

“Towards a modern, more European copyright framework”, or, how to rebrand the same old approach?

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In a 2000 article for the *European Intellectual Property Review* commenting on the political agreement on the Information Society Directive,¹ Hugenholtz opined that ‘the cannons are silent, the smoke has cleared over the battlefield, the dead have been buried, and the surviving lobbyists - the soldiers of fortune of modern-day politics - have moved on to other theatres of war’.² The reform of copyright in those days of peer-to-peer file sharing, when the music industry was caught off-guard by digitising technologies such as MP3 encoding, and confident that online markets for digital media content would not catch on,³ were in essence a modernisation project. The WIPO Internet Treaties,⁴ as they are known, sought to ensure that the copyright framework was reinforced to ensure the continued protection of copyright-protected subject matter in the digital environment, and to ensure that there was no lacuna in which copyright law could be considered to be inapplicable. The Commission’s latest forays into copyright reform on the Internet, a pillar of its Digital Single Market Strategy,⁵ are also framed as a modernising project, seeking to ensure that copyright protection in the EU is characterised by a ‘modern, more European’ framework.⁶ Despite the talk of modernisation, however, and embracing digital technologies, it would appear that the more things change, the more they stay the same.

In particular, Hugenholtz’s stated concerns regarding the passage of the Information Society Directive appear particularly pertinent to the current negotiations over the proposed Directive on copyright in the Digital Single Market.⁷ In September 2018, some controversial amendments were passed to already controversial Articles of the proposed Directive, known

¹ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

² P Bernt Hugenholtz, ‘Why the Copyright Directive Is Unimportant, and Possibly Invalid.’ (2000) 11 *European Intellectual Property Review* 499, 499.

³ For a fascinating insight into the music industry in the early days of the Internet’s mass adoption, see Steve Knopper, *Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age* (Free Press 2009).

⁴ The World Intellectual Property Organisation Copyright Treaty (1996) and World Intellectual Property Organisation Performances and Phonograms Treaty (1996)

⁵ European Commission, ‘A Digital Single Market Strategy for Europe’ (2015) COM(2015) 192.

⁶ European Commission, ‘Towards a Modern, More European Copyright Framework’ (2015) COM(2015) 626.

⁷ European Commission, ‘Proposal for a Directive on Copyright in the Digital Single Market’ (2016) COM(2016) 593.

as the Axel Voss amendments (named after the MEP who is both rapporteur on the Directive, as well as the proposer of the changes adopted). As well as presenting a more restrictive approach to text and data mining under a new Article 3a, Article 11 concerning the protection of press publishers with a form of ancillary copyright (framed by critics as a ‘link tax’) and Article 13 on filtering of copyright protected content (or, alternatively ‘censorship machines’) have been upheld, using language slightly different with similar effects. These proposals, as well as their potentially detrimental effects, have been considered in considerable detail by other academics in this publication, and will not be explored further here.⁸ The intention instead is to consider how exactly legislation intended to modernise and render more flexible the environment for online copyright protection and exploitation of digital media has instead had the opposite effect. One answer for this is the role of lobbying. The Directive is subject to claims of intense lobbying, the results of which will have considerable implications for the sharing of digital content on the Internet. As will be discussed, there have been accusations of bad faith on both sides of the debate, and of undue influence of lobbyists over the process, whether the finger is pointed at the news media, or tech companies such as Google. Yet to do so ignores the fact that lobbying is conducted by both sides, and that it is instead more pertinent to consider why some lobbyists are more successful than others. In particular, what this case suggests is that new dynamics in the online environment are serving not to change the trajectories of law-making in this field, but instead serve to reinforce them. Or, to put it another way, the more things change, the more they stay the same.

