishers often already benefit from copyright protection contractually obtained from journalists and other content creators. In response to the draft impact assessment that accompanies the proposal, the European Commission's Regulatory Scrutiny Board also observed that '[t]he report should more convincingly demonstrate that the creation of a new standalone right for news publishers would effectively contribute to reinforcing their role in the digital world and that action at EU level is needed.'³¹ In my view, it still makes no case for why the introduction of a press publishers' right is needed.

Various European Parliament's committees that are looking into the matter also seem to recognize that the evidence is against the proposal. The CULT Committee's draft report of 6 February 2017 advised to significantly limit the proposal and the draft report of the IMCO Committee of 20 February 2017 even suggested to abandon the press publishers' right altogether. The suggestion to replace the right with a presumption that publishers represent the authors' copyright in press publications and have the right to sue in their own name against digital infringement

²⁸ Impact Assessment, *op. cit.*, p. 157.

²⁹ See specifically art. 2(8) Berne Convention: 'The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.'

³⁰ The proposal contains neither a threshold for protection, such as the originality criterion in copyright, nor a carve-out to exclude 'news of the day' or 'miscellaneous facts' from the scope of protection.

³¹ European Commission, Regulatory Scrutiny Board, Opinion on DG CONNECT's draft impact assessment report on the modernisation of EU copyright rules (version of 1 July 2016), Ref. Ares(2016)3846527, 22 July 2016, available at: <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2016/sec_2016_0407_en.pdf>, p. 3.

of that copyright, as was made in the draft report of the JURI Committee of 10 March 2017, is probably easier to reach political agreement on. But in the absence of final votes on their positions, all is still out in the open.

Accordingly, the European Parliament has an important task ahead to make right what is wrong. Admittedly, this task is not easy. Still, the EU legislator should be very cautious to create a new right without having a clear picture of all its intended and unintended consequences. Lawmaking is not a process of trial-and-error. It actually has bearing on the subjects targeted by the legislation. As the potential impacts of the proposal on the position of journalists, on media pluralism, on future business models and on the B2B licensing market are not yet assessed, thoughtfulness and caution are warranted.

The Press Publishers' Right in a Nutshell

*Thomas Höppner**

I. Current Market Failure Necessitating the Proposed Right

The proposed right reacts to new technical opportunities for the mass-copying of press publications combined with strong economic incentives for companies to take advantage of these technical opportunities.

1. New Technical Means to Copy Press Publications en masse

Some 20 years ago, when the current InfoSoc directive 2001/29 was drafted, there was no need for an independent publishers' right. It was simply not economically viable for any company to copy and distribute newspapers and magazines en masse. Today, as a result of digitalisation, this is a different story of course. Press publications can be replicated and distributed globally through various digital platforms in the blink of an eye.

2. Strong Economic Incentives to Copy Press Publications en masse

There are not just new means to mass-copy, there are also strong economic incentives for companies to do so. This incentive is inherent in the internet ecosystem. It constitutes the standard business model of the internet economy to publish attractive content on one's website in order to attract internet users for advertising or subscription purposes. The easiest way to do that, of course, is to take the content from other websites and to display it on one's own site. The economic success of such aggregation platforms depends on bundling and presenting as much content as possible. More content attracts more users and more users mean higher advertising revenues or subscription fees. Consequently, every aggregator has an economic incentive to display as much third-party content as possible directly on its site.

This also applies to news intermediaries. There are many examples for such aggregators. They systematically index and copy third party news websites in order to set up their own news outlet. To this end, they have typically pre-installed news categories on their homepages. Users are presented with the most relevant text extracts that are often sufficient to convey the key message and thus the value of the article. If a user clicks on any of the news extracts copied from third party news websites, even more third party content becomes visible. Users are then invited to comment or to otherwise interact with the aggregating website. Thus, aggregators use third party press publications to build up own monetisable customer relationships and to ultimately keep users away from the source and on their own website. That explains why according to the Commission's Impact Assessment, 47% of all users of aggregators do not click through to a press publishers' site anymore.¹

3. Aggregators' Free-riding on Press Publishers' Efforts Distorts Competition and Eliminates Incentives to Invest and Innovate

Now, if nearly half of the users of such aggregators do not click through to publishers' sites but remain on the aggregator's site, it is apparent to me that we are not talking about a symbiosis here between aggregators and press publishers or even a win-win-situation as has been claimed by others. Instead, many aggregators are directly competing with press publishers' sites for the same advertising budgets by satisfying the same information demand of the same users. Regrettably, at the moment, they are also competing with the same content that the press publishers produce at high costs and that the aggregators merely copy at no costs. This is a classical market failure that needs to be addressed. The legal framework has to ensure that press publishers' incentives to invest in reliable, high-quality publications are maintained. That in turn is a traditional function of copyright law. The publisher's right as proposed by the EU Commission is capable of addressing this issue.

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¹ European Commission 'Staff Working Document, Impact Assessment on the modernisation of EU copyright rules' (SWD(2016) 301 final), 14.9.2016, p. 157.

II. The Proposed Right Strikes the Right Balance of Interests

Contrary to all the scaremongering from the side of aggregators, there are no substantial reasons for anyone to be afraid of the proposed right. It strikes a fair balance.

1. The proposed right does not limit but strengthens consumers' access to news

First, it has been argued that the publishers' right somewhat limits the flow of information and the ability of consumers to express their opinions freely.² However, it is difficult to see how the proposed right could have such effects. Press publishers vigorously defend the freedom of expression. Why would they want to prevent their readers from engaging with their publications? That is neither the purpose nor any likely effect of the publishers' right. The right does not protect any ideas or facts that are published. Everyone remains free access to the press publications published online. And everyone remains free to comment on any subject covered by a publication, to quote it, to link to it or to share it with others. Recital 33 of the proposed directive clarifies that the proposed right "does not extend to acts of hyperlinking" which are typically used for sharing and referencing purposes.

2. The proposed right supports a continuing availability of quality news

The critics ignore that the alternatives to a publishers' right would interfere much more significantly with the freedom of expression and consumers' access to information than a publishers' right. Without a better protection of publishers' online investments, press publishers would be forced to either invest less in quality content, make less content available online or to hide that content behind paywalls and subscription models. Each of these alternatives would leave consumers worse off. It is the consumers who benefit the most from the press publishers' current approach of making news available for free and anyone online. Aggregators' unrestricted copying of this content is threatening this approach.

3. The proposed right does not harm but back up journalists by empowering the entire press

Another point of criticism is that the publishers' right could in some way harm journalists by decreasing their public exposure.³ Again, it is difficult to see how this could happen. It would be surprising if there was any journalist who would not prefer being paid to merely being visible online but unpaid. The publishers' right aims at securing the sustainability of the entire press including its journalists. Empowering the press with an updated legislation is the best measure politicians can do to secure a diverse and open media landscape.

4. The narrow definition of a "press publication" appropriately restricts the rights' scope

Another criticism that has been raised is that the right was apparently too wide as it had no built-in restrictions.⁴ In fact, the proposed right contains a very important built-in restriction, that is the definition of the term "press publication". To be protected, the publication must be, *inter alia*, "a fixation of a collection of literary works of a journalistic nature within a periodical or regularly-updated publication under the initiative, editorial responsibility and control of a service provider." These criteria are not easy to fulfill. They require substantial and continuous investment and justify particular protection.

5. The proposed right is narrower than that for other media publishers

The proposed publishers' right is not wider but in fact narrower than comparable related rights for music producers, film producers or broadcasting organisations. Their protection is granted for certain activities, namely for the mere first technical fixation of a phonogram, a film or a broadcast, irrespective of the quality, relevance or originality of these activities. There is no legitimate reason to treat press publications any differently. If anything, considering their relevance for democratic societies, press publications merit additional legal protection not less. That is why the proposed publisher's right merits support.

² EDiMA, Directive Copyright in the Digital Single Market: The impact of Article 11 – publisher rights, 2017, p. 7, 16.

³ *Van Echoud*, A publisher's intellectual property right: Implications for freedom of expression, authors and open content policies, OpenForum Europe 2017.

⁴ *ibid.*

Platform Liability

Filtering obligations and fundamental rights: can the EU eat the cake and have it too?

Sophie Stalla-Bourdillon*

Setting the problem

The European Commission in its explanatory memorandum to the proposed new Copyright Directive in the Digital Single Market¹ released on 14 September 2016 states that the proposal “has a limited impact on the freedom to conduct a business and on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders.”² The European Commission, however, does not explain how the mitigation measures and its balanced approach meet fundamental rights requirements and does not even address the risk that its proposal could lead to divergent interpretations across and within Member States. Notably, the European Commission does not even refer to all the fundamental rights taken into account by the Court of Justice of the European Union (CJEU) when undertaking its own balancing exercise, including the rights to data protection and privacy (which were considered in the *Promusicae/Sabam*³ and *Scarlet/Sabam*⁴ cases).⁵ The European Commission’s impact assessment is not of great help either in this respect.⁶ The European Commission seems to rely on the fact that, implicitly, the choice of restriction is left, in the first instance, to the service providers meaning that it is not directly imposed by the transposing legislation.

It is therefore crucial to determine whether the proposed Copyright Directive strikes an appropriate balance between the different fundamental rights at stake in the light of CJEU case law and in particular, whether Article 13 is compatible with the EU acquis broadly defined including the Charter of Fundamental Rights of the European Union (the EU Charter).

Article 13 of the proposed Copyright Directive in its first paragraph provides that:

“Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.”

It thus expressly prescribes the use of effective content recognition technologies as a means to ensure the functioning of agreements with rightholders or to prevent the availability of copyright works. Recital 38 is more explicit in that it specifies that the obligation to “take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies” “should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.”

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¹ European Commission, Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, COM(2016) 593 final (Proposed Copyright Directive).

² Proposed Copyright Directive, p. 9.

³ Case C275/06 *Promusicae*, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 29 January 2008, EU:C:2008:54, para. 64.

⁴ Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011, EU:C:2011:771, e.g. para. 50.

⁵ For a similar point see e.g. Stalla-Bourdillon S et al. (2016), A brief exegesis of the proposed Copyright Directive, <https://ssrn.com/abstract=2875296>.

⁶ Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules - Part 1, SWD(2016) 301 final.

In other words, hosting providers, as a species of intermediary providers, should also implement effective technology, by which one should understand content recognition technology, also implicitly equated to upload filters as content recognition technology is described as a measure of its own to prevent the availability of copyright works. Crucially, the implementation of upload filters implies both the screening of online material and the removal of material matching reference files of copyright works. It also implies filtering for all file types (audio, audiovisual, photography, text) and all protected works, irrespective of their lengths (e.g. including snippets).

Can the European legislature decide to require mandatory upload filters to the detriment of certain online platforms defined as “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*”?⁷ Could it be that such a requirement would prove incompatible with the EU acquis and the protection of fundamental rights? To say it bluntly, are mandatory upload filters and fundamental rights friends or foes? Can the EU legislature impose *ex ante* filtering obligations upon certain online platforms and still argue that the proposed Copyright Directive is fundamental rights compatible? More prosaically, can the EU legislature eat the cake of fundamental rights and have it too?

Assessing mandatory upload filters in the light of fundamental rights

Mandatory upload filters are the wrong answer to a poorly formulated problem, confusingly referred to as the “*value gap*” conundrum.⁸ The European Commission in its memorandum explaining the new proposed copyright Directive states that “[i]t is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter.”⁹ Implicit in this statement is the idea that online platforms are unfairly appropriating part of the value generated by the use of copyright works. Several meanings can be attached to the concept of “value.” Economic theory suggests that the value of copyright works is not and should not be entirely appropriated by rightholders. The market value of a copyright work and its societal value are measured differently and should evolve over time.¹⁰ Moreover, value creation also relates to innovation.¹¹ “*Value creation results from actions that entail the novel combination and exchange of resources, by which resources are diverted from known applications to be deployed in new contexts.*”¹² The European Commission therefore does not account for the value created by online platforms themselves and more generally by transformative uses of copyright works.¹³ The chain of value creation to which online platforms contribute does not end with online platforms. By way of example,

7 As per Article 13 of the proposed Copyright Directive.

8 Such a view is shared by many academics and research centres across Europe. See e.g. S. Stalla-Bourdillon et al. (40 academics) (2016), Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society: <https://ssrn.com/abstract=2850483>; S. Stalla-Bourdillon et al. (2016), A brief exegesis of the proposed Copyright Directive, fn 5; C. Angelopoulos (2017), On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market (study commissioned by Julia Reda MEP), https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf<https://ssrn.com/abstract=2875296>; G. F. Frosio (2017), Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy, Northwestern University Law Review Online, 2017, Forthcoming, <https://ssrn.com/abstract=2912272>.

9 Proposed Copyright Directive, p. 3.

10 C. Handke, Y. Girard, A. Mattes (2015), Fördert das Urheberrecht Innovation? Eine empirische Untersuchung, Studien zum deutschen Innovationssystem Nr. 16-2015, p.12, https://diw-econ.de/wp-content/uploads/2015/02/StuDIS_16_20151.pdf.

11 A. Fayolles (2007), Entrepreneurship and New Value Creation - The Dynamic of the Entrepreneurial Process, Cambridge University Press, p. 48.

12 D. Di Gregorio (2013), Value Creation and Value Appropriation: An Integrative, Multi-Level Framework Journal of Applied Business and Economics vol. 15(1) 39, p. 40, http://www.na-businesspress.com/JABE/DiGregorioDWeb15_1.pdf referring to Schumpeter, J. A. (1928). The instability of capitalism. Economic Journal, Sept., 361-386. Reprinted in Schumpeter, J. A. 1988. Essays on entrepreneurs, innovations, business cycles, and the evolution of capitalism. New Brunswick: Transaction Publishers, 47-72.

13 8 years ago, in 2009 the European Commission had observed that

“*Web 2.0 applications, such as blogs, podcasts, wiki, file or video sharing enable users to easily produce and share text, video and pictures. This has fuelled the development of new applications on the Internet and highlighted the issue of user-created (amateur) content, where consumers are increasingly becoming creators of content, sometimes using copyright-protected material as a basis for their creation.*”

plenty EU companies develop their businesses based on code sharing platforms.¹⁴ Furthermore, value created by online platforms does not necessarily relate to the use of copyright works but also to the use of personal data relating to service users (in particular data about content consumption and content sharing habits) for service personification and advertising purposes in the context of highly concentrated markets. As a result, Article 13 as a means of redistributing value between online platforms and rightholders can only be a very approximate tool unable to cater for complex value creation processes with multiple stakeholders.

Upload filters are a reality. Google’s Content ID¹⁵ is probably the most well-known example. However, this is an expensive technology and only few online platforms use them.¹⁶ YouTube claimed in 2016 to have invested more than \$60 million in Content ID.¹⁷ Could the technology be then realistically licensed for a few hundred euros? Ironically, making upload filters mandatory would thus strengthen the market position of dominant online platforms. This is also supported by the fact that neither Article 13 nor Recitals 38 or 39 clarify whether online platforms will be permitted to use the reference files corresponding to copyright right without requesting a license.

Even if upload filters are already a reality, the EU legislature should be asking itself whether upload filters should be made mandatory, for a significant number of market players and for all types of protected works (e.g. including code-sharing platforms and software).

A crucial reason why making upload filters a requirement for certain online platforms is an ill-conceived policy is its incompatibility with fundamental rights. This has been explained by the CJEU in a series of cases starting with the landmark *Scarlet/Sabam* case and followed by the *Sabam/Netlog* case.¹⁸ In *Netlog*, in particular, the CJEU clearly highlighted the intimate relationship that exists between a cornerstone of the digital single market legal framework, i.e. Article 15 of the E-commerce Directive,¹⁹ and the protection of fundamental rights.

In *Sabam/Netlog*, Sabam, the Belgian Association of Authors, Composers and Publishers, had requested

“*that Netlog be ordered immediately to cease unlawfully making available musical or audio-visual works from SABAM’s repertoire and to pay a penalty of EUR 1000 for each day of delay in complying with that order.*”²⁰

How could Netlog, a social media platform, comply with the order in practice? By using content recognition technology and implementing upload filters. Netlog then claimed

“*that the granting of such an injunction could result in the imposition of an order that it introduce, for all its customers, in abstracto and as a preventative measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cin-*

However, the European Commission was of the view at that time that it needed to further “*investigate the specific needs of non-professionals that rely on protected works to create their own works.*” European Commission, Communication on Copyright in the Knowledge Economy, COM(2009) 532 final.

14 SUSE (Germany), <https://www.suse.com/contact/>, and Linagora (France), <https://linagora.com/>, are two examples. The European Commission itself has recognised the importance of open source software for the European economy and the necessity to focus “*on policy actions that strengthen the OSS knowledge base and the exchange of best practices between private and public organizations.*” European Commission (2017), Final Report - The Economic and Social Impact of Software and Services on Competitiveness and Innovation, (SMART 2015/0015), p. 12. Notably, many independent projects of a small or medium size rely upon code-sharing platforms.

15 Youtube Help, How Content ID work, <https://support.google.com/youtube/answer/2797370?hl=en-GB>. “*Videos uploaded to YouTube are scanned against a database of files that have been submitted to us by content owners. Copyright owners get to decide what happens when content in a video on YouTube matches a work they own. When this happens, the video gets a Content ID claim.*” Copyright owners can choose to block or monetise the video or track its viewership statistics.

16 One could also add to the list Audible Magic technology, <https://www.audiblemagic.com/Content-ID/>, and Facebook technology, <https://rightsmanager.fb.com/>.

17 How Google fights piracy, <https://drive.google.com/file/d/OBwxyRPFduTN2cl91LXJOYjIYSjA/view>.

18 Case C-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, 16 February 2012, EU:C:2012:85.

19 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) OJ L 178, 17.7.2000, p. 1-16.

20 *Sabam/Netlog*, para. 21.

ematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently that it block the exchange of such files.”²¹

The CJEU ruled that such an injunction is incompatible with EU law. The reasons for such a holding are plural but nonetheless related.

The first one is a violation of an existing secondary legislation, i.e. the E-commerce Directive, and more precisely its Article 15.

Article 15(1) of the E-commerce Directive provides that:

“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

The CJEU therefore states that issuing such an injunction would amount to imposing a monitoring obligation of a general nature:

*“The injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost **all the data relating to all of its service users** in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31.”²²*

The CJEU continues its analysis by considering and ultimately attempting to balance different fundamental rights. It finds that the rights to data protection, freedom of expression and to conduct one’s business, respectively protected by Articles 8, 11 and 16 of the EU Charter, were all engaged in this case.

It is worth reproducing the reasons for these findings:

1. *“The injunction requiring installation of the contested filtering system would involve the identification, **systematic analysis** and processing of information connected with **the profiles created on the social network by its users**. The information connected with those profiles is **protected personal data** because, in principle, it allows those users to be identified.”²³*
2. *“That injunction could potentially **undermine freedom of information**, since that **system might not distinguish adequately between unlawful content and lawful content**, with the result that its introduction could lead to the **blocking of lawful communications**. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned.”²⁴*
3. *“In the main proceedings, the injunction requiring the installation of the contested filtering system involves **monitoring all or most of the information stored by the hosting service provider concerned**, in the interests of those rightholders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also works that have not yet been created at the time when the system is introduced. Accordingly, such an injunction would result in a serious infringement of the **freedom of the hosting service provider to conduct its business**.”²⁵*

²¹ Sabam/Netlog, para. 23.

²² Sabam/Netlog, para. 38.

²³ Sabam/Netlog, para. 49.

²⁴ Sabam/Netlog, para. 50.

²⁵ Sabam/Netlog, para. 45.

