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by Miquel Peguera

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by Dan Jerker B. Svantesson

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by Adèle Azzi

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# Editorial

by **Miquel Peguera\***

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- 1 It is always a pleasure to present a new issue of JIPITEC, the Journal of Intellectual Property, Information Technology and E-Commerce Law. This Autumn issue is full of interesting and insightful pieces, touching upon different hot topics, including internet jurisdiction, online advertising, trade secrets, and, last but certainly not least, copyright.
- 2 Jurisdictional issues regarding internet-related activities is still a hotly debated issue, which has been particularly exacerbated in the wake of the General Data Protection Regulation (GDPR), which became fully applicable last May. Two of the articles published in this issue deal with the external reach of EU law, in a context heavily influenced by the global nature of the internet. First, *Dan Jerker B. Svantesson* explores three recent developments in EU law that illustrate the current trends in the field of internet jurisdiction; namely, the territorial scope of the GDPR, that of the proposed e-evidence Directive and Regulation and, finally, the CJEU judgment in the *Bolagsupplysningen OÜ* case. The author puts forward a framework that illustrates the core jurisprudential principles underpinning jurisdiction, and that can also be used as a tool to analyse whether some jurisdictional claims have deviated from those principles. The analysis of the selected developments leads the author to conclude that they fail to appropriately follow the principles embodied in that jurisprudential framework, and thus are liable to aggravate the negative trend of hyper-regulation. To counter this trend, he suggests recognizing those core principles as incorporated in the EU's foundational treaties.
- 3 In another piece, *Adèle Azzi* focuses specifically on the extraterritorial scope of the GDPR, particularly on the application of the GDPR to the processing of data carried out by controllers or processors who lack an establishment in the EU. The GDPR applies to the processing of personal data of data subjects who are in the EU carried out by a controller or processor not established in the EU, provided that the processing activities relate to the offering of goods or services to such data subjects in the EU, or to the monitoring of their behaviour as far as their behaviour takes place within the Union [art. 3(2) GDPR]. The author examines the legitimacy and legal basis of such an extraterritorial claim and finds that it can be deemed legitimate and indeed in line with a global trend of extending the reach of data protection laws. She also examines whether it will be feasible to enforce such a broad application of the GDPR and points to a number of tools - including indirect enforcement means - that may prove effective for that purpose.
- 4 Member States' deadline for implementing the Trade Secrets Directive, which provides for a minimum harmonization on the field, expired last June, though many of them have not transposed it yet. Regarding the transposition process currently taking place in Germany, *Tomas Hoeren* examines the key elements of the Directive and compares them with the current provisions in Germany that deal with

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the protection of trade secrets, highlighting the important differences between both regimes and suggesting approaches regarding the Directive's implementation.

- 5 Social media advertising plays a relevant role in internet marketing. The fine line between sponsored and non-sponsored messages promoting brands by social media influencers is addressed in a study presented by *Sophie C. Boerman, Natali Helberger, Guda van Noort and Chris J. Hoofnagle*. Different legal and self-regulatory measures seek to obtain full disclosure of sponsored endorsement of brands in blog posts, so that advertising to consumers is recognizable as such. The empirical and comparative research analyses 200 posts published in the 40 most popular blogs in the Netherlands and the US to test disclosure practices in brand-endorsing blog posts. The results show how compliance with the disclosure requirements is far from satisfactory, both regarding the number of disclosures and their quality. They also reflect the difficulties for monitoring compliance. The authors put forward theoretical and policy implications that reinforce the need of focusing on advertisers regarding compliance oversight.
- 6 Finally, EU copyright law is again in the spotlight, particularly due to the reform envisaged by the proposed Directive on Copyright in the Digital Single Market, which is currently the subject of triologue negotiations, after the Parliament agreed on its text on the 12th of September. The reform process reflects a very complex debate, encompassing many different approaches and perspectives. *Ananay Aguilar* explores how the claim of fairness has been sustained in the discourses for EU copyright reform, focusing on the Fair Internet for Performers Campaign as a case study. The article examines the views from the relevant stakeholders, including performers, featured artists, collective management organisations, authors, producers, digital services providers, and consumers, considering how their respective concept of fairness is very much dependent on their relative bargaining power.
- 7 In addition to the proposed Directive, other recent developments within the Digital Single Market strategy warrant attention, such as the Regulation on cross-border portability of online content services in the internal market (Portability Regulation), which became applicable on 20 March 2018. The Portability Regulation, which seeks to ensure that consumers have access to online content they have subscribed to, not only in their Member State of residence, but also when they are temporarily in another Member State, is examined in this issue by *Sebastian Engels* and *Jan Bernd Nordemann*. The authors provide a thorough analysis of the Regulation's provisions and offer insights regarding their interpretation and the conceptual difficulties it raises.