A vociferous debate: noisy cannons, a fog of war, and recriminations on both sides

It is worth stating that at this stage, the cannons have not yet ceased, nor has the smoke cleared, to use Hugenholtz’s phrasing. Despite the vote in the European Parliament on modified versions of Articles 11 and 13, and the adoption of a plenary position, the proposed Directive is now being discussed in the trilogue, with a final vote on the negotiated text expected to take place in early 2019. While it cannot yet be concluded that the text as voted on by the Parliament will be adopted in the approved Directive, it is unlikely that it will change substantially. The trilogue will be a quieter phase of the legislative process following a very public, and indeed

⁸ See for example Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio, ‘The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform’ (2017) 39 European Intellectual Property Review 202; Sabine Jacques and others, ‘Automated Anti-Piracy Systems as Copyright Enforcement Mechanism: A Need to Consider Cultural Diversity’ (2018) 40 European Intellectual Property Review 218.

vociferous, phase. Given the impact that the Directive may have on both the news publishing and social media industries, it is unsurprising that the substance of the proposed law has been subject to significant media attention and intense lobbying. Lobbying is not used here in a pejorative sense – lobbying forms part of the evidence-gathering process in policy making, in which stakeholders all seek to influence the substance of proposed legislation, be they industry representatives, academics, civil society groups or even individual citizens.⁹ The EU's concerns regarding the legitimacy (or justification) of its actions necessitates a participatory form of governance, based on expert evidence and hearing a range of voices on a particular issue or sector.¹⁰ Lobbying works as a form of exchange, in which stakeholders provide information to legislators that is required to justify and adopt appropriate legislative solutions, in return for the ability to influence that legislation to meet their specific needs or objectives.¹¹ To dismiss the role of lobbying over the form and substance of proposed laws is to dismiss the importance of participation in legislative processes, both to provide evidence and represent different parties whose interests ought to be reflected in legislation passed. For this reason, to state that the reason that copyright reform in this field is following a typical trajectory of increased restrictions and limited exceptions due to the role of lobbying provides an unsatisfying, and indeed incomplete answer. Instead, it is important to look at the dynamics that make certain types of lobbying, and certain types of lobbyists, more successful.

That is not to say that there are no concerns regarding the tone and behaviour of all parties during these debates, and accusations have been made on both sides regarding dubious conduct. One of the more concerning allegations concerns an article indicating that German MEPs from the CDU were applying pressure on other MEPs to vote in favour of the controversial Voss amendments to the Articles of the Directive,¹² which was then apparently removed for reasons

⁹ Robert Mack, 'Lobbying Effectively in Brussels and Washington - Getting the Right Result' (2005) 9(4) *Journal of Communication Management* 339, 339; David Coen, 'Empirical and Theoretical Studies in EU Lobbying' (2007) 14 *Journal of European Public Policy* 333, 334.

¹⁰ Principles of better governance laid out in European Commission, 'European Governance: A White Paper' (2001) COM(2001) 428; and refined and further justified in European Commission, 'Better Regulation: Delivering Better Results for a Stronger Union' (2016) COM(2016) 215.

¹¹ Heike Klüver, *Lobbying in the European Union: Interest Groups, Lobbying Coalitions, and Policy Change* (Oxford University Press 2013) 15.

¹² An Internet Archive stored-version of the article can be found at Martin Banks, 'Pressure Grows Ahead of Key Parliamentary Vote on Major Shake up of EU-Wide Copyright Laws - EU Today' (*EU Today*, 29 May 2018) <<https://web.archive.org/web/20180529173127/https://eutoday.net/news/politics//pressure-grows-ahead-of-key-parliamentary-vote-on-major-shake-up-of-eu-wide-copyright-laws?token=~v8Rq8nWWJwj9xZusVbof0wwTrT2j9B6>> accessed 20 September 2018.

unknown,¹³ before being replaced by a new version of the article with these statements removed, and a far more favourable discussion of the proposed amendments added.¹⁴ Whether this was the result of applied pressure, or instead new information coming to light, the circumstances surrounding its removal have contributed to a feeling of suspicion and distrust over the passage of the Directive. This distrust spilled into public debate, with MEP Voss arguing that there was considerable lobbying against the Directive by Internet platforms, and that many of the arguments against the Directive constituted little more than ‘fake news’.¹⁵ Similarly, MEP Julia Reda, shadow rapporteur for the Directive, indicated that media industry lobbying was no less fierce, referring to the undue pressure being applied both to both MEPs and journalists critical of the Directive, in particular the Axel Springer publishing company.¹⁶ That both sides were critical of the lobbying undertaken by those supporting and criticising the proposed Directive is a testament to just how fierce this battle appears to have been, both in public and behind the scenes. Yet what can help us to understand why it appears that media lobbyists have been successful at this juncture, with the Internet platforms disadvantaged in this debate? It is necessary to consider both the new dynamics at play in these debates, as well as the historical context that facilitates a trajectory that could be referred to as ‘copyright maximalism’.¹⁷

The more things change...