A careful analysis of these three arguments shows that it is the unfettered monitoring of all or most of the information stored by the online platform that raises fundamental rights concerns: either because it amounts to the systematic processing of personal data, or because it is unable to distinguish between lawful and unlawful information or more simply because of its costs. There is in particular a very intimate relationship between the finding of a monitoring obligation of a general nature and the finding of an engagement of Article 8. Certain amendments have been tabled in the European Parliament arguing that only the reference files are being checked, and thereby there is no processing of personal data. However, personal data must be processed in order to allow the proposed appeals process to function. It is also argued that a search for specific reference files is not a general monitoring. This ignores the fact that it is the size of the targeted population that is crucial (i.e. whether the entire user base is in fact targeted by the monitoring or not) as well as the wide range of information searched for. Furthermore, the number of reference files will run into hundreds of thousands, if not millions. Assuming each search for a matching with a reference file should be deemed monitoring “*in a specific case*” within the meaning of Recital 47 of the E-commerce Directive, which in itself is debatable as all service users would be concerned as well as all their platform activities, Article 15 would certainly be undermined by the systematic juxtaposition of hundreds of thousands of specific cases. Finally, the argument based on cost should be related to the discussion on innovation and value creation processes.²⁶

In consequence, the E-commerce Directive and its Article 15 are not the only reason why Article 13 of the proposed copyright directive is problematic. Said otherwise, fundamental rights concerns explain why mandatory upload filters are incompatible with Article 15. Article 15 of the E-commerce Directive thus finds its roots in the protection of fundamental rights, including the rights to data protection and freedom of expression of Internet users.

Reforming copyright at the EU level

What should the EU legislature do then? Once again, the decision of the CJUE *Sabam/Netlog* is worth rereading and in particular the reasons for finding that Article 11 of the EU Charter is engaged in the case at hand. The CJEU observes, more or less implicitly, that beyond the approximation of upload filters the route to automation can only reasonably start with the harmonisation of copyright exceptions. To repeat the words of the CJEU, “*it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another.*” Going back to the big sister of the proposed Copyright Directive, i.e. the infosoc Directive,²⁷ the latter comprises 20 optional exceptions and thereby cannot be describe as an attempt to reduce divergences.²⁸ The three mandatory exceptions²⁹ introduced in the proposed Copyright Directive will not change the situation.

For freedom of expression concerns to be (partially) alleviated, context assessment should be made possible in order to determine if the act at stake is permitted or justified without the rightholder’s consent. Because the technology itself is not able to assess context, processes in the sense of a set of steps taken in order to reach a decision whether to restrict access to a particular content become crucial to meet fundamental rights requirements.

²⁶ See p. 3.

²⁷ 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 L 167, 22/06/2001 p. 10 - 19.

²⁸ Notably, the infosoc Directive had already been criticised for its lack of ambition. See e.g. Bernt Hugenholtz (2000), Why the Copyright Directive is unimportant, and possibly invalid, vol. 22(11) EIPR, p. 501-502, https://pure.uva.nl/ws/files/3086454/9021_opinion_EIPR.html (“*If the Directive does not produce much legal certainty, it does even less in terms of approximation. This is painfully visible in the piece de resistance of the Directive, article 5 on copyright exceptions*”).

²⁹ See Articles 3-5 of the proposed Copyright Directive.

Article 13 does not put in place a proper process for the use of content recognition technology in order to reach a decision whether to restrict access to particular content. The only safeguard found in Article 13 would become relevant once the decision to restrict access has been taken, i.e. the availability of complaints and redress mechanisms.³⁰

Notice-and-action procedures are one example of processes, although there is a range of variations and not all notice-and-action procedures are well balanced. However, the EU legislature has up until now always postponed the task to harmonise through hard law or soft law such procedures, although such a possibility had been envisaged right from the beginning by the drafters of the E-commerce Directive.³¹

Notice-and-action procedures are all the more important since the right to freedom of expression is not the only fundamental right at stake. The right to data protection in the EU Charter and the right to the respect of one's private life imply following CJEU case law that the systematic processing of all or most user information to prevent copyright infringement raise serious concerns. Yet notice-and-action procedures are based on the premise that the processing undertaken by rightholders is only partial as per definition rightholders do not have access to the entirety of user information. In addition, notice-and-action procedures make possible the coupling of a second stage consisting in an assessment of the context in which the copyright work at stake is actually being borrowed from. This does not mean that notice-and-action procedures cannot be partially automated,³² at least at the detection stage. As a result, the use of content recognition technology should not be equated to the implementation of upload filters.

Amending Article 13, Recitals 38 & 39

In its draft report,³³ rapporteur Therese Comodini Cachia proposes to amend Article 13 and Recitals 38 and 39. The amended version of Article 13 does not refer to content recognition technology any more. Because of the confusion widely spread between the use of content recognition technology and the implementation of upload filters this disappearance could be seen as an improvement of the text. Besides, it is now clarified that intermediary providers would not be required to implement upload filters, although it is not entirely clear who would count as *“information society service providers [that] are actively and directly involved in the making available of user uploaded content to the public and where this activity is not of a mere technical, automatic and passive nature.”* Nevertheless, the reference to *“appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders for the use of their works”* is maintained. Whether such a drafting is enough to make it clear to both national legislatures and judges that mandatory upload filters should not become a requirement could still be questioned.

With this said, the new paragraph 2a adds that:

“The measures referred to in paragraph 1 shall be implemented without prejudice to the use of works made within an exception or limitation to copyright. To this end, Member States shall ensure that users are allowed to communicate rapidly and in an effective manner with the rightholders who have requested the measures referred to in paragraph 1 in order to challenge the application of those measures.”

³⁰ Article 13(2) of the proposed Copyright Directive provides that: *“Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.”*

³¹ See Article 21(2) of the E-commerce Directive.

³² See e.g. P. Zhang, S. Stalla-Bourdillon and Lester Gilbert (2016), A content-linking-context model for “notice-and-takedown” procedures In WebSci ‘16 Proceedings of the 8th ACM Conference on Web Science. ACM New York, NY, USA, p. 161-165, <https://eprints.soton.ac.uk/397678/>; P. Zhang, S. Stalla-Bourdillon and Lester Gilbert (2017), A content-linking-context model for “notice-and-takedown” procedures, Journal of Web Science, Forthcoming.

³³ Draft report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8 0383/2016 – 2016/0280(COD)), Committee on Legal Affairs, Rapporteur Therese Comodini Cachia, Rapporteur for the opinion Catherine Stihler 13 March 2017. Therese Comodini Cachia has been replaced by Axel Voss. The vote on the report is scheduled for 10 October 2017. Three opinions have been adopted respectively by IMCO, CULT and ITRE, [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0280\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0280(COD)).

Such a paragraph should therefore be read as requiring an assessment of the applicability of copyright exceptions before the decision to restrict access to a contentious material is taken.

It is true that the expression content recognition technology does not disappear completely from the text of the amended proposal and is maintained in the new version of Recital 39, which reads as follows:

“Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies.

In such cases, rightholders should provide the necessary data to allow the services to identify their content...”

The amended version of Recital 39 still feeds on confusion. At least two interpretations are possible: either Recital 39 still implies that content recognition technologies should be systematically used by online platforms in an attempt to detect potentially infringing content or Recital 39 implies that content recognition technologies should be used after the reception of a notification to check whether the claim made in the notification is legitimate. Importantly, such a check should not be seen as superfluous as notice-and-action procedures can be abused and have been abused in the past.³⁴ As it should be clear from the foregoing, the second interpretation should be preferred. With this said, whether online platforms shall be permitted, without additional licenses, to use reference files to check the legitimacy of claims made in the context of notice-and-action procedures is not explicitly stated in the amendment.

Concluding remarks

Making upload filters a requirement for certain online platforms is an ill-conceived policy at least for two reasons. First, mandatory upload filters are not meant to ensure a fair redistribution of value between the different stakeholders involved in the value creation process. Second and more importantly, they raise serious fundamental rights concerns and appear incompatible with the EU acquis broadly defined, including the EU Charter. Making the copyright framework fit for purposes in the digital single market would require dedicating time and energy to the simplification of the exceptions landscape and streamline processes such as notice-and-action procedures to the benefit of European culture and society.

³⁴ See e.g. Jennifer M Urban, Joe Karaganis, and Brianna L. Schofield (2016), Notice and Takedown in Everyday Practice. UC Berkeley Public Law Research Paper No. 2755628, <http://ssrn.com/abstract=2755628>.

Addressing the value gap on user-generated content platforms from the perspective of weaker copyright holders

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Introduction

In a piece published on The Guardian in October 2013, the former leader of Talking Heads, David Byrne, was very pessimistic about how the Internet would have impacted on the commercial value of copyright.¹ Byrne argued that streaming services such as Spotify and Pandora might be good to discover new music but they bring no income to today's artists across the creative industries.² Byrne's voice has not been isolated in emphasizing a situation that is due not only to the notoriously weak bargaining power of the average authors and performers vis-à-vis content producers (e.g., record labels, film studios, etc) but also to the widely uncompensated dissemination of copyright works on user generated content platforms and social media.³

From the outset of the so-called 'Web 2.0', the preservation of the incentive/reward rationale of copyright on online platforms that encourage and enable user creativity and participation has been a highly debated and complex problem. It is still unclear how copyright works and materials that users share and make available to others without the authorization of the respective rights-holders should be identified and removed. More than ten years after the first publication of a YouTube video,⁴ this question is still valid and open in Europe because of the legal uncertainties that characterize the regime of liability of providers of such services in different jurisdictions.

A copyright reform proposed by the European Commission in September 2016 seeks to bring the aforementioned uncertainties to an end.⁵ Notwithstanding its title (i.e. 'Copyright in the Digital Single Market') the priority of the draft directive is not the attainment of territorial unification or integration of digital markets. At least when it comes to the business-related aspects of the draft directive, the main goal is, rather, the achievement of a well-functioning market place for creative works through a EU-wide, more effective and broader protection of copyright. This objective is pursued through several provisions that aim at bringing greater fairness and transparency in the assignment and enforcement of copyright, also in the domain of user generated content. As acknowledged in the impact assessment that accompanies the directive proposal, licensing practices in this sector have been very difficult to develop. One of the main assumptions the directive proposal has drawn upon is that the advent of user-generated platforms and social media in the last decade has triggered a significant erosion of the value of copyright because of the central role these platforms have gained in making creative works available to the public and given the widely unlicensed character of the copyright works they provide access to.⁶

¹ David Byrne, 'The Internet will suck all creative content out of the world', The Guardian, 11th of October 2013.

² Byrne mentioned the example of the song of the summer 2013, 'Get lucky' by Daft Punk, which made the two members of the band earn approximately 13,000 USD each, as a result of 104.760.000 Spotify streams this track reached until the end of August 2013 ("What happens to the bands who don't have International summer hits?", he commented).

³ IFPI & IMPALA (coordinators), Securing a sustainable future for the European music sector, Letter addressed to Jean-Claude Juncker on 29th of June 2016 (signed by almost 1300 artists and songwriters from across Europe and who regularly perform in Europe as of 18th of July 2016). In the letter the artists claimed that the future of music was jeopardized by a substantial "value gap" caused by user upload services like Google's YouTube, which are taking value away from the music community and from its artists and songwriters.

⁴ The first video was uploaded on YouTube on the 23rd of April 2005 by Jawed Karim (with the title "Me at the zoo").

⁵ European Commission, Proposal for a directive of the European Parliament and of the Council, COM(2016)593 final, Brussels, 14.09.2016 (hereinafter '2016 directive proposal' or 'draft directive').

⁶ The central role of such companies and of their services is also due to their very successful businesses: YouTube's value was estimated to be \$70 billion and its revenues in 2015 were reported to be \$9 billion; Pinterest has been valued \$12 billion in 2015; Soundcloud \$700 million in 2014, etc. These figures are reported in European Commission, Impact assessment on the modernisation of EU copyright rules, Commission Staff Working Document, SWD(2016) 301 final, Part 1/3, Brussels, 14.09.2016, p. 146 (hereinafter 'Impact assessment').

From a legal point of view, the debate has been widely monopolised by the question about whether and how these kinds of platforms should be granted the special immunity from liability Directive 2000/31 (e-Commerce Directive) created for providers of hosting services when the web infrastructure was in its infancy.⁷ The provision of Article 13 of the 2016 draft directive seeks to bring clarity on this front, entailing that interactive services which play an active role in giving access to user generated content (e.g., by optimising the presentation of the uploaded works or promoting them) should be subject to copyright and be obliged to take measures to make unauthorised contents inaccessible.⁸

As we will see, this means that platforms such as YouTube, Facebook, Twitter, Instagram, Pinterest, Vimeo and Soundcloud and many others would be expected to clear copyright for the contents that pop up on their platforms and to implement technologies which ensure an accurate identification of those items made available by their service subscribers without the permission of copyright holders.

The 'value gap' provision

Article 13 of the draft directive aims at creating an obligation for providers of user-generated online content platforms to prevent the availability of unauthorised works on their services by means of appropriate and proportionate measures, for instance by implementing effective technologies. In the copyright reform debate and in the policy documents used for the preparation of the legislative proposal the provision has been constantly associated to a 'value gap' (from an expression used for the first time by the music sector) that would exist to the detriment of the creative sector because of the widely uncompensated use of copyright works.⁹

The entities that would be obliged to make un-licensed works inaccessible are "... providers that store and provide to the public access to large amounts of works or other subject matter uploaded by their users ...". As clarified by the Commission, assessing the size (i.e. "large amounts") of a user generated content platform would require an analysis of combined factors, such as the number of users and visitors and the amount of content uploaded over a given period of time.¹⁰ Appropriate and proportionate measures to be implemented would include technologies - such as Google's Content ID, currently used across the YouTube platform - ensuring accurate identification of the works for which the platform devisers must have concluded licensing agreements with their respective copyright holders.¹¹ As it has been critically observed, the text of the Commission proposal could be better drafted in so far as it does not specify whether Article 13 would impose a new filtering obligation only on platforms with existing licensing agreements or - as it seems more correct, at least to me - on all platforms, regardless of these agreements.¹²

In essence, the provision at issue aims at re-affirming the basic copyright principle according to which whoever reproduces and/or communicates to the public works protected by copyright must obtain *prior* permission to do so from their respective copyright holders. Without such permission - under copyright law - unauthorised uses such as those happening on social media or online platforms certainly expose users to the consequences of copyright infringement. However, it still uncertain in the case law of the EU member states whether or not the platform deviser would be (directly or indirectly) liable for infringements of their subscribers.¹³

⁷ Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.07.2000, pp. 1-16 (hereinafter 'e-Commerce directive').

⁸ See the 2016 directive proposal, recital 38.

⁹ Helen Smith, (IMPALA), Véronique Desbrosses (GESAC), Frances Moore (IFPI), 'Value gap is crucial for the music sector', *The Guardian*, 24th of July 2016.

¹⁰ See Impact assessment, p. 146.

¹¹ See YouTube, *How Content ID works*, available at support.google.com.

¹² European Research Centres (Amsterdam, Barcelona, Berlin, Cambridge, Glasgow, Munchen, Paris, Strasbourg, Tilburg, Torino), *EU Copyright Reform Proposals Unfit for the Digital Age*, Open letter to the Members of the European Parliament and of the Council of the European Union, 24th of February 2017, p. 6 (hereinafter 'Open Letter').

¹³ See the *GEMA v YouTube* cases in Germany (Higher Regional Court Hamburg, July 2015; Higher Regional Court Munich, January 2016), where the courts considered that, while YouTube presents itself as an alternative to Spotify and similar services, it does not carry out an act of communication to the public (which is carried out by the uploaders). A similar interpretation was given by the Court of Paris (January 2015) in the case *Kare Productions v YouTube*.

A limited liability of platforms has somehow been entailed by judgments of the Court of Justice of the European Union (CJEU). In particular, the Court found that the unauthorised embedding of copyright works on social media is lawful in so far as the linked or embedded content has already been made already to the public with the consent of the copyright holder.¹⁴ The CJEU found also that the installation of permanent filtering measures on social networks for purposes of copyright enforcement would be excessively costly and burdensome for online platform and would eventually run against their freedom to do business online.¹⁵

From a formal point of view, Article 13 would not directly modify the regime of liability exemption granted to providers of 'hosting' services. The e-Commerce Directive, at the end, would not be amended. The draft text, in this regard, clarifies that Article 13 would be applicable also to providers who qualify for the existing exemption, in a way that the two layers of regulation would operate simultaneously and in a complementary manner. However, it is evident that the provision would avoid, with EU-wide effects, an excessively broad application of the 'safe harbour' exemption by not allowing national courts to shield online platforms from liability in case of online copyright infringement. What is controversial is the fact that the provision would change the allocation of responsibilities between copyright holders and service providers, with the consequence that the new law would veer away from the above-mentioned CJEU judgments that are deemed to guarantee a fair balance between the goals of online copyright enforcement and freedom to do business online.¹⁶

The central question, in my view, is whether such a change of policy is justified by the new function, purposes and features of online platforms and social networks, considering also that such interactive environment did not exist when the current legislation was drafted and enacted. If such services are no longer passive actors but increasingly determine - at least with regard to professionally produced content - how we have access to copyright works, why should we treat them differently from how we treat professional content providers, such as media companies? If such services, in addition to user creations, systematically give us access to contents we previously sought on radio and TV, why should we grant these platforms the privilege of not remunerating what their businesses rely upon? Are the platforms media companies "by accident"?

If the new provision were interpreted, as it seems fair, as presupposing the obligation for online platforms to enter into licensing agreements with copyright holders, the implementation of filtering mechanisms and similar technologies could be regarded as a practical consequence of that obligation. At the end of the day, the obligation to clear the right of making content available to the public is already provided under Article 3 of Directive 2001/29, which aims to ensure a high level of protection also in relation to interactive forms of making content available.¹⁷ Article 13 of the draft directive would just specify an existing obligation in the realm of user-generated content by urging platform devisers to do what the biggest platforms have already started doing, as the example of YouTube's 'Content ID' shows. Unlike the hosting providers from late 1990s, today's platform providers are in a position to ensure accuracy of content identification by relying on sector-specific content databases and to remove unauthorised contents at the best of their abilities. It goes without saying that such activity might be insufficient to prevent copyright infringement and the related technologies might be mistaken and/or imperfect in performing such tasks, especially with regard to certain types of work. However, because of the above-mentioned technological change, there is no reason in my view to leave the burden of monitoring user-generated content just to copyright holders (i.e. through notice-and-takedown mechanisms) and to not force platform devisers to co-operate with copyright holders in order to verify and, if necessary, to filter the contents they commercially exploit. In assessing the plausibility of such obligation one should carefully consider that online platforms are already tracing user access to digital content in order to run their advertising-based and user profiling businesses.

All these cases are mentioned in the Commission's impact assessment, p. 143.

¹⁴ See C-466/12, *Svensson v. Retriever Sverige AB* (2014) and C-348/13, *Bestwater International GmbH v. Michael Mebes* (2014).

¹⁵ See C-70/10, *Scarlet Extended SA v. Sabam* (2011) and C-360/10, *Sabam v. Netlog* (2012).

¹⁶ See the Open Letter of European Research Centres, p. 6.

¹⁷ Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright in the information society, OJ L 167, 22.06.2001, pp. 10-19.

The European Commission's reasoning

In the impact assessment that accompanies the directive proposal, the European Commission pointed out that a legislative intervention on user-generated content and social networks is needed for copyright holders to re-gain control over the modes and conditions of online exploitation of their works. The Commission emphasized the necessity to continue to support and remunerate digital content creation at a time when, with the rise of interactive online environments, copyright holders have proven to be unable to rely on an undisputed legal obligation for platform and service providers to obtain permission for what their users/subscribers make available online and what the platforms gain through customized commercials.¹⁸

A situation of uncertainty, as regards such obligation, has arisen with regard to providers of social media and social network services because of their frequent inclusion, in the case law developed in various European jurisdictions, into the categories of hosting providers who benefit from the liability exemption under Article 14 e-Commerce Directive. The Commission acknowledged that this situation of uncertainty has significantly weakened the bargaining power of copyright holders and decreased the value for copyright content, especially with regard to TV broadcasts.¹⁹ On the one hand, online platform providers have offered to rights-holders – according to the impact assessment – mostly ‘monetization agreements’, which are regarded as being concluded on a voluntary basis, not as a result of an obligation of online platforms to clear copyright. On the other hand, these deals do not reflect the value (and the price) of the licensing agreements that copyright holders enter into with on-demand content suppliers such as Spotify, Deezer and Netflix and with TV broadcasters, who are therefore placed in a disadvantaged position vis-à-vis the user generated content platforms.²⁰

To motivate its decision to intervene, the Commission stressed also that the activities of providers of today's user generated content are unlikely to fall within the scope of the liability exemption created under Art. 14 of the e-Commerce Directive. The main reason for that is that the exemption, as explained by the Court of Justice of the European Union in a landmark decision,²¹ shall be reserved to merely technical and automatic activities, and not to services whose functionalities include content categorization, recommendations, playlists or the ability to share contents.²² In short, these functionalities make online platforms clearly distinct from the passive and unaware hosting providers the drafters of the e-Commerce Directive had in mind when shaping the exemption.