- 8 Still in the field of copyright, *Charis Tsigou* analyses the notice-and-take-down procedure recently enacted in Greece, which sets out an administrative system of enforcement regarding online copyright infringement. The new scheme establishes sanctions, which may be imposed by the Committee on Internet Violations of Intellectual Property against access providers, hosting service providers, and website owners who fail to comply with the notice-and-take-down procedure.

I hope you will enjoy reading this issue.

Miquel Peguera

# European Union Claims of Jurisdiction over the Internet

## An Analysis of Three Recent Key Developments

by **Dan Jerker B. Svantesson\***

**Abstract:** The topic of Internet jurisdiction is gaining a considerable amount of attention at the moment. Yet, we are seemingly still a long way from solutions. This article builds on the notion that we are presently in an era of jurisdictional “hyper-regulation” characterised by complexity and a real risk of Internet users being exposed to laws in relation to which they have no realistic means of ensuring compliance. Drawing upon a framework consisting of three jurisdictional core principles, the article seeks to examine whether three recent key developments in EU

law contribute to hyper-regulation. Those three developments are: (1) Article 3 of the General Data Protection Regulation (GDPR) which outlines the Regulations “territorial scope”; (2) The combined effect of the proposed e-evidence Directive and the proposed e-evidence Regulation; and (3) the Court of Justice of the European Union (CJEU) decision in *Bolagsupplysningen OÜ*. The article also provides an analysis of recent trends and draws some conclusions as to how we may best move forward in this field.

**Keywords:** Internet jurisdiction; GDPR; hyper-regulation; law enforcement; CJEU; scope of jurisdiction; e-evidence; substantial connection; legitimate interest; interest balancing

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## A. Introduction

1 When we engage in activities online, we are bound by law. While this may have been a controversial claim in the mid-90s, it is today little more than a truism. But the details of this truism remain contentious; that is, while it is clear that we typically must abide by the laws of the state in which we are located when engaging in the relevant online activity, to what extent do we also – at the same time – need to abide by other states’ laws? This is by no means a novel issue. I have myself written about it for almost 20 years, others have considered this matter for an even longer time,<sup>1</sup> and there are numerous interesting,

new approaches being advocated.<sup>2</sup> Despite the frustratingly many hours people have devoted to thinking about and debating this matter, it remains a “live” issue today.

2 To understand the complications involved, we must first realize that the number of laws a person is expected to comply with when engaging in online

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1 Consider, for example, the important works of Johnson and Post, “Law and Borders - The Rise of Law in Cyberspace”, 48 *Stan. L. Rev.* (1996), 1367; Reidenberg, “Lex Informatica”, 76(3) *Tx. L. Rev.* (1998), 553; Menthe, “Jurisdiction in Cyberspace: A Theory of International Spaces”, 4 *Mich. Telecom. & Tech. L. Rev.* (1998), 69; Goldsmith, “Against Cyberanarchy”, 65 *U. Chicago L. Rev.* (1998), 1250; Geist, “Is There a There There? Towards Greater Certainty for Internet Jurisdiction”, 16 *Berkeley Tech. L.J.* (2001), 1345.