In a short piece published in the *European Intellectual Property Review* published two years ago, I argued that the proposed Portability Regulation¹⁸ could constitute a significant shift in the Commission approach to copyright laws applicable on the Internet, signifying greater

¹³ As discussed in Mike Masnick, ‘EU Parliament Members Play Hardball On Terrible Copyright Policies, Article Highlighting Sketchy Tactics Magically Disappears’ (*Techdirt*, 2018) <<https://www.techdirt.com/articles/20180531/00285739946/eu-parliament-members-play-hardball-terrible-copyright-policies-article-highlighting-sketchy-tactics-magically-disappears.shtml>> accessed 20 September 2018.

¹⁴ Martin Banks, ‘Bitter Row over Copyright Law Intensifies Ahead of Key Parliamentary Vote - EU Today’ (2018) <<https://eutoday.net/news/business-economy/2018/bitter-row-over-copyright-law-intensifies-ahead-of-key-parliamentary-vote>> accessed 20 September 2018.

¹⁵ Axel Voss, ‘Copyright Directive: Statement by Axel VOSS (EPP,DE), Rapporteur’ (*European Parliament*, 7 February 2018) <https://multimedia.europarl.europa.eu/en/copyright-directive-statement-by-axel-voss-eppde-rapporteur-_I158298-V_v> accessed 20 September 2018.

¹⁶ Julia Reda, ‘What’s Really behind the EU Law That Would “Ban Memes” – and How to Stop It before June 20’ (*Julia Reda*, 6 June 2018) <<https://juliareda.eu/2018/06/saveyourinternet/>> accessed 20 September 2018.

¹⁷ Blayne Haggart and Michael Jablonski, ‘Internet Freedom and Copyright Maximalism: Contradictory Hypocrisy or Complementary Policies?’ (2017) 33 *The Information Society* 103.

¹⁸ Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market

consumer choice and less restrictive protections over digital content.¹⁹ In hindsight, this cautiously optimistic assessment was premature. The Regulation, and indeed the copyright reforms originally discussed in the context of the Digital Single Market Strategy did suggest a new, changed position on the interaction between new technologies and existing copyright laws. The economic crisis of the late 2000s served as an impetus for renewed attempts to facilitate trade and commerce both within the EU and with the EU's external trade partners, in order to both deal with the severity of the recession facing Eurozone countries,²⁰ with the promotion of the EU's IP-protected knowledge assets forming a central pillar of the measures as ensuring a return to growth and high employment.²¹ The Digital Single Market Strategy similarly placed copyright reform within this context, and argued that an ambitious, connected digital single market, free of borders, facilitated through the 'modernisation copyright laws in the light of the digital revolution and changed consumer behaviours' would allow for this type of growth.²² Measures considered included easing restrictions on text and data mining, facilitating greater access to cross-border content and opening up new avenues for content creators.²³ The implementation of the Portability Regulation, allowing for users of streaming content such as Netflix to legally access the content paid for in their own Member State when travelling to a second Member State seemed a small, yet positive step forward.

However, when the Copyright Directive proposal was published, it seemed that a step was taken back. While the proposed Article 3 on text and data mining did suggest some lessening of restrictions, the ancillary right under Article 11 and the filtering mechanisms under Article 13 caught many by surprise. So too did the language of the explanatory memorandum accompanying the proposal, which focused significantly on the inability of news publishers to effectively license and monetise content, and the need to 'share' value to the benefit of consumers.²⁴ What had changed in the meantime? If I were to summarise, it would be to say that some of the shine of Internet platforms has worn off, and that if we had seen the Digital Revolution as claimed in the Digital Single Market Strategy, some were concerned that perhaps

¹⁹ Benjamin Farrand, 'The EU Portability Regulation: One Small Step for Cross-Border Access, One Giant Leap for Commission Copyright Policy?' (2016) 38 *European Intellectual Property Review* 321.