Aren't users already obliged to not publish unauthorized works?

The rise to prominence of video-sharing platforms such as YouTube, Daily Motion and Vimeo, social networks like Facebook and Twitter and other interactive services or dedicated platforms for photos (e.g. Instagram, Pinterest) and sound recordings (e.g. Soundcloud) has significantly expanded the opportunities for Internet users to access copyright works and to become authors themselves. As of October 2015, YouTube had 1,3 billion users (i.e. one third of all Internet users) who upload 400 hours of video content every minute; Daily Motion has 300 million users watching 3,5 billion views every month; Vimeo has a monthly audience of approximately 170 million users and 35 million registered users; Soundcloud's user community has grown exponentially, going from 11 million users in 2011 to 150 million in 2015 and 250 million in 2016.²³

From a legal point of view, access to such platforms is made conditional upon the acceptance by each single user/subscriber of terms and conditions that are relevant from a copyright-related perspective. Standard terms and conditions that apply to online content platforms contractually oblige subscribers not to share and publish contents created by third parties and which they cannot lawfully dispose of.²⁴ This means that no ‘value gap’ provision would have

¹⁸ Commission's impact assessment, p. 139.

¹⁹ Impact assessment, p. 141.

²⁰ *Ibidem*.

²¹ See C-324/09, *L'Oreal and Others v. eBay International AG and Others* (2011).

²² Commission's impact assessment, p. 138.

²³ *Ibidem*.

²⁴ See, for instance, YouTube's (<http://youtube.com/terms>) and Facebook's (<http://facebook.com/terms>) Terms of Service.

been necessary if the online platform devisers had effectively enforced their own terms of service with regard the upload of unauthorized materials. No copyright infringement would have massively materialised in the era of Web 2.0 if the online platforms, from the outset, had paid attention (both legally and technologically) to the contents entire user communities were sharing on their networks. In this regard, what the value gap provision is seeking to achieve now is to make *legally* explicit what has already been expressed and required *contractually*, but not properly enforced, to the detriment of the value of unauthorised creative works.

A lose-lose situation for copyright holders

It is easy to understand why user-generated content platforms and social networks give rise to a ‘lose-lose’ situation for copyright holders if one considers the two aspects below:

1. Copyright holders have not been able to rely on a proper enforcement of their rights when someone else makes available their works without permission within an online platform. If an author or a copyright holder has no resources to monitor content generation on platforms and to send notices to take content down, her copyright remains ineffective unless the platform deviser acts spontaneously and removes the unauthorised work. It must be borne in mind that notice-and-takedown procedures have been mostly used by music and film majors and by their respective anti-piracy bodies, for which these industries have invested significant amounts of money across Europe. To the contrary, the notice-and-takedown mechanism has never worked properly for individual creators such as photographers, writers, composers and film or video makers and small producers because of the lack of time and money to be dedicated to online enforcement procedures.
2. The standard terms and conditions which are accepted by users of social networks and user-generated content services require subscribers to give platforms such as YouTube, Facebook and Instagram a global, free and perpetual licence for the platforms to use and exploit all contents (e.g. writings, photos, music, multi-media and audiovisual works) authored by users. This means that whoever wished to make available his or her works in order to take advantage of the remarkable exposure opportunities provided by large online platforms would instantaneously lose – especially in the absence of bargaining power, as in the case of individual creators and small-size content producers - all remuneration opportunities by the condition of gratuity imposed under standard terms and conditions. Moreover, the “exposure” effects the online platforms have strongly advocated are primarily beneficial to performing artists (i.e. musicians, actors) who could view uncompensated viewings on user upload platforms as a way to boost their live performance businesses. However, this is not a mechanism that fits the business of non-performing authors of works such as films, videos and other multi-media works for which the making available on a user-generated content platform inevitably compromises the exploitation and remuneration opportunities for each of those works.

Addressing the value gap from the perspective of weaker copyright holders

If one considers the relevance of copyright and of its effective enforcement for the purpose to preserve and stimulate diversity of content creation, Article 13 can be easily placed in relation to other measures of the draft directive that seek to help copyright holders gain a better position to negotiate and licence their online rights and to gain adequate remuneration. From this angle, the ‘value gap’ provision can be viewed as a complementary tool to achieve a broader policy objective, which is that of ensuring a fair share of income to copyright holders who – under the current legal framework - have been unable to gain adequate revenues from online uses of their works.

For the first time in the history of European copyright policy, the 2016 draft directive targets the contractual relationships between individual creators and their assignees with the intent to introduce a common approach of transparency requirements across the EU and to strengthen the bargaining power of original copyright holders.²⁵ To this end, Article 14 of the proposal

²⁵ Commission's impact assessment, pp. 173 ss.

obliges Member States to ensure that authors and performers be given, in accordance with the specificity of each sector of the creative industries, a right to timely and adequate information on the modes of exploitation of their works and the related revenues.²⁶ Moreover, Article 15 gives authors and performers the possibility of seeking contractual adjustments whenever their originally agreed remuneration proves to be disproportionately low in comparison to the earnings and benefits derived from the online exploitation of their works.

The above-mentioned provisions show that there is a clear attempt to enable copyright holders to take advantage of the expected increase of revenues produced by the implementation of Article 13. This is even more important for copyright holders with a weaker bargaining power in so far as their newly created rights to obtain sector-specific and timely information and an adequate remuneration - to be sought also through contractual adjustments - were made effectively enforceable and non-waivable on EU-wide grounds.²⁷

It would be much easier for individual copyright holders to licence and price their works, also through their collecting societies, if they knew how profitable their use has been in interactive environments. This would be true not only with regard to user generated content platforms and social networks but also in the realm of on-demand services. It is therefore not surprising that, among the hundreds of amendments which have been tabled in the European Parliament, a few of them seeking to pursue a fair remuneration strategy in a more straightforward way (i.e. through the codification of a right to remuneration to be paid directly to authors and performers for the making available of their works by on-demand content providers) were eventually incorporated in the opinions sent by the Culture and Industry Committees to the Legal Affairs Committee on the 11th of July 2017.²⁸

If the final version of the directive established a clearer and stronger link between Article 13 and the rights to information and to fair remuneration of authors and performers under Articles 14 and 15, the increased output coming from user generated content could be viewed as an equivalent of the right to equitable remuneration that the aforementioned amendments seek to introduce in the domain of on-demand content deliveries. Even though the structure of the two rights would be substantively different, both proposals aim at creating an obligation to remunerate copyright holders that would be particularly important for individuals and small companies having no or little bargaining power vis-à-vis the online platforms and the on-demand content suppliers. As far as online platforms are concerned, as we have seen, the draft directive seeks to place authors and performers in a position to better negotiate and licence their rights, also through their respective collecting societies. According to the proposed directive, contractual remedies will have to be made available each time the originally agreed remuneration of authors and performers proves to be disproportionately low in comparison to the (transparent) revenues generated by the exploitation of their works. As regards on-demand services, instead, the amendments proposed by the Culture and Industry Committees aim at codifying a EU-wide right to remuneration to be enforced against the providers of such services and to be administered by collecting societies of authors and performers, in both the music and audiovisual sectors.

Critical remarks

The proposal to enact the provision of Article 13 has been widely criticized in the current debate in so far as it would stifle innovation and user participation in online environments and would oblige platforms to implement technologies in sectors where content identification is flawed

²⁶ The Commission pointed out that the transparency obligations which are currently in force under national laws are either too generic or applicable just to certain sectors: see Impact assessment, p. 176.

²⁷ The Commission believes that this set of new measures would provide creators with practical tools to negotiate and obtain appropriate remuneration for online uses of their works: see Impact assessment, pp. 190-191.

²⁸ See Society of Audiovisual Authors (SAA), *European Copyright: Parliament Committees vote for an unwaivable right to fair remuneration for audiovisual authors*, 11th of July 2017, available at <http://saa-authors.eu>, and AEPO-ARTIS, *Statement of Fair Internet Coalition in reaction to ITRE and CULT votes on 11 July 2017*, which welcomed the introduction of such an unwaivable right. The opinions of the two committees will be examined by the leading committee on the file (Legal Affairs) in September 2017.

and unreliable.²⁹ Someone has also blamed the Commission for having inserted this provision in the directive having just one company and business in mind, i.e. Google's.³⁰ A brief reflection on the aforementioned critical remarks seems to be useful:

1. *Innovation and user participation*: in an environment where a high level protection of copyright is mandated under all copyright directives and regarded as an intrinsic guarantee for the creation of professional content, interpreting the duty to remunerate authors and producers of the content a business relies upon is a misconception of what intellectual property is about. It is true that the platforms that have started their activities and developed in the last decade have taken advantage of an unclear legal framework and of a loophole in widely using copyright works for free. However, this has come with a price, which is the erosion of the commercial value of creative works and the frustration of online remuneration opportunities for professional content creators. It seems obvious to me that the value of professional content should be protected as a crucial element of the 'Digital Single Market' strategy.
2. *Accuracy of content identification*: in certain sectors (music, for instance) content identification technologies are more developed than in others, depending also on the availability of databases copyright holders place at the disposal of online platforms to facilitate fair and proportionate filtering mechanisms.³¹ The fact that in other sectors, such as photography, such databases and technologies are not equally available is, in my view, a further reason to introduce the provision of Article 13, which would give platform devisers and rights holders an incentive to co-operate and to improve filtering and content identification technologies.
3. *Re-allocation of responsibilities*: as it has been pointed out above, the value gap provision entails a different regulatory treatment for a kind of intermediation in digital content distribution which is characterised by the active role of the platform and considers the opportunities of content identification and nuanced filtering mechanisms which has become available recently. The e-Commerce Directive and notice-and-takedown procedures would still matter and remain applicable in their own sphere of application.
4. *Freedom to do business online*: the technological measures required under the value gap provision would have to be fair and proportionate and should not cause 'over-blocking' or restriction of free and legally unprotected materials made available by the platform users.
5. *Addressees of the provision*: it is paradoxical that the initiative of the Commission might have been taken as a measure to be enacted just against the provider of one user generated platform, i.e. YouTube, and not also as a tool to foster copyright clearance activities on multiple platforms. YouTube's deviser, i.e. Google, was actually a pioneer in the development of content identification technologies and it is probably the platform that is best suited to achieve a well-functioning marketplace for copyright works on its platform. Due to such advancement of YouTube on content identification, it is evident that the enactment of the value gap provision would be more costly and demanding for other companies and platforms where licensing agreements and copyright enforcement measures have been poor or non-existing. The problem of the provision is actually the opposite, if one considers that the obligation to filter copyright works might end up being applicable to non-commercial user-generated platforms such as Wikipedia. In this respect, an amendment of Article 13 aimed at excluding non-for-profit platforms from the scope of application of the new provision could be a suitable solution.

Conclusion

After having briefly explained the rationale and policy objectives of Article 13 of the proposal for a directive on 'Copyright in the Digital Single Market' (the so-called 'value gap' provision), this paper has provided a brief reflection on the nature of the obligation to filter and make unauthorized copyright works inaccessible on user-generated content platforms. In particular, the

²⁹ Open Letter, p. 1.

³⁰ See Agustin Reyna, 'A tale of two industries: the "value gap" dilemma in music distribution', *Internet Policy Review*, 8th of August 2017.

³¹ For instance, a content identification technology provider such as Audible Magic has indicated positive identification rates that exceed 99%: see <http://audiblemagic.com/why-audible-magic/>.

paper has taken the current situation of individual creators and small-size independent content producers into specific consideration, pointing out that the online distribution of their works triggers a 'lose-lose' situation. On the one hand, the excessively burdensome and costly nature of notice-and-takedown mechanisms do not place these right-holders in a position to effectively enforce their rights when unauthorised users makes them available on online platforms. On the other hand, such rights-holders have no contractual freedom under standard terms and conditions of use of these services to licence and effectively monetize their own creations when they decide to join online platforms and social networks and to create their own, official accounts. The paper suggests that the provision of Article 13 could have a much stronger justification if its goal to fill a gap in the value chain of online content were more closely linked to the codification of a right to fair remuneration to be achieved through effective rights and remedies (i.e. a right to information about the levels of remuneration and the modes of online exploitation; a right to contractual redress in case of disproportionately low remuneration) that the 2016 draft directive embodies under Article 14 and 15.

Form and Substance in the Value Gap Proposal'

*Tito Rendas*²

In September 2016, the European Commission published a copyright reform package, including a new Directive on copyright in the Digital Single Market. One of the Directive's most controversial aspects is the so-called "value gap proposal" provided in Article 13 and accompanying recitals.

This proposal suffers from a number of fundamental problems, of both a formal and substantive nature. From the formal point of view, the proposal (i) includes normative provisions in the recitals, (ii) lacks basic clarity, and (iii) uses trivially vague language. On the substantive side, if passed into law the proposal will (i) thwart digital innovation and (ii) disproportionately restrict the fundamental rights of Internet users and platform operators.

Given the seriousness of these flaws, the EU institutions should consider deleting or, at least, significantly rewriting the proposal.

Introduction

In September 2016, the European Commission published a copyright reform package³. The most controversial instrument in this package⁴ is the Directive on copyright in the Digital Single Market⁵ (draft Directive). The main reason behind the controversy, along with the proposed right for press publishers⁶, lies in the so-called "value gap proposal" provided in Article 13 and Recitals 37 to 39.

Over the last few years, rightholders and their representatives have been floating the idea that there is a value gap in the online content marketplace that is in need of closing. In their lobbying efforts, the value gap⁷ has come to replace piracy as the main digital threat to the survival of the creative industries⁸. The idea is that rightholders face difficulties when seeking to license and be remunerated for the online distribution of their works⁹. With the evolution of digital technologies, platforms of user-uploaded content (think of YouTube, Dailymotion and Vimeo) have become important vehicles for such distribution. According to rightholders, these platforms inappropriately invoke the "hosting safe harbour" laid down in Article 14 of the E-Commerce Directive in order to argue that they are under no obligation to conclude licensing agreements. Rightholders claim that, as a result, they are not always able to obtain a fair remuneration from platforms of user-uploaded content. The unfairness, they add, is made evident by the difference between the remuneration paid by these (typically ad-funded) platforms and that paid by subscription services, such as Spotify Premium and Deezer¹⁰.

¹ The title of this contribution borrows from the title of one of the most influential American law review articles of the late twentieth century: Kennedy (1976).

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³ With the fundamental purpose of "modernising" EU copyright rules for the digital age, the package comprises one Regulation on copyright and related rights for online transmissions and retransmissions of television and radio programmes and one Directive on copyright in the Digital Single Market, as well as two other instruments dedicated to implementing the Marrakesh Treaty into EU law.

⁴ The number of amendments submitted by MEPs – almost 1.000 – may serve as an illustration of the degree of controversy. See <http://en.euractiv.eu/wp-content/uploads/sites/2/2017/05/JURI-copyright-amendments.pdf>.

⁵ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final.

⁶ Criticising the introduction of a new right for press publishers, see, e.g., Hugenholtz (2016); Kretschmer et al. (2016); Peukert (2016); Ramalho (2017); and Geiger et al. (2017).

⁷ The expression "transfer of value" is sometimes used instead of "value gap". See, e.g., Lucas-Schloetter (2017).

⁸ See, e.g., the petition at <http://www.makeinternetfair.eu>.

⁹ See Recital 37.

¹⁰ See IFPI (2015), p. 23.

Grounded on this rationale, Article 13 and Recitals 37 to 39 of the draft Directive attempt to address this gap, by reinforcing the position of rightholders to negotiate and be remunerated for the online use of their works by platforms of user-uploaded content¹¹.

Article 13(1), the proposal's centrepiece, reads as follows:

Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

Since the Commission released the draft Directive, numerous independent academics have raised their voices against the value gap proposal¹². With the present contribution, I merely reinforce the chorus of critics, by discussing those that are, in my view, the major problems with the proposal.

These problems are of a twofold nature: formal and substantive. Formal problems and substantive problems are naturally intertwined, in that poor drafting choices often affect the provision's substance. For clarity of exposition, nonetheless, I will treat these problems separately. The problems that arise from the way in which the Commission chose to formulate the proposal, even where these choices have substantive repercussions, are treated under the section "formal problems" (1.). On the other hand, the problematic nature of some of the options made by the Commission is purely material and independent from the exact formula employed in the text of the Directive. I address these shortcomings under the section "substantive problems" (2.).

1. Formal problems

1.1. The proposal includes normative provisions in the recitals

The departure point of the proposal seems to lie in Recital 38, which starts by stating that online platforms, in storing and providing public access to protected content uploaded by their users, perform an act of communication to the public. Abruptly, though at the same time stealthily, a significant change to the copyright *acquis* is proposed: if the text of Recital 38 is approved as it stands, *all* platforms of user-uploaded content, in providing their services, will be *prima facie* liable for communicating works to the public.

It is important to note that Recital 38 is not merely codifying a CJEU-developed construction¹³.

On the one hand, throughout a long line of case law, the CJEU has shaped a complex concept of communication to the public, composed of many interdependent criteria. None of these criteria, nor the way in which they interact with each other, are reflected in the value gap proposal. Instead, Recital 38 simply states that platforms go beyond the mere provision of physical

facilities and violate the right of communication to the public, leaving no room for further considerations related to the nature of the platform's intervention or to its profit-making intention – considerations that the CJEU has found essential in recent case law¹⁴.

On the other hand, when the draft Directive was published there was no clear indication in the copyright *acquis* that the concept of communication to the public within the meaning of Article 3(1) InfoSoc covered the activities of platforms of user-uploaded content. Arguably, some such platforms would nonetheless be found liable on grounds that they exerted an "indispensable intervention" in providing access to protected works¹⁵. This was made clearer in the recent *Pirate Bay* judgment, in which the CJEU held that an online search platform that indexes, categorizes, deletes and filters content may actually engage in acts of communication to the public¹⁶. But the nature of the intervention of BitTorrent websites like The Pirate Bay differs from that of other platforms that store and provide public access to user-uploaded content. This CJEU "precedent" could well be found inapplicable to platforms that do not show as high a degree of editorial intervention as The Pirate Bay¹⁷.

The Commission therefore (mis)uses Recital 38 of the draft Directive to reshape the concept of communication to the public, extending its coverage to new situations. As is common knowledge among jurists, in general, and among those interested in EU law matters, in particular, recitals are (supposed to be) interpretative tools. According to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, "[t]he purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. *They shall not contain normative provisions or political exhortations*"¹⁸. The CJEU has also acknowledged that recitals should not perform a normative role, holding that "the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question"¹⁹.

In agreeing that recitals should not assume the role of their act's operative part, EU institutions show a palpable concern with legal certainty and with the protection of the expectations of legal subjects. In the draft Directive, the Commission grossly neglects these values, by including a crucial normative development of the copyright *acquis* in Recital 38²⁰. Assuming such a development is to be adopted at all, it should be included in the operative part of the Directive and subject to the corresponding scrutiny.

1.2. The proposal lacks basic clarity

Legal norms, if they are to give their subjects any guidance, must be clear. "The desideratum of clarity", in the words of a celebrated legal theorist, "represents one of the most essential ingredients of legality"²¹. The value gap proposal fails to achieve that desideratum. In fact, Article 13(1), read together with Recital 38, is a remarkably confusing provision²².