2 See, e.g., Lutzi, “Internet Cases in EU Private International Law— Developing a Coherent Approach”, 66 *ICLQ* (July 2017), 687–721, and Taylor, “Transatlantic Jurisdictional Conflicts in Data Protection Law” (forthcoming).

activities is not static. Rather it varies depending on a range of factors and must be approached as something context-specific. In other words, the number of laws, and which laws, a person is expected to comply with when engaging in one online activity (e.g. sending an email from Sweden to Luxembourg, discussing the activities of a person in Russia) will be markedly different to the number of laws, and which laws, the same person is expected to comply with when engaging in another online activity (e.g. posting information about Chinese officials on a US social media site on which the person making the posting has “friends” in 50 different countries). Thus, for any specific activity, we can speak of a “contextual legal system” consisting of the norms of all those states’ laws that the person in question is expected to abide by in relation to the given activity.<sup>3</sup>

- 3 It may, however, be quite impossible for a person to ascertain all the norms of the contextual legal system by which she is expected to abide. The obvious obstacles include problems accessing the relevant law, language barriers and legal uncertainties, as well as the practical issue of identifying which states’ laws make claim to be part of the relevant contextual legal system in the first place. In fact, predictability here requires nothing less than a complete knowledge of all the laws of all the states in the world, including their respective private international law rules on jurisdiction, choice of law, declining jurisdiction, as well as on recognition and enforcement.
- 4 Furthermore, given that each such contextual legal system is made up of norms from multiple states’ legal systems – norms that typically are neither coordinated, nor harmonized, with the norms of the other states’ legal systems – it will surprise no one that the contextual legal system to which a person is exposed may contain clashing norms; that is, the norms of one state may order something that the norms of another state forbids, or the norms of one state may outline duties that directly contradict rights provided for under the norms of another state.
- 5 The situation I have just described may be referred to as a form of “hyper-regulation”,<sup>4</sup> and it involves the following conditions: (1) the complexity of a party’s contextual legal system amounts to an unsurmountable obstacle to legal compliance; and (2) the risk of legal enforcement of—at least parts of—the laws that make up the contextual legal system is more than a theoretical possibility.<sup>5</sup>

3 See, further, Svantesson, “The holy trinity of legal fictions undermining the application of law to the global Internet”, 23(3) *Int’l J. of L. and Info. Tech.* (2015), 219-234.

4 See, further, Svantesson, *Solving the Internet Jurisdiction Puzzle*, (OUP, 2017), pp. 105-111.

5 See, further, Svantesson, *Are we stuck in an era of jurisdictional hyper-regulation?*, (Institutet för rättsinformatik,

6 This article seeks to examine three recent key developments in European Union law and to assess the extent to which they contribute to hyper-regulation as defined above. More specifically, attention will be directed at the impact of:

- Article 3 of the General Data Protection Regulation (GDPR) which outlines the Regulation’s “territorial scope”;
- The combined effect of the Proposal for a Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (hereinafter “proposed e-evidence Directive”),<sup>6</sup> and the Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters (hereinafter “proposed e-evidence Regulation”);<sup>7</sup> and
- The Court of Justice of the European Union (CJEU) decision in *Bolagsupplysningen OÜ*.

7 In examining these three developments, account will be taken of what traditionally is discussed as personal jurisdiction (i.e. jurisdiction over the relevant party), as well as what may be referred to as “scope of jurisdiction”, or “scope of (remedial) jurisdiction”. Scope of jurisdiction relates to the appropriate geographical scope of orders rendered by a court that has personal jurisdiction and subject-matter jurisdiction.<sup>8</sup> This question has gained far less attention to date than other jurisdictional issues. Yet, while this third dimension is often overlooked, it is doubtless a major arena for hyper-regulation.

8 Finally, by way of introduction, the analysis of the extent to which the examined developments in European Union law contribute to hyper-regulation will be assisted by a jurisprudential framework I have presented elsewhere<sup>9</sup> that outlines three core

forthcoming 2018).