²⁰ European Commission, 'Economic Crisis in Europe: Causes, Consequences and Responses' (2009) *European Economy* 7 1.

²¹ European Commission, 'A Single Market for Intellectual Property Rights: - Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe' (2011) COM(2011) 287 3.

²² European Commission, 'A Digital Single Market Strategy for Europe' (n 5) 2.

²³ *ibid* 7.

²⁴ European Commission, 'Proposal for a Directive on Copyright in the Digital Single Market' (n 7) 3.

we were now looking at the potential for the Digital Terror. The perception that large Internet corporations such as Google, as well as social media platforms like Facebook and Twitter were not necessarily sources for opportunity and growth, but instead could present a threat to existing jobs, economic models, and indeed the EU itself have become manifest. Between September 2015 and January 2016, the Commission ran a consultation on online platforms in order to gather evidence and views on the role of these platforms in the digital economy. According to the final report on the basis of this consultation, two-thirds of respondents regarding relations between copyright holders and online platforms were right holders, who argued that these platforms hold disproportionate market power in the online environment, making favourable license terms difficult, including news publishers arguing that news aggregation negatively impact upon their revenue streams.²⁵ The Commission's Online Platforms Communication reiterated that online platforms have a duty to act responsibly, both in terms of ensuring that there is a fair distribution of value and allocation of revenue as a result of exploitation of copyrighted digital media online, as well as regarding the use of services for the promotion of hate speech, illegal activity and terrorism.²⁶ Post Brexit and the US election of Donald Trump, concerns have also been raised regarding the use of online platforms to spread disinformation, including in the form of 'fake news',²⁷ further destabilising the EU during times of political and economic uncertainty.²⁸ On this basis, Internet-based platforms such as Google are in a defensive, even precarious position regarding their regulatory status in the EU – a position that without doubt impacts upon their ability to effectively influence the direction of legislation pertaining to their economic functions.

The more they stay the same.

Despite a new dynamic, the direction of law-making in this sector is following a recognisable trajectory. In fact, these new factors identified above may serve to reinforce existing path dependencies in the legislative process for copyright reform. Successfully influencing the direction of legislation is related to the effectiveness of an actor's ability to set the agenda and

²⁵ European Commission, 'Full Report on the Results of the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy' (2016) 11.

²⁶ European Commission, 'Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe' (2016) COM(2016) 288 8.

²⁷ A term the Commission has made clear it is not overly fond of, in particular because of its use by certain high profile politicians.

²⁸ See generally European Commission, 'Tackling Online Disinformation: A European Approach' (2018) COM(2018) 236.

frame the narrative for the changes being proposed.²⁹ Setting the legislative agenda requires good network contacts with policy-makers in Brussels, based on a history of providing evidence to consultations and working groups as well as personal connections with Commission staff that facilitate relationships of trust. In the context of the current reforms, Commissioner Oettinger acted as Commissioner for the Digital Economy and Society when the Directive was first proposed, before moving to DG Budget and Human Resources. Oettinger has been a strong proponent of increased protection for newspaper publishers and has close links with Axel Springer.³⁰ This created the favourable conditions for the creation of ancillary copyright in the proposed Directive. By being able to submit information quickly to Commission consultations preceding proposals for legislation, well-placed actors are also able to successfully influence the substance of legislation, identifying the problems and potential solutions they feel will best serve their sectors through these forms of ‘early lobbying’.³¹ By the time that Internet platforms and academics critical of this legislation are aware of the substance of the text, and wish to make their positions known, often the legislative agenda is set; furthermore, it is much harder to change the agenda than it is to fix it in the first place.³² The fact that proposed legislation favours existing categories of copyright right holder is not particularly unusual or unforeseeable – in the passing of other contentious laws such as the Information Society Directive and Enforcement Directive,³³ the media industry was active early in the process and active in setting the legislative agenda, identifying their perceived problems requiring legislative intervention and framing the protection of their interests in the resulting legislative proposals.³⁴

As well as providing information to the Commission and MEPs, right holders have been able to effectively construct a pro-Directive narrative in the media (again, not unsurprising, given that the media have acted as direct proponents of the Directive). Much of the press coverage of the proposed changes has been overwhelmingly positive, including opinion pieces by

²⁹ For more on this applied to historical developments in EU copyright law, see Benjamin Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ (2015) 35 *Oxford Journal of Legal Studies* 487.