As seen, Recital 38 determines that online platforms that store and provide public access to protected content uploaded by their users perform acts of communication to the public. These platforms are thus obliged to conclude licensing agreements with rightholders, *unless* they are eligible for the hosting safe harbour provided in Article 14 E-Commerce. How a platform's liability for communicating works to the public relates to the protection conferred by the safe harbour is not made entirely clear. Is the hosting safe harbour supposed to work as a defence

¹¹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market', COM(2016) 592 final, p. 8.

¹² See Stalla-Bourdillon et al. (2016a); Stalla-Bourdillon et al. (2016b); Angelopoulos (2016); Angelopoulos (2017); European Copyright Society (2017); Max Planck Institute for Innovation and Competition (2017); and CREATE (2017). Scholars dispute the very existence of a "value gap". See, e.g., Frosio (2017), p. 7 (arguing that the "value gap" rhetoric is "fabricated" by rightholders and "scarcely concerned with empirical evidence"), and CREATE (2017), p. 6 (claiming that "[t]he idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis").

¹³ Such a codification of judge-made law would not be unprecedented. For instance, Article 4(2) of the InfoSoc Directive codified the rule of exhaustion of the distribution right developed by the CJEU in *Deutsche Grammophon*, C-78/70.

¹⁴ See CJEU, *GS Media*, C-160/15, paras. 47-55, and CJEU, *Filmspeler*, C-527/15, paras. 41-53.

¹⁵ See Rosati (2016), p. 20.

¹⁶ See CJEU, *The Pirate Bay*, C-610/15, in particular para. 38. See also Rosati (2017), p. 15, noting that this recent judgment brought CJEU case law closer to the Commission's legislative initiative.

¹⁷ See Angelopoulos (2017), p. 32.

¹⁸ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, para. 10 (emphasis added). Similarly, see Interinstitutional Style Guide, <http://publications.europa.eu/code/en/en-120200.htm>, stating that "[r]ecitals set out the reasons for the contents of the enacting terms (i.e. the articles) of an act".

¹⁹ CJEU, *Nilsson*, C-162/97, para. 54.

²⁰ In the words of Angelopoulos (2017), p. 31, "[f]or a nonchalant statement hidden in a recital, this represents a dramatic development of EU copyright law".

²¹ Fuller (1964), p. 63.

²² See Angelopoulos (2016) and European Copyright Society (2017), p. 7, deeming the provision's language "ambiguous"; and CREATE (2017), stating that the proposal is "poorly drafted".

against primary liability, in the sense that if the platform acts neutrally²³ its liability for infringing the right of communication will be negated? Or is the platform's non-neutrality (*i.e.*, its active role) a requirement for it to be considered as performing an act of communication? Who bears the burden of showing what?

In any case, proceeds the recital, *regardless* of whether platforms are protected by the safe harbour, they need to take measures to guarantee the protection of content, so as to ensure the functioning of licensing agreements... agreements which, as stated in the very same recital, protected platforms do not need to conclude. Imposing on platforms that are immunised by the hosting safe harbour an obligation to ensure the functioning of licensing agreements that they need not have concluded is, at best, puzzling. For the sake of analysis, however, let us consider the case of a platform that provides its service non-neutrally, being thus ineligible for the safe harbour, and that therefore undoubtedly needs to license the content it hosts (at least according to Recital 38).

In that case, Article 13(1) kicks in, imposing two alternative obligations upon the platform, in order to try and close the value gap: the platform should (a) take measures to ensure the functioning of agreements concluded with rightholders for the use of their content; *or* (b) take measures to prevent the availability on their services of content identified by rightholders through the cooperation with the service providers.

The first obligation – when interpreted in light of Recital 38, which uses similar language in its third paragraph (“ensure the functioning of any licensing agreement”) – translates into an obligation to take appropriate and proportionate measures to ensure the protection of content, such as implementing “effective technologies”. These technologies, judging by the second sentence of Article 13(1), Article 13(3) and Recital 39, can be no other than content recognition technologies.

Alternatively, platforms should take measures to prevent the availability on their services of content identified by rightholders. What are the precise measures that platforms should take? The suggestion that Article 13(1) makes, yet again, is that platforms use “effective content recognition technologies”. The question then becomes: How, in practical terms, does preventing infringement (second obligation) differ from ensuring the protection of content (first obligation)? Are they truly alternative – and, by necessity, *different* – obligations? A combined reading of Recital 38 and Article 13(1) indicates that the two (supposedly alternative) obligations laid down in the latter are, in reality, one and the same obligation – and a rather worrying one²⁴: that online platforms implement content recognition technologies. But it may well be that the Commission intended to give online platforms a true choice. What that choice is, though, remains unclear.

In sum, as I hope to have successfully showed, several parts of Article 13(1) and Recital 38 lend themselves to importantly diverging interpretations. This lack of clarity is possibly the product of a difficult, compromise-ridden drafting process. Understandable as that is, it is safe to anticipate that the proposed formulation will result in different transpositions by Member States, thus fostering disharmony and legal uncertainty.

1.3. The proposal uses trivially vague language

Vague words are words that have borderline cases, *i.e.* cases in which “one just does not know whether to apply the expression or withhold it, and one's not knowing is not due to ignorance of the facts”²⁵. Typical examples of vague words are gradable adjectives like “bald”, “rich” and “mature”. We all know people that are clearly bald and people that are clearly not bald, but we also know people that are borderline bald (I would count myself as one such person). Legislators tend to avoid employing these trivially vague terms. For instance, in establishing the legal

capacity to vote, legislators set an age of majority, instead of stipulating that “mature citizens” are entitled to vote²⁶. And if legislators want to tax rich people more heavily, they usually do so by reference to a numerical level of income, instead of imposing a higher rate on “rich people”²⁷.

Sometimes, however, vagueness in the law is useful or simply unavoidable. The most notable examples of vagueness in the law are cases of extravagant vagueness²⁸. Every jurist is familiar with examples of legal norms deploying this type of language, such as norms exempting the “*fair use*” of protected works from liability or norms requiring adherence to a standard of “*reasonable care*”. In certain circumstances, the situations that ought to be covered by a norm are so diverse that vague language allowing for a multi-dimensional evaluation is needed. One scholar offers “child *neglect*” as an example of a situation where a myriad of factors need to be taken into account: “[y]ou just cannot stipulate that, say, leaving a child unattended for *n* hours would constitute neglect”²⁹.

In defining its subjective scope of application, Article 13(1) uses a vague adjective. The provision applies to information society service providers that store and provide to the public access to “*large amounts*” of content uploaded by their users. “Large”, like “rich” or “mature”, is a trivially vague word – the type of vagueness that the law normally tries to avoid. In most cases, instead of resorting to this sort of language, the law defines a more or less precise threshold for its application. The exercise of defining such a threshold is, of course, fairly arbitrary; but there are very good reasons for doing it, namely legal certainty and efficiency.

While in some cases the flexibility provided by vague language is needed, the situation regulated by Article 13 is far from being one such case. If online platforms are to comply with an obligation to implement certain exacting measures, they need a high degree of guidance. They need to know, at the very least, if they are subject to that obligation or not. It is beyond doubt that YouTube and Dailymotion are platforms hosting “large amounts” of user-uploaded content. But what should be said about the Portuguese platform Sapo Vídeos or the German tape.tv? Do these platforms host large or non-large amounts of content? Where and how should the line be drawn?

2. Substantive problems

2.1. The proposal thwarts digital innovation

By now, you hopefully agree that the value gap proposal is not an example of good legal drafting. Still, you may be tempted to downplay the criticism: after all, form is not substance and substance trumps form. On the substantive front, however, the value gap proposal does not fare any better.

As seen, in what regards the measures for copyright protection that should be adopted by platforms hosting large amounts of user-uploaded content, the only suggestion given by Article 13(1) and the cited recitals is the implementation of content recognition technologies.

This suggestion, if transposed by Member States as a mandatory requirement, has the potential to seriously threaten innovation in the digital economy. Requiring online platforms to use such technologies entails erecting a market entry barrier that is very costly to overcome. Google, for example, reported that, by 2016, it had invested more than \$60 million on its ContentID system³⁰. An obligation to filter user uploads would discourage investment in the development of this type of platforms, with indirect adverse effects on user creativity.

The fact that the requirement may be imposed only upon hosts of “large amounts” of content does not eliminate the problem. At a certain point in their growth (a point that Article 13 leaves indeterminate), smaller platforms will be forced to invest in technology the development and

²³ The requirement to act in a neutral manner was developed by the CJEU as a threshold condition for accessing the defence provided in Article 14 E-Commerce. See CJEU, *Google France*, C-236/08, para. 114, and CJEU, *L'Oréal v. eBay*, C-324/09, para. 113.

²⁴ See *infra* 2.1. and 2.2.

²⁵ Grice (1989), p. 177.

²⁶ See Endicott (2011), p. 17.

²⁷ See Marmor (2014), p. 87.

²⁸ The term “extravagant” associated with these instances of vagueness is attributable to Timothy Endicott. See, e.g., Endicott (2011), p. 17.

²⁹ Marmor (2013), p. 5.

³⁰ See Google (2016), p. 6.

maintenance of which is said to be “unattainably expensive”³¹. The requirement that online platforms install such an expensive technology for copyright enforcement purposes would always amount to an intolerable constraint upon their operators’ right to freely pursue an economic activity³². Even if the operators of smaller platforms manage to license some reasonably effective technology, instead of developing their own, this cost will hinder their capacity to compete with the larger incumbents³³. As noted by the European Copyright Society, “[t]he unforeseen effect of the provision may, therefore, be locking in YouTube’s dominance in the EU”³⁴.

2.2. The proposal disproportionately restricts fundamental rights

Several commentators have shown a concern with the proposal’s compatibility with Article 15 E-Commerce, which establishes a prohibition on general monitoring obligations. In fact, the use of content recognition technologies necessarily involves such monitoring. And, again, the fact that the proposal applies only to some platforms is not enough to save it: the covered platforms, however few they may be, will have to monitor *all* of the new content that is uploaded onto them³⁵. Christina Angelopoulos puts the point metaphorically: “[t]he chaff cannot be separated from the grain without the thrashing of all the harvested wheat”³⁶.

But the proposal’s incompatibility with the E-Commerce Directive is not, in and of itself, a decisive argument against the requirement of using content recognition technologies. A conflict between Article 13 of the draft Directive and Article 15 E-Commerce would be solved by the well-known meta-rule *lex posterior derogat legi priori*. EU institutions may well want to amend the *acquis*, in which case the later rule, introducing an exception to the general rule prohibiting monitoring obligations, would prevail³⁷.

But the commentators’ concern runs deeper than this. The conflict with Article 15 is particularly worrying because it is, simultaneously, a conflict with the Charter of Fundamental Rights of the EU. As hinted by the CJEU, the prohibition against general monitoring obligations is rooted in Articles 8 (protection of personal data), 11 (freedom of expression and information) and 16 (freedom to conduct a business) of the Charter³⁸.

In the name of safeguarding the interests of rightholders, an obligation to implement content recognition technologies would disproportionately restrict the Internet users’ right to the protection of their personal data, as well as their freedom of expression and information. First, content recognition technologies would necessarily involve the “identification, systematic analysis and processing of information” connected with the profiles of individual users, allowing them to be identified³⁹. Second, these technologies are not infallible: they often fail to adequately distinguish between lawful and unlawful content, taking down uses that may be protected by copyright exceptions⁴⁰. Not long ago, it must be noted, the European Parliament invoked these rights when rejecting the adoption at the EU level of enforcement strategies based on a three-strikes policy (the so-called “graduated response systems”)⁴¹.

In addition, as suggested above, the obligation to use content recognition technologies would gravely affect the platform operators’ freedom to conduct their business, since it would require them “to install a complicated, costly, permanent computer system at [their] own expense”⁴².

Contrary to what is stated in its Recital 45, the draft Directive *does not* respect the fundamental rights enshrined in the Charter. The value gap proposal fails to strike a fair balance between, on the one hand, (i) the users’ right to the protection of their personal data, (ii) the users’ free-

dom of expression and information, and (iii) the online platform operators’ freedom to conduct their business, and, on the other hand, the intellectual property rights of creators, protected by Article 17(2) of the Charter. If enacted without the necessary amendments, Article 13 may be struck down by the CJEU on grounds of violations of the foregoing rights⁴³.

Conclusion

The value gap proposal, as provided in Article 13 and Recitals 37 to 39 of the draft Directive, suffers from a number of fundamental problems. From the formal point of view, the proposal (i) includes normative provisions in the recitals, (ii) lacks basic clarity, and (iii) uses trivially vague language. On the substantive side, if passed into law the proposal will (i) thwart digital innovation and (ii) disproportionately restrict the fundamental rights of Internet users and platform operators.

Given the seriousness of these flaws, the EU institutions should consider deleting or, at least, significantly rewriting the proposal. The amendments put forward by former rapporteur Therese Comodini Cachia address some of the mentioned flaws and could form the basis of a possible rewrite. Nevertheless, the amended provisions fail to give targeted platforms guidance regarding the appropriate and proportionate measures they should take, while preserving a risky reference to content recognition technologies in Recital 39. At this stage, and considering the extent of the necessary amendments, it should be kept in mind that it may be better to pass no text than to pass a text that promotes legal uncertainty and threatens innovation in the digital economy.

31 Urban et al. (2016), p. 58.

32 See *infra* 2.2.

33 See Angelopoulos (2017), pp. 37-38. See also Husovec and Leenes (2016), pp. 47-48, reporting on the costs behind the implementation of filtering technologies.

34 European Copyright Society (2017), p. 7.

35 I thus disagree with von Lewinski (2017).

36 Angelopoulos (2017), p. 36.

37 In any case, such a change should be made clear in the enacting terms of the Directive, rather than left tacit.

38 See CJEU, *Scarlet*, C-70/10, paras. 46-50, and CJEU, *Netlog*, C-360/10, paras. 44-48.

39 See CJEU, *Scarlet*, C-70/10, para. 51, and CJEU, *Netlog*, C-360/10, para. 49.

40 See CJEU, *Scarlet*, C-70/10, para. 52, and CJEU, *Netlog*, C-360/10, para. 50.

41 See European Parliament, Resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, para. 11.

42 See CJEU, *Scarlet*, C-70/10, para. 48, and CJEU, *Netlog*, C-360/10, para. 46.

43 Although the CJEU has been assessing the validity of EU legislation against fundamental rights for some time now, it has been more open to engaging in such close scrutiny since the Charter became legally binding. See, notably, CJEU, *Digital Rights Ireland*, C-293/12, in which the CJEU annulled the Data Retention Directive, on grounds of violation of Articles 7 and 8 of the Charter.

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Copyright on Data

Data producer's right: Powers, Perils and Pitfalls

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Introduction

On 10 January 2017, the European Commission issued its Data Economy Package, which includes a Communication on building the European data economy¹ and an accompanying Commission Staff Working Document on the free flow of data and emerging issues of the European Data Economy,² followed by a Public Consultation. The initiative reveals the growing importance of non-personal, machine generated data. It is grounded on the need for market players to have access to large and diverse datasets in the context of the emergence of a data economy, as well as on the goals of incentivizing the sharing of data, ensuring the free flow of data, protecting investments and assets, and minimizing lock-in effects.³ The number of market players involved in data trading as a means to develop new business models or to open up additional revenue streams is expected to grow exponentially.⁴

Personal data is excluded from the scope of the communication,⁵ even though the Commission recognises that some market players deal with datasets that contain both personal and non-personal data⁶ (this would be the case, for example, of wearables that function as health and fitness trackers). The data under consideration in the Communication are both non-personal (either naturally non-personal, or turned non-personal through the process of anonymization) and machine-generated (i.e., created without human intervention, through e.g. computer processes or applications).⁷ Arguably, the exchange and access to this type of data is limited, with many companies that de facto own the data generated by their products or services usually preferring not to share it, and, according to the Commission, even preventing the user who owns the data-generating device from authorising use of the data by other companies.⁸

The Commission puts forth several possibilities to increase access to and sharing of data, such as e.g. setting up default data contract rules, fostering the development of technical solutions for reliable identification and exchange of data, developing a framework based on FRAND (fair, reasonable and non-discriminatory) principles to provide access to data against remuneration, or creating a data producer's right. This contribution will analyse the latter solution. As the Commission rightly points out, raw machine-generated data are not protected by any intellectual property rights, and their economic exploitation and exchange is frequently ruled by contract.⁹ Indeed, typically, IP rights are granted at the innovation (or expressed creativity) level. By contrast, the production of data happens at an earlier stage in the data value chain, prior to any innovation.¹⁰

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Building a European Data Economy", COM(2017) 9 final, 10.1.2017 [hereinafter, "Communication"]

2 Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, SWD(2017) 2 final, 10.1.2017. [hereinafter, "SWD"]

3 Communication, at 4.

4 SWD, at 13, citing a Report from Consultancy IDC, "Europe's Data Marketplaces – Current Status and Future Perspectives", 2016, available at <http://www.datalandscape.eu/data-driven-stories/europe%E2%80%99s-data-marketplaces-%E2%80%93-current-status-and-future-perspectives> (last accessed 17 August 2017).

5 Legislative initiatives concerning personal data have already been undertaken separately, see e.g. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), or the review of the e-Privacy Directive (which resulted in a proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications, COM(2017) 10 final, 10.1.2017)

6 Communication, at 9.

7 Communication, at 9.

8 Communication, at 9-10. See also SWD, at 15-16, where the Commission points to a notable exception to the alleged non-sharing trend: the bank BBVA shares anonymized and aggregated statistical data from millions of transactions that can convey consumer's habits or demographics.

9 Communication, at 10.

10 H. Zech, "A legal framework for a data economy in the European Digital Single Market: rights to use data", *Journal of Intellectual Property Law and Practice* 2016, 11(6), 460, 461.

The question therefore becomes whether the creation of a data producer's right is an adequate solution. The next section will briefly describe the contours of the proposed right. The following sections will focus on the merits of the right and analyse respectively its powers, perils and pitfalls.

The data producer's right

As devised in the Commission's Communication, the subject matter of the data producer's right is non-personal or anonymised machine generated data, including metadata on the data. The Commission stresses that the data covered by the right should be at the syntactical, not the semantic, level, and that care should be taken to ensure that ideas and information remain free.¹¹ This means that the object of protection is at the level of signs (such as sequences of 0 and 1), not at the level of content of the information.¹²

The owner of the right would be the data producer (i.e., the owner or long-term user of the device), who would then have the exclusive right to use and authorise the use of the data (e.g. through licensing). According to the Commission, this would include "a set of rights enforceable against any party independent of contractual relations thus preventing further use of data by third parties who have no right to use the data."¹³ The right would be limited by exceptions granting access to the data by others, namely the manufacturer of the device (who, besides having a commercial interest in the data, might be obliged by national law to monitor the product) or public authorities (for, e.g., statistical information or urban planning).¹⁴ The Commission further envisages that, in certain cases, there might be a public interest in making the data available for other private actors, such as sharing smart metering information for purposes of fully enabling smart homes or care institutions.¹⁵ Along the same lines, an exception to the right could also be established to ensure access for research that is entirely or mostly funded by public resources.¹⁶

The right addresses a controvert question in the data economy – who owns the data? As pointed out by the Commission, given the regulatory gap in this regard, the (de facto) owner of the data is the company whose devices generate the data. The data producer's right would shift the (de facto) data ownership from the company that supplies the machines or devices to the user/owner of the device, allowing the latter to contract with other data-based service- and device providers. This is connected to the objectives of the right, which are "clarifying the legal situation and giving more choice to the data producer, by opening up the possibility for users to utilise their data and thereby contribute to unlocking machine generated data."¹⁷ Presumably, clarifying the legal situation by attributing exclusive rights would avoid conflicts over ownership, and giving more choice to the producer would contribute to fostering data access and sharing (and thereby the data economy).

Powers

Most EU legislative activity so far has occurred in the field of personal data. Non-personal data had been largely overlooked until now. The objectives of the Commission's proposals are laudable and include the improvement of access to non-personal machine-generated data, the facilitation of its sharing, and the protection of investment that also takes into account a fair sharing of benefits with other players.¹⁸

¹¹ SWD, at 34.

¹² W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", 2016, at 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858171 (last accessed 23 August 2017); H. Zech, "Data as a Tradeable Commodity", in A. De Franceschi (ed.), *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution*, Intersentia, 2016, at 53-54.

¹³ SWD at 33.

¹⁴ SWD at 35-36.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Communication at 13.

¹⁸ Communication, at 11.

The Commission is also well aware of potential risks that the current situation might bring to the development of a sound data market. In fact, it should be noted that, in most cases, manufacturers or service providers de facto own the data, which could in theory lead to unfair contractual terms of access to the data. The problem of access to data is – rightly – at the centre of the Commission's line of action,¹⁹ and even if the data producer's right is in the end an exclusive right over data, it is also mainly thought of as a way to ensure access, rather than as a way to generate income from further uses of the data.²⁰

Perils

Even though the intentions of creating a new data producer's right might be commendable, such right would also have its shortcomings. Perils or immediate dangers include the fact that creating a new right will add an *extra layer of rights* to be cleared, which in turn can work against one of the other objectives of building a data economy – the free movement of data.²¹ Moreover, the right becomes especially problematic if one considers that non-personal data becomes most valuable when used in large amounts (big data). Giving exclusive rights over small amounts of data will hinder big data analytics (since the analysis would require acquiring lots of exclusive rights held by different owners), with potentially negative effects to the data economy.

Furthermore, in practice, the manufacturer of the device could just resort to contracts to *regain control of the data* (e.g. through an exclusive license), in which case de facto control becomes legal control. Put it differently, an IP right would not solve the problem of the de facto control, since the manufacturer of the device will typically be in a stronger negotiating position and can contractually acquire the rights (a better solution for a situation of de facto control could be, e.g., competition law).²²

Yet another peril is the risk of *information lock-ins* due to the difficulty in distinguishing the syntactical from the semantic level. The value of the data comes from the information it can convey, and from the insights that can be derived from it (i.e., the semantic level); but the information at the semantic level can be transformed into data (at the syntactic level), which means that protection of one can entail protection of the other.²³

Pitfalls

Mismatch between IP rationales and the data producer's right

The first pitfall, or source of potential danger, is the mismatch between justifications or rationales for IP protection, on the one hand, and both the subject matter of the data producer's right (machine generated, non-personal data) and the objectives underlying the protection of non-personal data, on the other hand. This mismatch could dictate the inadequacy of the right to achieve the goals it is supposed to achieve.

¹⁹ Stakeholders have also highlighted that the main issue is access: see SWD at 35.

²⁰ J. Drexel et al, "Position statement of the Max Planck Institute for Innovation and Competition of 26 April 2017 on the European Commission's 'Public consultation on Building the European Data Economy'", 2017, at 8, available at http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Statement_Public_consultation_on_Building_the_EU_Data_Eco_28042017.pdf (last accessed 24 August 2018).

²¹ As pointed out by the Commission in the Communication, at 3, 5 *et seq.*

²² On the use of competition law in this context, see W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", 2016, at 17, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858171 (last accessed 23 August 2017); and, at length, J. Drexel, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", 2016, at 41 *et seq.*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862975 (last accessed 23 August 2017)

²³ W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", at 18. Also highlighting the difficulty in distinguishing the syntactic from the semantic level, J. Drexel, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", at 13.

Several theories compete regarding the justifications or rationales for intellectual property rights. Each of them is conducive to a different analysis of the same IP policy, but new exclusive rights should be viewed from the perspective of all of them before they are introduced in the legal order.²⁴

The personality rights theory, for which mainly the philosophers Kant and Hegel are responsible, holds that the work is worthy of protection because it is an expression of the personality or self of its creator.²⁵ Not all types of intellectual property can be justified by this theory; rather, only those that entail some level of personality or self-expression (such as copyright).²⁶ This connection to the personality of the creator is at odds with the very nature of the subject-matter of the data producer's right (non-personal data).

The labour theory, formulated by the British philosopher John Locke in the 17th century, implies that every man should be the proprietor of the product of his labour. This theory suggests the idea of "reward", as it would seem fair that whoever uses his or her intellectual labour to create or to invent should have a right over the ensuing product.²⁷ Non-personal, machine generated data does not fit this construction, as there is no intellectual labour in the production of such data. There might be intellectual labour involved in creating devices and sensors for the production of data – and those devices and sensors could be protected by an IP right if conditions are met – but not in the further production of data itself.

Finally, the utilitarian theory considers that IP rights are necessary to promote or incentivize creative/inventive activity,²⁸ but also the efficient use and commercialization of the creation or invention after it has been produced.²⁹ Under this theory, IP rights are positive rights (as opposed to natural rights), granted with the goal of furthering societal welfare. In other words, IP rights are granted to creators and inventors with the goal of promoting further creation and inventive activities, and the dissemination of the outcomes from said activities (namely, through licensing). It is doubtful that the utilitarian rationale, based on the idea of incentive, can justify the creation of an IP right in data. Data is produced independently of incentives; there is no underproduction of data that needs to be remedied (in fact, quite the contrary is true).³⁰ It is not because of the existence of an exclusive right over data that users of devices that generate data will start producing more data. Likewise, a new exclusive right will also not facilitate access or sharing, as firms are able to trade data without having exclusive rights on it (mainly relying on their de facto control).³¹ The incentive rationale for the creation of an IP right in data is thus not present either.

It should be noted however that other rights, such as the sui generis right for databases or some neighbouring rights, have a slightly different justification – the protection and/or promotion of investment.³² It is the case, for instance, of the neighbouring right of the film producer³³ or the sui generis right of the database maker.³⁴

It is doubtful that a data producer's right could be devised as a neighbouring right as such. Neighbouring rights is an umbrella category that encompasses rather different subject matter, but generally they aim to protect activities somehow related to copyright. Their object is the dissemination – not the creation – of works which are often literary and artistic works.³⁵ Raw data which is machine-generated does not fall under copyright, which means that the link between a (possible) neighbouring right and copyright is not present in the case of a data producer's right. This makes it difficult to justify the use of a neighbouring right for the case of non-personal machine generated data.

The last possibility available would be to have a sui generis right for data producers, which would have as its main justification the protection and/or promotion of investment. However, if the data producer's right is designed as a "one size fits all", it should also be considered whether all investments (from owners or long-term users of devices) are worth protecting. This problem is connected to another issue: as the Commission rightly notes, it is hard to identify clear patterns across different sectors, with usage rights being dependent on context and the particular service provider.³⁶ The specific relation at stake – B2B or B2C – also plays a role when it comes to the importance of non-personal data to the data producer. Arguably (and on average), the consumer who generates non-personal data through his or her fitness tracker will be less interested in questions of (non-personal) data ownership than the owner of a smart factory's machinery; the former will also have invested less in acquiring the device/machine than the latter. This means that a legislative solution designed as a "one size fits all" measure may in any case be inadequate and premature, regardless of its legal form. Moreover, most of the stakeholders that participated in a study about the European Data Market are satisfied with current arrangements (mainly contractual) for the exchange of data, conveying that the current levels of data exchange and re-use do not seem to cause problems to the market efficiency.³⁷ In its Staff Working Document, the Commission further notes that stakeholders consider it more relevant to define rights of access to data than to define ownership rights.³⁸ Altogether, it is doubtful that there is an investment worth protecting in every case where a data producer's right would be applicable.

Moreover, IP rights, including neighbouring rights or the sui generis right of databases, share one common trait – they stem from human creativity or effort (be that effort financial or intellectual), to a greater or lesser degree. Machine-generated data seems to be one step further than that – it can be generated automatically, without any human intervention (apart from the

24 As proposed by R. Spinello & M. Bottis, *A Defense of Intellectual Property Rights*, Edward Elgar, 2009, at 171-172.

25 J. Hughes, "The Philosophy of Intellectual Property", 77 *Georgetown Law Journal*, 287, 330 and W. Fisher, "Theories of Intellectual Property", available at <http://www.law.harvard.edu/faculty/tfisher/iptheory.html> (last accessed 22 August 2017).

26 R. Spinello & M. Bottis, *op.cit.* at 166.

27 See also R. Spinello & M. Bottis, *op. cit.*, at 155 *et seq.*; Hughes *op. cit.* at 296; Fisher *op. cit.*

28 R. Spinello & M. Bottis, *op. cit.*, at 166.

29 See e.g. regarding patents J. Kesan, "Economic rationales for the patent system in current context", *George Mason Law Review* 2015, 22(4), 897, 902-903.

30 W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", 2016, at 8-9, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858171 (last accessed 23 August 2017).

31 W. Kerber, "Governance of Data: Exclusive Property vs. Access", IIC 2016 (7), 759, 761. The same author, in "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis" points out at 14: "First analyses about the problems of [data] markets do not indicate that legal questions about data ownership (...) are the main impediments to a faster development of data markets. Rather, the problems are seen to lie in an insufficient demand for data (...)". See also, at length, J. Drexler, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access*", at 33-34

32 This is true for some neighbouring rights – such as the rights of producers – but not for others – such as the rights of performers. Protection for the latter is based on social objectives and natural rights arguments, as well as on utilitarian arguments – see M. van Eechoud et al., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*, Wolters Kluwer, 2009, at 186-194.

33 Recital 5 of Rental Right Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), O.J. L 376, 27 December 2006): "(...) the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of (...) recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned."

34 Recital 12 of the Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J. L 77, 27 March 1996): "(...) an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases."

35 C. Colombet, "Major principles of copyright and neighbouring rights in the world: a comparative law approach", 1987, at 87, available at <http://unesdoc.unesco.org/images/0007/000750/075056eo.pdf> (last accessed 23 August 2017).

36 SWD, at 16. Also pointing out the problems with the "one size fits all" approach, J. Drexler, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", at 40.

37 IDC and Open Evidence, *European Data Market SMART 2013/0063 Final Report*, 1 February 2017, at 139, available at <http://www.datalandscape.eu/study-reports> (last accessed 22 August 2017).

38 SWD at 35.

initial one of, e.g., setting up the sensors). The fact that the subject matter of protection is machine-generated is, in and of itself and independently of the concrete IP right at issue, at odds with the essence of IP.³⁹

On a general note, it should be recalled that the underlying justifications for a data producer's right are to clarify the legal situation and to foster data access and sharing. It can be questioned whether an exclusive, IP-type of right is the best way to achieve this. There are other options that can clarify the legal situation (thereby also avoiding potential conflicts of ownership over data). Indeed, the Commission lists a few, such as developing a framework based on fair, reasonable and non-discriminatory (FRAND) terms of access, or setting default contract rules,⁴⁰ which would seemingly be more compliant with the principle of proportionality.⁴¹ In addition, as mentioned above, a potential data producer's right would be applicable throughout a wide variety of industries, which have different business models. Deciding upon an initial allocation of rights to the data producer disregards the specific governance structures of different businesses and can turn out to be the economically wrong allocation.⁴² Moreover, new exclusive rights typically lead to conflicts and litigation.⁴³ As to the goal of fostering data access and sharing, as explained above, granting exclusive rights over data does not necessarily give an incentive to share. In theory, an exclusive right over a particular subject matter, coupled with broad, mandatory limitations, might offer more access to said subject-matter than e.g., a sole reliance on contracts; however, there are alternatives to this route, namely, regulating access (and thereby trumping potential unfair/one-sided contracts).⁴⁴ To sum up, not only do IP rationales not support the introduction of an IP-type of right for data producers, but also the objectives of the data producer right could not be achieved through the grant of an IP-type of right.

Relationship with the database directive

The Database Directive grants a sui generis right to the database maker who has made a substantial investment, quantitative or qualitative, in obtaining, verifying or presenting the contents of the database (article 7 of the Database Directive). Databases are defined in the Database Directive as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means” (Article 1(2)).

In principle, the new right would cover a gap of protection left by the Database Directive: the period before the data is collected (i.e., “obtained”) by the database maker. The Database Directive states clearly that the sui generis right should not give rise to a new right in data.⁴⁵ The object of protection of the sui generis right – the database, or the investment made in the database – is thus different than the object of protection of a data producer's right, which concerns raw, machine-generated data itself.

It should be noted that investment in obtaining data is not akin to investment in creating data. The CJEU has clarified this question in several cases. The resources used to “seek out independent materials and collect them in the database”⁴⁶ amounts to an investment in obtaining the data, and this activity can thereby give rise to a sui generis right; but the resources used for the creation of such data are outside of the scope of the sui generis right. This interpretation results in many sole-source databases going unprotected, thus addressing competition concerns.

³⁹ See however, as an exception to this, Section 9(3) of the Copyright Designs and Patents Act of the United Kingdom, which vests protection of computer generated works in the person by whom the arrangements necessary for the creation of the work are undertaken.

⁴⁰ Communication at 12-13.

⁴¹ A proportionality check involves the evaluation of three factors: the suitability of the measure for the attainment of the objective; the necessity of the measure; and the proportionality of it vis-à-vis the restrictions that might be thereby involved, or proportionality *stricto sensu*. See inter alia case C-331/88 *Fedesa*, para. 13, and case C-210/00 *Käserei Champignon Hofmeister*, paras. 59-67. For a detailed explanation of the factors, see X. Groussot, *General Principles of Community Law*, Europa Law Publishing, 2006, at 146-152; J.H.Jans, “Proportionality Revisited”, *Legal Issues of Economic Integration* 2000, 27(3), at 240 *et seq.*, and references therein.

⁴² W. Kerber, “A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis”, at 15-16.

⁴³ J. Drexler, “Designing Competitive Markets for Industrial Data – Between Propertisation and Access”, at 35.

⁴⁴ J. Drexler, “Designing Competitive Markets for Industrial Data – Between Propertisation and Access”, at 36.

⁴⁵ Recital 46 Database Directive.

⁴⁶ Case C-46/02 *Oy Veikkaus*, at 34; case C-203/02 *British Horseracing Board* at 31; case C-338/02 *Svenska Spel*, at 24; case C-444/02 *OPAP*, at 40.

The creation of data left outside the scope of the sui generis right includes in principle data generated by machines. In any case, at least in theory, many businesses could have (an aspect of) non-personal data protected via the Database Directive if they so wished, because e.g. they invest in the presentation of the contents via an app. Admittedly, however, this is not in the interest of all de facto owners of data, with some preferring to keep the data to themselves (for purposes of product improvement, for instance). More importantly, it can be difficult to differentiate investment in creating or producing the data (for example, through sensors) and investment in obtaining or collecting it⁴⁷ (which in the case of machine generated data could be, e.g., assembling the data from several devices into files). Where it is not possible to distinguish between creating and obtaining the data, or where the activity of obtaining the data is “indivisibly linked” to the creation of data, the CJEU has considered that there is no independent investment in obtaining the data (thus denying protection to the database on those grounds).⁴⁸

Moreover, depending on how a potential data producer's right is designed, conflicts might arise due to the fact that the database and the machine-generated data (which might later go in the database) have different owners: the owner of the former will be the database producer, while the owner of the latter will be the user who owns or is in possession of the device. Even though the manufacturer would have a non-exclusive access to the data, determining potential infringement by third parties could be challenging.

Drawing the line between personal and non-personal data

In some devices such as wearables, personal and non-personal data are intertwined, and it might be difficult to draw the line between them. Importantly, such line must be drawn, as personal data is subject to its own specific regime in the EU. Personal data concerns information where a natural person is identified or identifiable, including personal data that have undergone pseudonymization but that could be attributed to a natural person by using additional information.⁴⁹ In the assessment of whether a person is identifiable, account should be taken of the means used to do so, such as singling out, including its cost and amount of time required for identification.⁵⁰ According to Article 4(1) GDPR, a natural person is identifiable by reference in particular to “a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”. The CJEU has added to this list an IP address.⁵¹ The Court has also stressed that, in order to treat information as personal data, it is not necessary that that information alone allows the data subject to be identified.⁵² The definition of “personal data” is thus by no means straightforward. In addition, the nature of data is dynamic and subject to change. Anonymous data can be deanonymized, for example, by matching it with other datasets and applying some probability theory.⁵³ This makes the distinction between personal and non-personal data a moving target.

Conclusion

Enhancing data sharing and access and doing away with legal uncertainty in data markets are in themselves praiseworthy objectives. The solution of achieving them through introducing in the legal order a new property, IP-type of right is however not the best course of action.

⁴⁷ E. Derclaye, *The Legal Protection of Databases. A Comparative Analysis*, Edward Elgar, 2008, at 94-96. M. Davison & P.B. Hugenoltz, “Football Fixtures, horseraces and spin offs: the ECJ domesticates the database right”, *E.I.P.R.* 2005, 27(3), 113, 113-115.

⁴⁸ *Oy Veikkaus*, at 44; *Svenska Spel* at 33; *OPAP* at 49.

⁴⁹ Recital 26 of the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC), O.J. L119, 4 May 2016.

⁵⁰ *Ibid.*

⁵¹ In case C-582/14 *Breyer*, the CJEU has considered that in cases where the IP address is capable of sufficiently identifying a natural person (because the provider has means to identify the person with additional data) such address amounts to “personal data”(see para. 49 of the decision).

⁵² *Breyer*, para. 41.

⁵³ M. Thomas, “Big Data: The Broken Promise of Anonymisation”, 2016, available at <https://www.gresham.ac.uk/lectures-and-events/big-data-the-broken-promise-of-anonymisation> (last accessed 22 August 2017). See also, underlining this dynamic nature of data, S. Stalla-Bourdillon & A. Knight, 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927945 (last accessed 22 August 2017).

The fabric of a data economy is not compatible with exclusive, crystallised IP rights: a data producer's right would add an extra layer of rights to the legal order, which could hinder the free flow of data; rights over small datasets would be at odds with the big data analysis that underlies the data economy; and exclusive rights over data could also lead to information lock-ins.

None of the justifications for having IP rights are fulfilled in the case of a right over data. There is no connection to the personality of the creator, nor to its intellectual labour. No incentives are needed to produce or disseminate data. Even the case for a sui generis right is weak, since there is no investment worthy of protection or promotion (at least not in all cases where a data producer's right would be applicable).

The interaction of the data producer's right with existing regimes, namely the sui generis right for databases and the protection of personal data, could also lead to conflicts and result in legal uncertainty.

The objectives of the Commission would thus be better achieved through other options mentioned in its Communication, which sound both more efficient and realistic. Such is the case, for instance, of the implementation of an obligation to license the re-use of data under fair, reasonable and non-discriminatory terms (FRAND), or developing guidelines to incentivise businesses to share non-personal data. These and other options should be better explored and take precedence over a data producer's right, always bearing in the mind that the main focus of any option taken should be fostering access to data.

Text & Data mining Issues

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Text & Data mining arise several types of issues, some of which are related to intellectual property rights whereas some depends on infrastructures or bargaining power. Since those questions cannot totally be ignored in order to delineate a proper regime for TDM. But as the purpose of this meeting is to reflect about the copyright rules, we will mostly focus on the possible solutions related to the use of the protected subject matter in the process of TDM (**part II**), after having quickly defined the core elements of the discussion (**part I**).

Part I. What is TDM ?

Definitions of TDM that can be found in the studies or in the existing laws (Japan, UK, Ireland, France) may vary according to the social use of the process. Some are restricted to certain kinds of subject-matter, for example, written texts because the first process of mining occurred in the field of scientific research that mostly relies on publications. But the potential technical application of TDM is wider and encompasses any sort of works/contents as long as it is in a digital format. So images, video, music but also "pure" information can be subject to mining whenever there is a possible "use" of the results of the process. Some definitions also limit the TDM to certain uses or purposes – such as research or journalism...- because, here again – it is in those fields that the practice and the claims have emerged. But the ongoing debate shows that the applications of such processes can cover industrial developments, leisure...

Such a contextual approach of TDM does not seem to be the proper starting point to address the issue in the forthcoming directive because the technical evolution and the orientation of the market that cannot be fully anticipated may extend the scope of TDM beyond the existing pattern. Therefore, the first step will consist in finding permanent criteria that sketches the skeleton of TDM, regardless of the actual practices. This structural definition being achieved, then comes the time to discuss the opportunities to welcome this process or not when it conflicts with other legitimate interests, which is a matter of policy.