³⁰ Sascha Lobo, ‘Leistungsschutzrecht Für Presseverleger: So Ein Quatschgesetz’ *Spiegel Online* (13 June 2018) <<http://www.spiegel.de/netzwelt/netzpolitik/leistungsschutzrecht-fuer-presseverleger-so-ein-quatschgesetz-a-1212697.html>> accessed 20 September 2018.

³¹ Pieter Bouwen, ‘The European Commission’ in David Coen and Jeremy Richardson (eds), *Lobbying the European Union institutions, actors, and issues* (Oxford University Press 2009) 20.

³² Mack (n 9) 345.

³³ Directive 2004/48/EC on the enforcement of intellectual property rights

³⁴ Farrand (n 29).

journalists arguing the necessity of the changes,³⁵ with stories being framed in terms of journalists versus ‘big tech’. Comparatively little reporting, save for predominantly online-only or technology oriented publications covered the Directive in negative terms.³⁶ Academic criticism of the proposals have largely been relegated to institutional blogs, publications such as the Conversation, or academic journals, arguably having little impact on the legislative process. Indeed, Haunss and Kohlmorgen made similar findings in the case of the passing of the Enforcement Directive, in which the relatively little coverage of the proposed changes to the IPR enforcement regime were predominantly covered in favourable terms in the media, with effective network coalitions able to present their views far more effectively than looser connections of telecommunications providers and Internet platforms.³⁷ Given the current perception of Internet-based platforms as being sources of uncertainty, economic and social harm, whether on the basis of their use to spread fake news, significant data breaches such as those concerning Cambridge Analytics, and the growing scepticism over the freedom of economically powerful ‘big tech’ to act as it wishes, presenting a convincing and effective counter-narrative may have been much more difficult to achieve. In such an environment, new dynamics have not appeared to have done much to influence the direction of legislation in favour of more open access and flexible frameworks; instead, they appear to have achieved the opposite.

What happens next?

As stated above, the Directive is now being discussed in the trilogue, after which there will be a vote on the finalised text. It is somewhat unlikely that the controversial Articles will be substantively modified during this process, meaning that while the war may not yet be over, the outcome may be foreseeable. If copyright holders are successful in getting the legislation they desire, this is not so much a case of lobbyists winning over legitimate law-making. Instead, it is an indication that one group of lobbyists has been far more successful than others. This may be based in new dynamics, in which modernisation has been framed as the need for

³⁵ See, for example, Sammy Ketz, ‘War Reporters like Me Will Cease to Exist If the Web Giants Aren’t Stopped’ | Sammy Ketz’ *The Guardian* (28 August 2018) <<https://www.theguardian.com/commentisfree/2018/aug/28/war-reporters-internet-giants-news-journalism-facebook-google-eu-vote-copyright>> accessed 20 September 2018.

³⁶ James Vincent, ‘EU Approves Controversial Copyright Directive, Including Internet “Link Tax” and “Upload Filter”’ (*The Verge*, 12 September 2018) <<https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved>> accessed 20 September 2018.

³⁷ Sebastian Haunss and Lars Kohlmorgen, ‘Conflicts about Intellectual Property Claims: The Role and Function of Collective Action Networks’ (2010) 17 *Journal of European Public Policy* 242.

Internet platforms to act responsibly in light of high profile cases where they have been alleged not to, as well as concerns over their economic power that traditional media see as being somewhat parasitic on the content they produce, but feel is no longer remunerated adequately. However, it is also indicative of the fact that while the discourse may change, the rules of the game remain the same – effective legislative change is based in the ability to effectively set agendas, provide evidence to policy-makers quickly and in a form they can use to justify their actions, and in being able to frame their policy preferences favourably. So long as the existing networks favour traditional market players, it is unlikely that we will see considerable changes in the approach to copyright reform.