The first invariable criterion is the digital format of the source subject to the process of mining, the second is the existence of a process involving specific tools, the third is the purpose for which the process of the element is being made (*animus*), the fourth is the constitution of a result of the process that is new/different from the source mined.

In order to actually realize TDM, it is necessary to have access to the "source" (the mine) and to the tools allowing the process (the picks and shovels); to search something and to have a reasonable expectation of the results that may derive from the searching activity (the opportunities of exploitation of the ore).

Many of the elements required to achieve TDM are irrespective of copyright issues such as the need for technical infrastructure and investment allowing the miners to dig, the market opportunities for the results of mining. If TDM is considered to be encouraged for social benefit, policy makers might therefore take into consideration these various needs and eventually intervene in order to build the necessary foundations in case the market does not provide for – investing in digitization, establishing norms for formats, facilitating open or broad availability of the content and the technical tools, developing storage, cloud computing facilities... It is also noticeable that access to information is not always locked by IP rightholders but may be the mere results of contractual practices and/or technical control of access of individual or companies regardless of any IP consideration.

Therefore, solving the copyright issues that may conflict with TDM will not be the only key for suddenly developing the market of the applications of TDM in Europe, this will also be a matter of education, investment, interoperability, open data policy.

Some publisher's opponents to the TDM exception point out that they don't face an important demand for TDM license when required (hardly few licenses a year) and that they easily come to an agreement in this case. Many reasons may explain why they experience such a situation (people don't ask permission because they don't know they have to, they know but they fear to

ask because they don't know how to and what will be the cost, they don't want to ask on behalf their freedom of action) but societal and infrastructure impediments may also be an explanation.

This is not to say that copyright questions don't matter but that the potential conflict with copyright rules and the TDM will not solve the whole problem. In balancing the pro & cons of the limits to copyright rules, the policy maker shall also take into consideration the reality of the social benefit of the TDM.

Part II. Which are the problems with mining vis-à-vis copyright issues?

Going back to the "bony" definition of TDM, TDM uses may encroach on Intellectual property rights.

The "source" of the TDM might be protected by different rights – copyright, neighbouring rights, sui generis rights on databases-. So access to the source may – in certain circumstances – trigger the application of IP rules.

The type of tool used to mine may also raise questions of IP when it comes to the acts of exploitation involved in the process or compliance thereof with the digital right management.

The assessment of the purpose/intent may also be taken into account when considering the balance between the claim for exclusive right on the one hand and the claim for accessing to and processing the content. At this stage, this shall be limited to a conflict of principles– who is entitled to mine with which project against the legitimacy of the rightholder position.

Finally, the opportunities of "exploitation" of the result of the mining may also be balanced according to the competing interest of the rightholder to benefit from its property.

2.1. Mining a "protected" material

This paper will not detail the famous distinction between the "form" of expression that is the subject protected by copyright rules and the mere information or ideas that are outside of the scope. We shall only insist on the fact that the distinction is legally and practically fragile. Even if one might find some traces of the distinction in the international and European "acquis" such as the article 9.2 of TRIPS agreement or article 2 WCT and more specifically in the computer program directive article 1.2 (Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.)

it is still complicated to draw a line between the form and the information whenever access to information supposes reproduction of the form in which this information has been expressed. (Information comes from the latin in formare). Even if the word "data" refers to raw material – less structured than information – the reference to the "text" as the potential scope of application of the process of mining applies both to non-protected elements and to protected works. When both elements are so intertwined that they cannot be separated, it is somewhat artificial to claim that such can be the case for TDM.

Besides, many copyright rules do cover the use of the information/idea/content. The value of the work is also linked to the amount of information it provides to the public – see the newspaper-; the content is indirectly covered by the copyright protection when an authorization is required for the adaptation of a novel into the movie: it is the story, the characters that matter here and not the choice of a specific sentence. When considering moral right to integrity, distorting the "spirit" of the work may amount to an infringement before certain jurisdictions. Furthermore, the form/information dilemma has less echo in the realm of neighboring rights and sui generis rights for databases. Even if the 1992 directive remain quite silent on the definition of the subject-matter (phonogram, film...), of the producer or performer rights the ECJ and the recitals of the various directives seem to acknowledge that the justification for protection lies in the investment made by the producer, just as the maker of the databases for the sui generis right, whereas the performers rights are covering the performance and its fixation. If access to the data contained in this "material" supposes any process of copying of the file, this might trig-

ger the protection because investment has been protected. According to the rules governing the relationship between copyright and related rights, it would be paradoxical to consider that the use of the data in the work is free because of the form/information dichotomy whilst the use of the data in the related right is not. If TDM is to be enhanced because of its social function, it is questionable to dissociate its regime according to the various regimes of the sources.

Yet, if we stick to mere copyright consideration, it could be argued in order to limit the conflict between the claim for free use and the exclusive right that TDM does not access to and/or use a "work" per se, according to a "functional" conception of what a work is. For example, in France some decisions (see example in France: *Etre et Avoir / Place des Terreaux*) have considered that there was no reproduction of the work "as such" when the public could see it (architectural work or drawing) in the frame of a wider image or in a film but that the work was not the subject of this image. Instead of relying on a legal exception to the exclusive right (namely panorama and ancillary copy that was not existing in the law) the judges answered at the upper level and decided that the work as a legal concept was not sufficiently "present"; therefore, that there was no infringement of the copyright. It is the **metaphor of the puzzle**: even if all the pieces of the puzzle are present, the recombination of all of them do not amount to the same source.

Consequently, one of the first answer that could mitigate the conflict between TDM and copyright would consist in defining the works subject to protection in the *acquis* – when this definition only exists for computer programs, databases – and/or determining the situations when the work would not be protected because the function of copyright has not been harmed. Accordingly, all the works would not be protected and some could be explicitly excluded from the scope of copyright and the protection of the work would not be absolute but may depend on the function provided for in the copyright legislation. Still even in introducing in the directive the distinction between expression and information, or establishing that the protection is limited to work "as such" it is rather unsure that it would provide enough legal security and fulfil the objective of harmonization of the situations within the different Member States.

One can also think of relying on the concept of originality and consider that the threshold of protection is not met in certain cases. This question has been addressed by the Court of Justice in the famous *Infopaq* case (rendered about clipping practice of the press aggregators) and the judges held that reproduction of small pieces of the work – extracts of 11 words – was to be considered according to the originality criterion. The decision has been interpreted as acknowledging the originality of the pieces but I think that we can also see it the other way round like establishing the possibility that the originality threshold is not sufficiently fulfilled in certain cases and that the judges have to control the existence of the originality of the "pieces". It would not be sufficient for the rightholder to prove that the source as a whole was original to prevent the use of the pieces, since it should also be demonstrated in this case that the pieces are also – as such- original. So legislative intervention could consist in defining a general threshold of originality.

Still, even if defining what a "protected work" means as regards EU law would certainly be needed in the broader perspective of a coherent copyright code, and may help to delineate when a "work" is used, it does not seem to match the short-term perspective of the ongoing harmonization.

2.2. Mining as an act covered by IP rights

Besides, as regards TDM, the difficulty lies in the fact that the process involves technical reproduction of works and that the *Infosoc* Directive cover any kind of reproduction by an exclusive right (art. 2) (Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part). This very broad definition of the reproduction right has been heavily criticized by many authors in France because our definition (still) requires an act of communication to the public of the work (Article L. 122-3 Code de la propriété intellectuelle: Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way.)

According to this requirement, it can be argued that some acts of reproduction are not covered by the definition of the exclusive right since they don't permit to the communication to the *public* of the work. What is communicating the work to the public? I don't refer here to the flimsy definitions provided for by the Court of Justice in its numerous case-law but to a "sensitive" perception of what is an act of communication towards human being. Is a work communicated to the public when the recipient cannot perceive, recognize it? When considering copyright infringement, the judge compares the resemblances between the work and the copy: it is a "human" appraisal of where the work has been reproduced. So keeping a broad definition of the right of reproduction covering any kind of reproduction – even individual, temporary, transient, partial, automatic- may, at the end of the day, be inconsistent with the assessment of the infringement.

So an answer to TDM but also to other issues (linking, transient copies) may consist in introducing a condition of **human identification of the work**. Copyright protection would only be involved as far as the work is perceptible, recognizable by a human (and not a mere machine): the material presence of the work would not be sufficient to infringe copyright if this presence is not somehow perceptible by the public. Article 5.1. of the Infosoc directive establishing the transient exception relies somehow on this assumption of human perceptibility when saying that the reproduction which is necessary to the transmission of work in a network is "exempted" from the reproduction right. But instead of establishing positively the condition in the definition of the exclusive right, it is in the rationales for a mandatory exception.

Being a pragmatic person, and though I regret it, I don't believe that the legislator will have the courage to introduce such a "perceptibility" condition in the definition of the exclusive rights but will overcome the difficulty with exceptions. This requirement would indeed - in the present context of value gap - deprive the rightholders from the possibility to be associated to the value deriving from the automatic processing of their work, which appears to be a very promising market. Yet, it is my belief that mass digitization of works - whatever the purpose is: linking, mining, crawling- implies other answers than the mere individual exclusive right and that establishing a differentiated regime of protection depending on the existence of a "sensitive" contact of the human being with a work at the end of the process would be a solution.

As to TDM, art 5.1. provides a part of the answer and may cover most of the reproduction acts involved in the process of mining. This appear in the directive proposal, where it is recalled that the future exception has to be combined with the former one. This "distributive" approach is nevertheless a complicated one. Many of the operations involved in the mining can be covered by article 5.1. exception, and it can be argued that a specific exception for TDM is not required. Yet, the pro TDM exceptions consider that some conditions – temporary copy, absence of economic significance - as interpreted by the Court (*Infopaq, Meltwater...*) may nevertheless impede certain activities. This has to be scrutinize because for example, the absence of economic significance condition has not been an obstacle to the commercial exploitation of a service subsequent to transient copies as long as it is not the exploitation of the work itself.

Consequently, providing for a supplementary exception is only meaningful if it extends the scope of the free uses to certain activities that have a legitimate interest to be balanced with the legitimacy of copyright protection.

2.3. Mining as a legitimate reason to cope with (social value)

Considering that, in some situations, there is a need for a specific regime of TDM that goes beyond the transient exceptions, the acts that exceed the scope of this exception shall be assessed in the perspective of the social interest and value of the project that grounds the TDM. Answers may also vary according to the social value of the activity and to the context of the project: individual authorization, collective management, exception. In this perspective, the legislator shall address several questions:

Are all intent, purposes equally valuable? If not, the TDM project may be assessed according to the social need: scientific research, collecting news (subjective approach). We see the opposition between the commission proposal and the Comodini report that extends the scope of the exception irrespective of the quality of the institution and to "innovation". Is innovation as

such a social value that justify to overcome the protection of innovation by intellectual property rights? Is there not a risk that the second "innovator" would claim exclusivity over its own innovation after having deprive the first innovator from its protection?

Shall the means-process be related to the genuine project? If yes, has the framework of the TDM to be determined *ex ante* and the proportionality of the extraction to be assessed in consideration of the project? (De minimis approach) ? Shall the legislator "force" the access to the data and overcome the contractual/technical barrier? Shall we apply the essential facilities doctrine *ex ante* ? *ex post* ?

Shall the destination of the mining be subject to any form of control? Springer, for example, requires to know who is mining what. Is it legitimate? What are the opposite interests that justify that such a control would be forbidden (either in an exception or in the licensing framework) ?

What are the types of acts necessary to fulfill the legitimate purpose (copying, storing, displaying?). The Comodini report expressed concern about the possibility to verify the reliability of source, which supposes a storage capacity and the organization of the access to the data set. Such a concern may not be as justified for other purposes than scientific research.

2.4. Exploiting the results and the fair share of revenues

Once all these elements have been discussed, one might also take into account the "value gap" issue.

Here again many questions may be answered to:

Does TDM compete with the normal exploitation of the work? If yes is an answer, then the legislator cannot adopt an exception because it would not be consistent with the three-step-test. The solution would may be consist in providing a reasonable frame for licensing (but the experience of License for Europe makes this rather uncertain).

If there is no such competition, is there an economic prejudice suffered by the rightholders that shall trigger a fair compensation? To which extent mining content harms the rightholder economic rights? Is it different if the exploitation of the result of the mining is commercial or not?

If there is a specific investment by the rightholder (formats, accessibility of the dataset), shall this be taken into account in a licensing framework or in the realm of the exception?

Data Property: Unwelcome Guest in the House of IP

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1. Introduction

With the incessant growth of the ‘data-driven economy’¹ have come calls for the introduction of a novel property right in data. Apparently in response to demands from the automotive industry,² and encouraged by a number of German lawyers and scholars,³ the European Commission has in its 2017 Communication on ‘Building a European data economy’ tentatively advanced the idea of creating at EU level a ‘data producer’s right’ that would protect industrial data against the world.⁴ The movement for ‘data property’ (in German *Dateneigentum*) has its champion in European Commissioner Günther Oettinger, who until 2016 led the directorate general that is responsible for the Communication, DG Connect. An op-ed published by Mr. Oettinger in the *Frankfurter Allgemeine Zeitung* reveals some of the thinking and the powerful forces behind this revolutionary legal concept. Data, writes Oettinger, are the “gold of the future”, principally in the automotive sector where modern sensor-equipped cars automatically generate and collect large amounts of data – on traffic and road conditions, engine performance, etc.⁵ These machine-generated sensor data have enormous value, for example, for developing self-driving automobiles. But – writes Oettinger – it is as yet unclear who owns these data: the automobile manufacturer; the car owner; the producer of the sensor equipment; or no one at all? What we need, concludes the Commissioner, are rules at EU level that establish data ownership.⁶

Apparently inspiring this call for protecting industrial data is the fear – common to other recent policy initiatives – that valuable European assets are being misappropriated by large American companies. The specter of Google ‘stealing’ European news has already led to an ongoing EU initiative towards a neighbouring right for news publishers, following comparable rules previously introduced in Germany and Spain.⁷ The sui generis database producer’s right introduced in Europe in 1996 was similarly inspired by European fears of dominance by the US database industry.⁸

Although the contours of the ‘data producer’s right’ being contemplated by the European Commission are sketchy, as are its economic underpinnings, such a right would most likely bring the protection of industrial data in the EU to a much higher level than the – much-maligned and still

¹ OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being* (2015).

² Christiane Schulzki-Haddouti, ‘Wem gehören die Daten im Auto?’, *VDI Nachrichten*, 15 April 2016, available at <http://www.vdi-nachrichten.com/Technik-Gesellschaft/Wem-gehoren-Daten-im-Auto>. The German industry coalition BDI (Bundesverband der deutschen Industrie) does not however support the idea of a property right in data. See BDI, ‘Industrie 4.0 – Rechtliche Herausforderungen der Digitalisierung Ein Beitrag zum politischen Diskurs’, November 2015, available at <https://bdi.eu/media/presse/publikationen/information-und-telekommunikation/201511-Industrie-40-Rechtliche-Herausforderungen-der-Digitalisierung.pdf>. See also heise online, BDI spricht sich gegen neues Eigentumsrecht an digitalen Daten aus’, available at <https://www.heise.de/newsticker/meldung/BDI-spricht-sich-gegen-neues-Eigentumsrecht-an-digitalen-Daten-aus-3697626.html>.

³ See, inter alia, T. Hoeren, ‘Big Data and the Ownership in Data: Recent Developments in Europe’, [2014] *European Intellectual Property Review* 751-754; A. De Franceschi & M. Lehmann, ‘Data as tradable commodity and new measures for their protection’, 1 *Italian Law Journal* (2015) 51-72; H. Zech, ‘A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data’, 11 *Journal of Intellectual Property Law & Practice* (2016) 460-470

⁴ European Commission, ‘Building A European Data Economy’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 10 January 2017, COM(2017) 9 final, 13. See in particular: European Commission, ‘Staff Working Document on the free flow of data and emerging issues of the European data economy’, Brussels, 10 January 2017, SWD(2017) 2 final, 33-38.

⁵ The German automobile association ADAC has conducted tests showing that modern automobiles produce, process, store and forward vast amounts of machine-generated data; available at https://www.adac.de/infotestrat/technik-und-zubehoer/fahrerassistenzsysteme/daten_im_auto/default.aspx.

⁶ G. Oettinger, ‘Wem gehören die Daten?’, *Frankfurter Allgemeine Zeitung*, 14 October 2016.

⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, art. 11 (Protection of press publications concerning digital uses).

⁸ P.B. Hugenholtz, ‘Something Completely Different: Europe’s Sui Generis Database Right’, in: Susy Frankel & Daniel Gervais (eds.), *The Internet and the Emerging Importance of New Forms of Intellectual Property* (2016), 205-222.

controversial – database right. Whereas database right protects data on the double condition that the data are structured in a ‘database’ and the database is the result of ‘substantial investment’, the novel right would directly protect machine-generated data without any material prerequisite.

As this article argues, introducing such an all-encompassing property right in data would seriously compromise the system of intellectual property law that currently exists in Europe. It would also contravene fundamental freedoms enshrined in the European Convention on Human Rights and the EU Charter, distort freedom of competition and freedom of services in the EU, restrict scientific freedoms and generally undercut the promise of big data for European economy and society. In sum, it would be a very bad idea.

This article starts (in Section 2) by briefly examining the background and stated aims of the proposed new right: why would there be a need for creating a property right in industrial data? And what would be its subject matter and scope? Section 3 looks at existing intellectual property regimes, inquires to what extent these extend to data, and speculates how a data property right in data might affect these regimes. Section 4 thereafter scrutinizes the data right from the broader perspective of fundamental rights and freedoms. Section 5 concludes.

Although creating a property right in data surely has additional ramifications outside these fields, in particular for the right of informational privacy (personal data protection), the focus of this article will be on the law of intellectual property. We will therefore not examine whether the law of data protection might already imply a property right in personal data.⁹ Nor shall we query whether the civil law concept of private property might be extended – or already extends – to (recorded) industrial data, and thus offer alternate protection to data sets.¹⁰ We shall also avoid discussing other doctrines in potential support of ‘data property’,¹¹ such as criminal law¹² or trade secret law¹³, and stay away from the contract and consumer law related issues of ‘trading’ personal data for services, which have become moot in the light of the proposed EU Digital Content Directive.¹⁴

Finally, a general caveat is in order. Whereas the European Commission has now posited the issue of ‘data property’ as worthy of serious discussion, the policy arguments advanced in favor of introducing such a right are underdeveloped, and its contours remain sketchy at best. Criticizing a right of data property is therefore taking aim at a moving target.

2. Quid data property?

The arguments advanced by proponents of introducing a right of ‘data property’ can be roughly summarized as follows. First, it is pointed out that industrial data represent enormous economic value. For example, according to the European Commission, “the value of the EU data economy was estimated at EUR 257 billion in 2014, or 1.85% of EU GDP. This increased to EUR 272 billion in 2015, or 1.87% of EU GDP (year-on-year growth of 5.6%). The same estimate predicts that, if

policy and legal framework conditions for the data economy are put in place in time, its value will increase to EUR 643 billion by 2020, representing 3.17% of the overall EU GDP”.¹⁵ Studies by the OECD and the European Commission present similarly mind-boggling figures.¹⁶

The rapidly increasing value of machine-generated data is attributed to a variety of factors: the rise of ‘smart manufacturing’, which involves real-time exchanges of massive amounts of data between machines and robots; the economic potential of ‘mining’ Big Data (i.e. extracting information by way of sophisticated large-scale data analysis);¹⁷ and the promise of the *Internet of Things*, the magical world where machines quasi-independently communicate and exchange data directly with other machines, such as the ‘intelligent’ energy meter that sends usage data to the energy company, or the axiomatic refrigerator that automatically orders milk and coffee from the online supermarket. As in Commissioner Oettinger’s op-ed, many of the examples used in the literature are taken from the automotive sector, where data have become essential input and valuable output in manufacturing and navigation.¹⁸ The specter of Google’s self-driving car potentially out-competing the European car industry is never far away.

Having thus demonstrated that data have tremendous and increasing value, proponents go on to point out that current legal regimes, such as traditional civil-law based property right and existing intellectual property regimes, do not, or do not adequately, protect these data. Admittedly, non-property regimes such as contracts and trade secret protection might occasionally do the job, as would technical protection measures that create de facto ownership positions. However, these regimes do not create rights *erga omnes*, so valuable data are at risk of being misappropriated and a market for using and trading (i.e. licensing) raw data will not develop.¹⁹ Ergo, what is needed is a novel property right that protects industrial data as such. As the European Commission tentatively suggests in its Communication, as one of six policy options presented for “building a European data economy”, “[t]his approach would aim at clarifying the legal situation and giving more choice to the data producer, by opening up the possibility for users to utilise their data and thereby contribute to unlocking machine-generated data”.²⁰

In light of these radical contentions, it is surprising to see how little economic evidence is brought forward in support of a property right in data. According to standard economic analysis, there are two main justifications for the creation of a new IP right: (1) solving the public good problem by creating an economic incentive for the production of data; and (2) facilitating the use and trade of data. As to the first rationale, Prof. Kerber, a leading German economist, sees “no evidence that there are generally too few incentives for producing and analyzing data in the digital economy”²¹. Indeed, much machine data production occurs (nearly) automatically, often as a by-product of industrial production or services, and it is hard to see why a legal incentive in the form of a data property right would enhance it.²²

As to the second argument, Prof. Kerber observes: “Although it cannot be ruled out that the market for trading and licensing data can suffer from market failure problems, and empirically data markets are still developing and need more scrutiny, it seems that so far data producers and holders have sufficient possibilities for commercializing their data. The potentially most important market failure problem that the first buyer might resell data seems to be solvable through either contractual and technical restrictions or through the strategy of selling services based upon these data.”²³ Prof. Kerber concludes: “there are no convincing economic argu-

⁹ See N. Purtova, *Property Rights in Personal Data. A European Perspective* (2012), reviewed by E.J. Dommering, [2012] *Maandblad voor Vermogensrecht* 22-26.

¹⁰ See H. Zech, ‘Daten als Wirtschaftsgut – Überlegungen zu einem „Recht des Datenerzeugers“’, [2015] *Computer und Recht* 137-146.

¹¹ See for a comprehensive overview of possible doctrines M. Dorner, ‘Big Data und „Dateneigentum“’, [2014] *Computer und Recht* 617-628; Osborne Clarke LLP, *Legal study on Ownership and Access to Data*, Study prepared for the European Commission DG Communications Networks, Content & Technology (2016), <https://bookshop.europa.eu/en/legal-study-on-ownership-and-access-to-data-pbKK0416811/>.

¹² T. Hoeren, ‘Dateneigentum: Versuch einer Anwendung von § 303 a StGB im Zivilrecht’, [2013] *Multimedia und Recht* 486-491.

¹³ See J. Drexler, ‘Designing Competitive Markets for Industrial Data – Between Propertization and Access’, Max Planck Institute for Innovation & Competition Research Paper No. 16-13 (2016), 22-24.

¹⁴ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final; see A. Metzger, ‘Dienst gegen Daten: Ein synallagmatischer Vertrag’, 216 *Archiv für die civilistische Praxis* (2016) 817-865.

¹⁵ European Commission, ‘Building A European Data Economy’ (n. 4), 2.

¹⁶ OECD (n.1); European Commission, ‘Towards a thriving data-driven economy’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2 July 2014, COM(2014) 442 final, 2.

¹⁷ In addition, Big Data analysis may have numerous social benefits; see Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), 5-8.

¹⁸ See A. Wiebe, ‘Protection of industrial data – a new property right for the digital economy?’, [2016] *GRUR Int.* 878.

¹⁹ H. Zech, ‘Information as a tradable commodity’, in: A. De Franceschi (ed.), *European Contract Law and the Digital Single Market* (2016) 51-79; see also M. Dorner, ‘Big Data und „Dateneigentum“’, [2014] *Computer und Recht* 617-628.

²⁰ European Commission, ‘Building A European Data Economy’ (n. 4), 13.

²¹ W. Kerber, ‘A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis’, [2016] *GRUR Int.* 989, 997.

²² See P.B. Hugenholtz, ‘Program Schedules, Event Data and Telephone Subscriber Listings under the Database Directive The ‘Spin-Off’ Doctrine in the Netherlands and elsewhere in Europe’, Paper presented at Fordham University School of Law Eleventh Annual Conference on International IP Law & Policy New York, 14-25 April 2003, available at <https://www.ivir.nl/publicaties/download/spinofffordham.pdf>.

²³ Kerber (n. 21), 998. See also Drexler (n. 13).

ments for the introduction of such a new IPR”.²⁴ A more recent, and more elaborate study by the Joint Research Centre of the European Commission is somewhat less skeptical,²⁵ recognizing that legal uncertainty regarding data ownership rights might negatively affect the efficiency of data markets. However, this study too concludes that there are, at present, no compelling economic arguments to advise regulatory intervention.

This article will, however, not further engage in economic analysis of a possible data property right, but focus instead on its consequences for the existing system of intellectual property. In order to do so, it is important to gain some preliminary understanding of what such a right might entail. Drawing from the sketch presented in the Staff Working Paper that underlies the European Commission’s recent Communication,²⁶ which seems to be largely based on the work of Prof. Herbert Zech,²⁷ we assume the features of a *data producer’s right* to be roughly as follows. The right would create a *right in rem* (i.e. a property right enforceable against the world) in respect of “non-personal or anonymised machine-generated data”. It would encompass “the exclusive right to utilise certain data, including the right to licence its usage. This would include a set of rights enforceable against any party independent of contractual relations thus preventing further use of data by third parties who have no right to use the data, including the right to claim damages for unauthorised access to and use of data.”²⁸

Whereas the Commission remains vague on the issue of initial ownership, according to Prof. Zech, the right would initially vest in “the economically responsible operator of equipment that generates the data (data producer)”.²⁹ As the European Commission concedes, thus allocating the right might be highly problematic in practice, since data-generating machines are often owned and operated – and corresponding investments done – by numerous different actors.³⁰

In view of its stated aims, the right would have to be fully transferable.³¹ As to the term of protection, the Commission is silent, but according to Prof. Zech “[a] short term of protection seems to be appropriate since using data by analysing them can be done relatively quickly”.³² The Commission excludes from the scope of the new right personal data, “as the protection of the latter is a fundamental right in itself under which natural persons should have control of their own personal data”.³³ Otherwise, the Commission’s proposal seems to encompass all sorts of machine-generated data.

As to its precise subject matter, Prof. Zech proposes: “A well-defined subject matter would be machine-readable coded information that is defined only by its representative characters (bits) irrespective of its content (data delimited on the syntactic level).”³⁴ This distinction is reflected in its intended scope. “The scope of protection would in particular include use by carrying out statistical analyses, but not the re-creation of the same data by independent measurement.”³⁵ The Commission seems to embrace this distinction, perhaps in the hope that such a limitation might prevent undue information monopolies.³⁶ We shall examine the distinction between syntactic and semantic data in the following section.

In sum, both in terms of its intended subject matter (data, an immaterial good) and its scope of protection (reproduction and use of data by third parties), the proposed data producer’s right would probably qualify as a right of intellectual property.

²⁴ Kerber (n. 21), 989. See also Dorner (n. 10), 625; Drexl (n. 13), 30 ff., 66.

²⁵ European Commission, Joint Research Centre (N. Duch-Brown, B. Martins & F. Mueller-Langer), ‘The economics of ownership, access and trade in digital data’, JRC Digital Economy Working Paper 2017-01.

²⁶ European Commission, Staff Working Document (n. 4).

²⁷ Zech, ‘Information as a tradable commodity’ (n. 19), 74-76.

²⁸ European Commission, Staff Working Document (n. 4), 33.

²⁹ Zech, ‘Information as a tradable commodity’ (n. 19), 75.

³⁰ European Commission, Staff Working Document (n. 4), 35.

³¹ Zech, ‘Information as a tradable commodity’ (n. 19), 76.

³² Ibidem.

³³ European Commission, Staff Working Document (n. 4), 33. Note that applying this distinction in practice will not be easy. For example, much machine data generated by automobiles is related to a person, and will therefore qualify as ‘personal data’; see ADAC Study (n. 5).

³⁴ Zech, ‘Information as a tradable commodity’ (n. 19), 74.

³⁵ Zech, ‘Information as a tradable commodity’ (n. 19), 75.

³⁶ European Commission, Staff Working Document (n. 4), 34.

3. Data in the system of intellectual property

Before further scrutinizing the proposed data right and its possible impact on the system of intellectual property law, we first need to examine how existing legal regimes in the EU deal with machine-generated data. This section will focus on relevant laws of intellectual property, and not discuss other possibly relevant legal mechanisms, such as tangible property, contract and trade secrets. While the focus of this section will be on the two IP regimes most closely associated with protecting data structures, copyright law and sui generis database right, we shall also make a brief excursion into the field of neighboring rights.

3.1 Copyright in data

Is there copyright in data? The textbook answer is a resounding *no*. As U.S. Supreme Court Justice Warren Brandeis famously stated in his dissent in the *INS* case, “[t]he general rule of law is, that the noblest of human productions - knowledge, truths ascertained, conceptions and ideas - after voluntary communication to others, are free as the air to common use”.³⁷ This axiom reflects what is called the *idea/expression dichotomy*: the dividing line between, as European copyright scholars prefer to say, protected form and unprotected content(s). The rule is generally codified in the U.S. Copyright Act (S. 102 (b)), as well in the TRIPs Agreement (art. 9(2)) and the WIPO Copyright Treaty (art. 2). In EU law we find a similar rule, albeit limited to computer software, in the Computer Programs Directive (art. 1(2)). Although these provisions do not expressly mention ‘data’, it is generally assumed, and uncontroversial – either on the basis of the ‘dichotomy’ or by way of direct application of copyright’s requirement of authorship and creativity – that there cannot be copyright in data per se.³⁸

Whereas data as such are thus excluded from copyright protection, copyright’s treatment of data compilations is more complex. The Berne Convention protects “collections of literary or artistic works such as encyclopaedias and anthologies” (art. 2(5)), but does not mention collections of mere data, and expressly denies copyright to “news of the day or to miscellaneous facts having the character of mere items of press information” (art. 2(8)). The TRIPs Agreement (art. 10(2)) more broadly protects “compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations”. The WIPO Copyright Treaty (art. 5) contains similar language. In line with these modern conventions the EU Database Directive instructs Member States to provide copyright protection to “databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation” (art. 3(1)).

In *Football Dataco and others* the Court of Justice clarified that the test of ‘the author’s own intellectual creation’ (in short, originality) implies that the selection or arrangement of the data is the result of creative choices. Applying art. 3(1), 2nd sentence (“No other criteria shall be applied to determine their eligibility for that protection”), the Court held that merely investing significant amounts of skill and labour does not justify a finding of originality. In other words, the Directive’s originality standard preempts any (quasi-)copyright protection for databases that is merely based on investment or other criteria.³⁹ The Court’s decision has brought to an end not only the United Kingdom’s long-standing practice of according copyright protection to compilations of data based on ‘skill and labour’ (investment), but also similar doctrines in other Member States. For example, the Dutch protection of non-original writings (‘geschriftenbescherming’) that existed for over a century in the Netherlands as a vehicle for protecting non-original writings and compilations, was formally abolished in 2014 following *Football Dataco*.⁴⁰

Football Dataco also rules out copyright protection for data compilations that are generated by machines without any human intervention. This is in line with the general rule that copyright requires acts of human authorship. Note however that the U.K. Copyright, Design and Patents Act

³⁷ J. Brandeis, diss. opinion, *International News Service v. Associated Press*, 248 U.S. 215 (1918).

³⁸ P.B. Hugenholtz, *Auteursrecht op informatie* (1989).

³⁹ *Football Association Premier League Ltd and Others v QC Leisure and Others; and Karen Murphy v Media Protection Services Ltd*, ECJ 4 October 2011, joined cases C-403/08 and C-429/08, ECR [2011] I-9083.

⁴⁰ See P.B. Hugenholtz, ‘Works of Literature, Science and Art’, in: P.B. Hugenholtz, A.A. Quaedvlieg & D.J.G. Vissier (eds.), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (2012) 54. See also P.B. Hugenholtz, ‘Goodbye, Geschriftenbescherming!’, Kluwer Copyright Blog, March 6, 2013, available at <http://kluwercopyrightblog.com/2013/03/06/goodbye-geschriftenbescherming/>.

appears to extend copyright protection to machine-created works: “in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken”.⁴¹ Whether this rule can co-exist with *Football Dataco* remains to be seen. According to the European Court there is no originality “when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom”.⁴²

Both TRIPs and WCT caution that copyright in compilations of data “not extend to the data or material itself”. Similarly, the Database Directive (art. 3(2)) warn that database copyright “shall not extend to their contents”, thus ruling out copyright protection for the data compiled in a database. The scope of database copyright protection is limited to the original structure (selection or arrangement) of the database (Database Directive, recital 15). Extracting (parts of) the contents of the database without appropriating the selection or arrangement does not infringe the copyright in the database.⁴³

3.2 *Sui generis database right*

Art. 7(1) of the Database Directive supplements the Directive’s copyright regime by obliging Member States to protect databases that result from substantive – qualitative or quantitative – investment. This is the *sui generis* database right that has made the Directive internationally (in)famous. The substantial investment is to be made “in either the obtaining, verification or presentation of the contents” of the database (art. 7(1)). ‘Obtaining’ is the act of gathering the data, works or other materials to be included in the database. ‘Verification’ relates to the checking, correcting and updating of data already existing in the database. ‘Presentation’ concerns acts such as digitizing (scanning) analogue files, or creating a thesaurus. A decision by the German Federal Supreme Court suggests that the standard of ‘substantial investment’ is not very hard to meet. Any investment in a database that “viewed objectively [...] is not wholly insignificant and easy to be made by anyone” would suffice.⁴⁴ The European Court of Justice has yet to opine on the level of this threshold criterion.

In four landmark cases concerning the unauthorized use by betting companies of sports events schedules (‘fixtures’) the European Court held that database right does not protect investment in generating the data or other contents of a database. According to the Court, “investment in the obtaining of the contents” (of a database) “refers to the resources used to seek out existing materials and collect them in the database but does not cover the resources used for the creation of materials which make up the contents of a database.”⁴⁵ The main argument for this distinction, as is transparent from the decision, is that the Database Directive’s economic rationale is to promote and reward investment in database production, not in generating new data. According to the Court, “[t]he purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.”⁴⁶

Thus investment in ‘creating’ data does not count towards investment. However, the European Court’s epistemological distinction between ‘creating’ and ‘obtaining’ data is not self-evident.⁴⁷ While the Court ruled out from *sui generis* protection such ‘invented’ data as horse racing schedules and football fixtures, the Court of Appeal of England and Wales in a subsequent decision held that facts observed – such as the scoring of a goal in football – are not ‘created’

41 Copyright, Design and Patents Act, U.K. 1988 (c. 48), c. 1, s. 9(3); see M. Perry and T. Margoni, ‘From Music Tracks to Google Maps: Who Owns Computer-generated Works?’, 26 *Computer Law & Security Review* (2010) 621-629.

42 *Football Dataco and others* (n. 39).

43 *The Newspaper Licensing Agency & others v Meltwater & the PRCA*, High Court of Justice (Chancery Division), 26 November 2010, [2010] EWHC 3099.

44 Bundesgerichtshof (Federal Supreme Court), 1 December 2010, case I ZR 196/08.

45 *Fixtures Marketing Ltd v Oy Veikkaus Ab*, ECJ 9 November 2004, case C-46/02, ECR [2004] I-10396; *British Horseracing Board v William Hill Organization*, ECJ 9 November 2004, case C-203/02, ECR [2004] I-10415; *Fixtures Marketing Ltd v Svenska Spel AB*, ECJ 9 November 2004, case C-338/02, ECR [2004] I-10497; *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)*, ECJ 9 November 2004, case C-444/02, ECR [2004] I-10549.

46 *British Horseracing* (n. 45), para. 31.

47 M.J. Davison & P.B. Hugenoltz, ‘Football fixtures, horseraces and spin-offs: the ECJ domesticates the database right’, [2005] *European Intellectual Property Review* 113-118.

data.⁴⁸ But where in this spectrum between purely synthetic data and data ‘observed’ should we place machine-generated data? The answer depends on the type of data that the machine processes. For example, sensor data produced by a radar system or observation satellite are likely to qualify as data ‘observed’, and concomitant investments may thus be taken into account when applying the database right. Conversely, computer-generated airline schedule data squarely falls under the rubric of ‘created’ data excluded by the European Court.

Whereas the *sui generis* right comes close to a property right in aggregate data – and has been justly criticized for its potential of creating harmful information monopolies⁴⁹ – the Directive’s recitals admonish that the *sui generis* right “does not in any way constitute an extension of copyright protection to mere facts or data” (recital 45) and “should not give rise to the creation of a new right in the works, data or materials themselves” (recital 46).

Indeed, the database right comes with several statutory limits in order to prevent the right from extending to the data in the database per se. The *sui generis* right protects database producers against ‘extraction’ and ‘reutilization’ of the whole, or a substantial part, of the database (art. 7). In other words, non-substantial takings of data are permitted without authorization. Moreover, as the European Court clarified in *British Horseracing*,⁵⁰ *sui generis* protection does not extend beyond misappropriation of data (contents) that result from substantial investment. In other words, the database right tolerates takings of (potentially valuable) data that are not the product of substantial investment.

Another delimiting factor is the notion of ‘database’. Art. 1(2) of the Directive defines this as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means”. While the Explanatory Memorandum generally describes the contents of the database as “‘information’ in the widest sense of that term”,⁵¹ the compiled data or materials must be ‘independent’, that is to say, “materials which are separable from one another without their informative, literary, artistic, musical or other value being affected”.⁵² Therefore an audiovisual, cinematographic, literary or musical work or a sound recording does not qualify as a database, even if it can be perceived as a representation of data (recital 17). This reflects a clear intention on the part of the European legislature to avoid extensive overlaps between the database right and existing copyright and neighbouring rights.⁵³

Finally, according to art. 1(2) of the Database Directive, the individual elements of the database must be “arranged in a systematic or methodical way”. This squarely rules out protection – whether by copyright or by database right – of (collections of) raw machine-generated data.

3.3 *Phonogram protection*

In addition to copyright and database right, the phonographic right – one of the four neighbouring rights recognized at EU level – merits brief consideration. The rights of phonogram producers are harmonized by the Rental Right Directive (currently Directive 2006/115/EC) and the Information Society Directive (Directive 2001/29/EC). These Directives leave defining the notion of ‘phonogram’ to the WIPO Performances and Phonograms Treaty (WPPT) of 1996. According to the WPPT (art. 2) ‘phonogram’ means “the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incor-

48 *Football Dataco & Others v Stan James Plc & Others and Sportradar GmbH & Others*, Court of Appeal (Civ. Division), 6 February 2013, [2013] EWCA Civ 27.

49 See J. H. Reichman, ‘Database Protection in a Global Economy’, [2002] *Revue Internationale de Droit Economique* 455-504.

50 *British Horseracing* (n. 45).

51 Explanatory Memorandum, Proposal for a Council Directive on the Legal Protection of Databases, 19.

52 *Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE (OPAP)* (n. 45).

53 On the other hand, the European Court has held that the geographical data in topographic map are sufficiently ‘independent’ to for the map to qualify as a protected ‘database’. According to the Court, “geographical information extracted from a topographic map by a third party so that that information may be used to produce and market another map retains, following its extraction, sufficient informative value to be classified as ‘independent materials’ of a ‘database’ within the meaning of that provision.” *Freistaat Bayern v Verlag Esterbauer GmbH*, CJEU 29 October 2015, Case C-490/14.

porated in a cinematographic or other audiovisual work”. By including ‘other sounds’ and ‘a representation of sounds’ this definition apparently encompasses raw audio data stored (‘fixed’) on a digital medium.

Whether there is a threshold criterion for the phonographic right that might delimit both the substance and scope of the right, is as yet unsettled under EU law. In its 2008 *Metall auf Metall* decision the German Bundesgerichtshof extended neighbouring rights protection to every single recorded note of a sound recording, because the record producer’s investment is reflected in every – even very minor – part of the recording.⁵⁴ This suggests that no threshold criterion (no investment minimum) would apply. In a follow-up decision the German Constitutional Court has however held that a phonographic right of unlimited scope, as contemplated by the Federal Supreme Court, may collide with the ‘freedom of art’ that is constitutionally guaranteed in Germany (art. 5 of the Basic Act). Most recently, the Bundesgerichtshof has referred questions regarding the scope and limitations of the phonographic right to the EU Court of Justice.⁵⁵

3.4 Assessment: impact of data property on the system of intellectual property law

As this section shows, both copyright and database right do not extend to data per se. Both regimes do conditionally offer protection to data compilations that result from creative selection and arrangement (copyright) or substantive investment (database right). Both regimes deny protection to machine-generated, raw data. For copyright, this follows from the axiom that only acts of authorship conducted by human beings are protectable. For database right, this is a consequence of the sui generis right’s categorical delimitation: only data structured in a ‘database’ qualify for protection. Moreover, the sui generis right’s substantial investment test sets an – admittedly fairly low – minimum threshold. If operating a machine that records sensor data does not require substantial investment (for example, a low-cost digital weather station or a bicycle computer), then this will not result in a protected database. The CJEU’s ‘Fixtures’ decisions pose an additional hurdle to sui generis protection for machine-generated data by excluding ‘created’ data from protection, thus ruling out machine-generated synthetic data.

In sum, introducing a right in raw, machine-generated industrial data, as envisaged in the Commission’s Communication, would go far beyond the main intellectual property regimes presently existing in Europe in the field of data and information, copyright and database right.

Disruptive overlaps

How would this affect existing intellectual property law? In the first place, creating a new layer of rights in machine-generated data would cause broad and disruptive overlaps with copyright and sui generis right in productions made with the aid of digital machines. For example, a film shot with a digital camera would qualify not only as a work protected by copyright, but also as machine-generated (sensor) data subject to a ‘data producer’s right’. Similarly, the aggregate stock market data in a financial database would be protected both by sui generis right and ‘data producer’s right’, since the data are recorded automatically by the computerized stock exchange.

Whereas the EU legislature has clearly intended to prevent the database right from spilling over into the realms of copyright and neighbouring rights, the ‘data producer’s right’ would lead to extensive overlaps. As a consequence, the new right might give rise to multiple competing claims of ownership in the same content. To continue with our first example, while the creators of the film (e.g. the director, screen writer, and other creators of the film) could claim authorship in the cinematographic work, the owner or operator of the camera might claim ‘data property’ in the photographic data (i.e. the digital representation of the film) – surely, to the unpleasant surprise of the film’s producer. Similar examples might be given with regard to digital photographs or e-books. In the second example, the database producer might be confronted with ‘data property’ claims of the stock exchange, or the exchange’s computational services company.

⁵⁴ *Metall auf Metall*, Federal Supreme Court, 20 November 2008, case I ZR 112/06, *GRUR* 2009, 403; German Constitutional Court, 31 May 2016, case I BvR 1585/13 of, *GRUR* 2016, 690.

⁵⁵ *Metall auf Metall III*, Federal Supreme Court, 1 June 2017, case I ZR 115/16.

Another consequence of this wide-ranging overlap would be that statutory limitations and exceptions under copyright, neighbouring rights or database right are ‘trumped’ by data producer’s right. For example, both copyright and database right in the EU presently allow users to copy or extract data from databases for non-commercial research purposes. Unless, the ‘data producer’s right’ would replicate all relevant existing exceptions, it would undercut these essential user freedoms.

This is especially true for *data mining*. Strangely, while the Commission’s Communication on ‘Building a European data economy’ ponders the introduction of an exclusive right in machine-generated data, one of the highlights of the DSM Directive proposal that is currently being debated in the European Parliament is a mandatory exception, both under copyright and database right, for text and data mining by non-commercial research organisations.⁵⁶

In line with Prof. Zech’s suggestions, the European Commission in its Staff Working Paper attempts to alleviate concerns of wholesale overlap by distinguishing *syntactic* from *semantic* data. The proposed ‘data producer’s right’ would be conceived in such a way that “only the syntactical level of information is protected, not the semantic level”⁵⁷ What is probably meant here is that the raw data would be protected only as regards its digital representation (the machine-readable bits and bytes, the ‘ones and zeros’ in the digital file), not the informational content that these data convey. Thus, the European Commission hopes, the new right would not extend to ideas and information, and the new right would not become a “super-IP right”.⁵⁸

But would such a distinction really prevent the new right from extensively overlapping with existing IP rights? I do not believe so. The problem here is that digital data are commonly coded and interpreted following standardized rules and protocols. In other words, there usually will be a one-on-one relationship between the (syntactic) data substrate and the (semantic) content layer. Returning to our example of the digitally produced film, any copy of the film’s digital file (the syntactic data) would by necessity also reproduce the copyright protected work (the semantic layer). Thus, the new data right could be invoked against any digital copying (or streaming) of the digitized copyright work. For the same reason, the new right would broadly overlap with database right, even if its scope were confined to the syntactic layer. The phonographic right discussed above illustrates this point. Whereas its subject matter, like the proposed ‘data producer’s right’, is limited to the recorded signal (i.e. syntactic audio data), its scope extends into the semantic realm. Reproducing a cd recording of a musical performance will, by necessity, result in the reproduction of the underlying musical work and performance.

The only way to prevent the data right from becoming an all-encompassing ‘super-IP right’ would be to categorically exclude all data that (possibly) represent subject matter protected under traditional IP regimes: not just copyright, database right and neighbouring rights, but also design right and perhaps even patents. But even a non-overlapping data right would have seriously corrosive effects on the system of intellectual property, for various reasons. First, it would undermine the economic incentives that underlie IP rights. For example, the main rationale of the sui generis right is to promote and reward investment in the building of databases from pre-existing data and other materials. This incentive is clearly undercut if a lower-tier, no-threshold right in machine-generated data were to exist in parallel. Second, and more importantly, it would compromise the general principle of intellectual property – whether utilitarian or grounded in natural law theory – that protection be reserved to creation, innovation or otherwise meritorious investment. A data right in all data produced by machines might, on occasion, protect assets of considerably economic value, but nothing of merit. This has ramifications, in particular, at the political level. With intellectual property laws under increasing fire, legislatures – at EU and national level – need powerful and convincing arguments to defend existing regimes and introduce new rights. In this volatile political climate proposing a data producer’s right with the

⁵⁶ 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. 3(1) of the proposed Directive provides: “Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.”

⁵⁷ Zech, ‘Information as a tradable commodity’ (n. 19), 74; European Commission, Staff Working Document (n. 4), 34.

⁵⁸ European Commission, Staff Working Document (n. 4), 34.

sole aim of (better) protecting the economic assets of the automotive (or any other) industry will surely backfire. Not only is such an initiative likely to fail in the legislative process, but it will also (re)ignite broader discussions on the legitimacy of intellectual property law.

No legal certainty

Another, more mundane objection against a property right in data lies in its inherent lack of legal certainty. Although it is still not fully conceptualized, it is difficult to imagine a data right sufficiently stable in terms of subject matter, scope and ownership to be admitted to the ranks of intellectual property. As to subject matter, if the right vests in data generated by machine processes, which data would it protect? All the data that the machine produces within a given time frame (e.g. an hour, a minute or a second)? Or all the data that result from a finite machine process (e.g. all the data gathered by a satellite that sensors the earth)?

Admittedly, the sui generis database right has already raised similar questions. With data in a database constantly being updated, what exactly constitutes the protected database? But in database law the definition of 'database' and requirement of substantial investment create at least some measure of permanency in the subject matter and scope of the right. This stability is, however, completely absent from the data producer's right. The problem here is that industrial data generation mostly occurs in real time. The 'velocity' – the dynamic nature – of big data makes it very difficult, if not impossible, to identify a stable object of protection.⁵⁹ The subject matter of the right is simply too fluid. If this is to become a full-fledged right of intellectual property that is enforceable against the world, it should be possible to ascertain its subject matter – and, by implication, its scope of protection – with sufficient legal certainty.

A related problem is allocating ownership of the right. Since the right would be sparked by machine operations, no causal ownership connection with a natural person as, for instance, in copyright, exists. As Prof. Zech and the European Commission suggest, ownership might be vested in the person owning or operating the machine that generates the data. This, however, is hardly a reliable rule. As the OECD points out in its groundbreaking study on 'big data', multiple actors/stakeholders might claim ownership to the data, both upstream and downstream in the process of generating and processing data.⁶⁰

In sum, the proposed 'data producer's right' would most likely seriously affect, or even distort, existing copyright and database right, and its underlying incentives. Moreover, in the absence of clear and predictable rules circumscribing its subject matter, scope and ownership, it would lead to gross legal uncertainty. This conclusion in itself justifies serious restraint on the part of the EU legislature, even without considering the adverse effect the new right might have on the free flow of information, one of the cornerstones of the emerging information society.

4. Data property and the free flow of information

The exclusion of data per se from the scope of existing intellectual property regimes is not merely ontological. Although old-school author's right scholars might argue that data are not copyright works, *because* data are not 'created', this is at best a partial explanation for this exclusion.⁶¹ Rather, IP law's abhorrence of protecting data reflects implicit or explicit information policies not to protect data. These policies are, in turn, informed by a variety of public interest values and concerns. In the first place, of course, freedom of expression and information – the fundamental freedom enshrined in the European Convention on Human Rights (art. 10 ECHR), and the EU Charter (art. 11).

As case law and doctrine regarding the Convention teach, this fundamental freedom is to be interpreted broadly. Article 10 ECHR is phrased in media-neutral terms and thus applies to old and new media alike. The term 'information' (in French: 'informations') comprises, at the very least, the communication of facts, news, knowledge and scientific information. It also, undoubtedly, extends to syntactic data; the scope of article 10 is not limited to (semantic) speech, but extends to the means used for communication purposes. To what extent the article's protection

extends to *commercial* speech has been a matter of some controversy. However, the European Court of Human Rights has made it clear that information of a commercial nature is indeed protected, albeit to a lesser degree than political speech.⁶²

Article 10 ECHR prevents states from creating restrictions to the free flow of information unless such restrictions "are prescribed by law and are necessary in a democratic society [...] for the protection of the [...] rights of others". From this perspective data and information must flow freely, uninhibited by property rights or other state-created restrictions, unless a compelling societal need for protection ("necessary in a democratic society") can be established. Freedom of expression and information, in other words, makes intellectual property rights in data the exception to the default rule of freedom.⁶³

This brings us back to the question of expediency. The EU legislature would bear the burden of proving that a property right in machine-generated data is a socially and economically justifiable ('necessary') interference in the freedom of European citizens and companies to freely access and reuse machine-generated data. In light of the abundant praise in political literature of 'big data'⁶⁴ and big data mining as drivers of progress and prosperity, and the absence of convincing evidence supporting a property right in machine-generated data, this burden of proof would be difficult to surmount.

In particular, freedom of expression and information militates strongly against any new right of intellectual property that would restrict scientists' access to data – a freedom that the EU legislature expressly wishes to preserve as regards 'text and data mining' by non-commercial research institutions. Note that this freedom finds additional support in art. 13 of the EU Charter ("The arts and scientific research shall be free of constraint. Academic freedom shall be respected"). Another area where a data right would patently conflict with freedom of expression and information is journalism, where mining data has become an essential tool for investigative reporting.⁶⁵

A second over-arching policy consideration underlying intellectual property law's reluctance to protect data per se is freedom of competition (enshrined in art. 16 of the EU Charter as the "freedom to conduct a business"). This economic freedom traditionally sets limit to intellectual property rights and is one of the rationales underlying the idea/expression dichotomy. As the literature on the economic potential of 'big data' demonstrates, machine-generated data are both input and output to innovative manufacturing processes and value-added services, and thus a major driver of economic growth. This calls for measures promoting access to data and fostering data mining rather than commodification of data by creating property rights in data. Unless equipped with wide-ranging exceptions and safety valves, introducing a new property right in data might create undesirable data monopolies that could impede, rather than foster, competition in this rapidly evolving European 'data market' place.⁶⁶ At the global level, introducing data property rights in the EU might well lead to anti-competitive distortions as well, in cases where European data users are obliged to purchase licenses for usage of data freely available to their competitors in the United States.

⁶² See e.g. *Hertel v. Switzerland*, ECHR 25 August 1998, Publications of the ECHR, Reports 1998-VI.

⁶³ See (for copyright) *Ashby Donald and Others v France*, European Court of Human Rights 10 January 2013, No. 36769/08; ECLI: 2013:0110JUD00367690.

⁶⁴ OECD (n. 1); see also European Commission, 'A Digital Single Market Strategy for Europe', Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 6 May 2015, COM (2015) 192 final, p. 14: "Big data, cloud services and the Internet of Things are central to the EU's competitiveness." I. Hargreaves a.o., *Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining*. Report from the Expert Group to the European Commission (2014), doi:10.2777/71122.

⁶⁵ See *Dammann v. Switzerland*, ECHR 25 April 2006, no. 77551/01. The Court opines that "the gathering of information was an essential preparatory step in journalism and an inherent, protected part of press freedom". Surprisingly, data mining for journalistic purposes seems to be overlooked in the proposed TDM exception of the DSM Directive.

⁶⁶ Max Planck Institute for Innovation and Competition, 'Data Ownership and Access to Data', Position Statement of the Max Planck Institute for Innovation and Competition, Max Planck Institute for Innovation & Competition Research Paper No. 16-10 (2016), 2.

⁵⁹ Drexl (n. 13), 15.

⁶⁰ See OECD (n.1), 195-196; Drexl (n. 13), 6, 39.

⁶¹ See generally P.B. Hugenholtz, *Auteursrecht op informatie* [Copyright in information] (1989).

Finally, a novel data right would also create new barriers to the freedom of services, one of the four freedoms of the EU Internal Market. In its Communication on 'Building A European Data Economy', the European Commission interprets this freedom, together with the freedom of establishment, as implying a "principle of free movement of data within the EU".⁶⁷ It is hard to see how a novel property right in machine-generated data would square with this freedom.

5. Conclusion

This article makes the case against introducing a data property right. As we have seen, there are abundant reasons to reject this idea. A 'data producer's right' in machine-generated data would ride roughshod over the existing system of intellectual property. It would violate one of the IP system's main maxims that data per se are "free as the air for common use", and that only creative, innovative or other meritorious investment is protected. It would corrode IP's mechanism of incentives by creating an underlayer of rights that automatically protects all data produced with the aid of machines. This parallel layer of rights would, most likely, extensively overlap with other IP regimes, and thus create undue impediments for the exploitation of existing rights, such as copyright and database right, and endanger user freedoms guaranteed under these regimes. It would also give rise to gross legal uncertainty, since the 'velocity' of real-time data generation makes it difficult, or even impossible, to circumscribe its subject matter, scope of protection and ownership. More generally, a property right in machine-generated data would contravene freedom of expression and information, and pose new obstacles to freedom of competition, freedom of services and the 'free flow of data'.

The great promise of big data – for the economy, for science, for society at large – is that this resource may be freely exploited. Introducing a 'data right' preventing unauthorized access to big data would directly contradict this. Indeed, it is hard to understand how the proposed new right would square with the text and data mining proposed by the European legislature in the current EU copyright reform package.

If, as the European Commission rightly believes, "big data, cloud services and the Internet of Things are central to the EU's competitiveness"⁶⁸, one would have expected supporters of a novel data producer's right to present powerful and convincing arguments in support of this revolutionary proposition. So far, the case for a property right in machine-generated data has yet to be made. As Prof. Drexl and others have pointed out, the existing toolkit of trade secret protection, contract and technological protection measures offers data producers ample means of securing de jure or de facto exclusivity.⁶⁹ Rather than wasting time and effort on inventing a data producer's right, the focus of the European Commission's possible interventions should be on fostering access to big data.⁷⁰

Fortunately, the possible introduction of a 'data producer's right' is only one of several policy options currently being contemplated by the Commission in its 'European Data Economy' initiative. As this article has shown, there are innumerable reasons for the European Commission not to go down this road. If nothing else, Europe's experience with the sui generis database right should give reason for extreme caution. In 2005, less than ten years after it was introduced at EU level, the European Commission published its first review of the Database Directive, a remarkably self-critical assessment. According to the Commission, "[t]he economic impact of the 'sui generis' right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases".⁷¹ The Commission's report also suggests that the sui generis right has not helped the European industry to overcome its productivity gap vis-à-vis the United States.⁷² It points to several other deficiencies of the sui generis right, such as its uncertain contours, and its proximity to a property right in data that might negatively affect innovation and growth. The report

⁶⁷ European Commission, 'Building A European Data Economy' (n. 4), 7.

⁶⁸ DSM Strategy, p. 14.

⁶⁹ Drexl (n. 13), 66.

⁷⁰ See Drexl (n. 13), 41 ff; Max Planck Institute Position Statement (n. 66); see also European Commission, Staff Working Document (n. 4), 36 ff.

⁷¹ European Commission, 'First evaluation of Directive 96/9/EC on the legal protection of databases', DG Internal Market and Services Working Paper, Brussels, 12 December 2005, p. 5.

⁷² European Commission, 'First evaluation of Directive 96/9/EC on the legal protection of databases', DG Internal Market and Services Working Paper, Brussels, 12 December 2005, p. 22-23.

juxtaposes the legal situation in the EU with that in the United States, where since the Supreme Court's landmark *Feist* decision⁷³ no legal protection for 'sweat of the brow' based databases exists. Nevertheless, as the Commission wryly observes, "there has been a considerable growth in database production in the US, whereas, in the EU, the introduction of 'sui generis' protection appears to have had the opposite effect."⁷⁴

The 2005 evaluation report concludes by offering four possible ways forward: (1) repeal the whole Directive; (2) withdraw the sui generis right, (3) amend the sui generis to clarify its scope, and (4) maintain the status quo. Despite these harsh conclusions, the database right has yet to be amended or repealed. The problem is that removing (parts of) a directive is, politically and legislatively, even more complex than substantive harmonization. Repealing the database right would require a new directive not only rescinding major parts of the existing Directive, but also – absurdly – instructing Member States to *abolish* sui generis database protection. Unsurprisingly, the only option that has so far materialized from the Commission's assessment is no. 4: "do nothing".⁷⁵

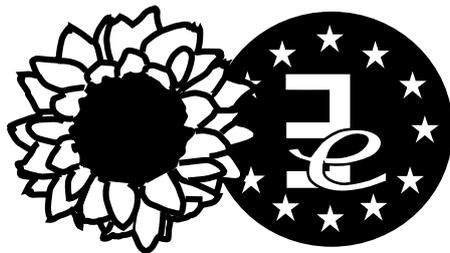
The lessons of the EU's database experiment⁷⁶ are not to be forgotten. Introducing a novel right of intellectual property should never be done in the spur of the moment. Any new right should be contemplated only after conducting thorough economic, evidence-based research that demonstrates a real need for the right and predicts its consequences for information markets and society at large. Assuming a convincing case in support of the right might indeed be made, this should then be followed by systematic legal analysis of the new right's contours and scope, and of its impact on the existing system of intellectual property. The two-tiered structure of the Union does not allow for legal experimentation at the EU level. Like the database right, a 'data producer's right' would be here to stay – a most unwelcome guest in the house of European intellectual property.

⁷³ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

⁷⁴ European Commission, 'First evaluation of Directive 96/9/EC on the legal protection of databases', DG Internal Market and Services Working Paper, Brussels, 12 December 2005, p. 24.

⁷⁵ Note that the European Commission has launched a public consultation on a possible review of the Database Directive on 24 May 2017, see <https://ec.europa.eu/digital-single-market/en/news/commission-launches-public-consultation-database-directive>.

⁷⁶ S.M. Maurer, P.B. Hugenholtz & H.J. Onsrud, 'Europe's database experiment', 294 *Science* 789-790.



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