6 Strasbourg, 17.4.2018, COM(2018) 226 final, 2018/0107(COD), Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

7 Strasbourg, 17.4.2018, COM(2018) 225 final, 2018/0108(COD), Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters.

8 See, further, Svantesson, “Jurisdiction in 3D – ‘scope of (remedial) jurisdiction’ as a third dimension of jurisdiction”, 12(1) *J. Private Int’l L.* (2016), 60-76.

9 Svantesson, “A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft”, 109 *Am. J. of Int’l L. Unbound* 69 (2015), <<https://www.cambridge.org/core/journals/american-journal->

principles that, in my view, guide jurisdictional claims. Under that framework:

In the absence of an obligation under international law to exercise jurisdiction, a State may only exercise jurisdiction where:

- (1) there is a substantial connection between the matter and the State seeking to exercise jurisdiction;
  - (2) the State seeking to exercise jurisdiction has a legitimate interest in the matter; and
  - (3) the exercise of jurisdiction is reasonable given the balance between the State's legitimate interests and other interests.
- 9 While this framework was developed to illustrate the true jurisprudential core principles that underpin jurisdiction (in both public, and private, international law), the three principles can also serve the function of a diagnostics tool that may identify the cause of *why* a certain jurisdictional claim goes too far so as to contribute towards hyper-regulation. I hasten to acknowledge that I recognize the somewhat schizophrenic use to which I put this framework. On the one hand, I claim that it describes the true jurisprudential core principles underpinning jurisdiction. This implies that all jurisdictional claims are anchored in these principles. But on the other hand, I am suggesting that the framework can be used to assess specific jurisdictional claims, which implies that not all jurisdictional claims are anchored in these principles. This may, however, not be quite the contradiction it appears to be at a first glance.
- 10 The fact that a particular phenomenon is anchored in a certain way of thinking obviously does not prevent occurrences straying from the mentioned thinking. And where the situation is such that more occurrences are straying from the thinking that was previously dominant than not, we may speak of a paradigm shift. Thus, my claim may be best expressed in the following. As I see it, under our current paradigm (which I argue has moved away from territoriality as the core of jurisdiction),<sup>10</sup> legitimate jurisdictional claims are founded in the principles I have outlined in my framework. Thus, this framework both describes the true jurisprudential

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of-international-law/article/new-jurisprudential-framework-for-jurisdiction-beyond-the-harvard-draft/BA4AE9C46D9783ADC433C0C79B7B7E04> (last visited 28 May 2018).

10 If territoriality ever was the true jurisprudential core principle underpinning jurisdiction – and I doubt it ever should have been viewed as having that status – we can no longer treat the plentiful occurrences (online and offline) that stray from the territoriality-focus as mere exceptions.

core principles underpinning jurisdiction and allows us to use this framework to assess whether specific jurisdictional claims have strayed from these core principles.

- 11 At any rate, before starting the analysis alluded to, we first need to consider the general safeguards contained in EU law imposing restrictions on jurisdictional claims that may otherwise contribute to the trend of hyper-regulation.

## B. General safeguards

- 12 The fact that US law imposes restrictions on jurisdictional claims is generally well-known. The reason this is so may be attributed to the fact that legal tools such as the “presumption against extraterritoriality”<sup>11</sup> and the “*Charming Betsy*” doctrine<sup>12</sup> are debated in the courts, and in academic literature, on a regular basis. In contrast, comparatively little attention has been directed at the extent to which EU law contains similar tools for limiting jurisdictional claims.
- 13 However, thanks to an *amicus brief* filed by the European Commission in the controversial *Microsoft Warrant* case – heard in the Supreme Court of the United States on 27 February 2018 – we now know that EU law does in fact embody similar principles to the US presumption against extraterritoriality and the *Charming Betsy* canon.<sup>13</sup> The Commission made the point that:

[a]ny domestic law that creates cross-border obligations—whether enacted by the United States, the European Union, or another state—should be applied and interpreted in a manner

11 “Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.” *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

12 “Under the *Charming Betsy* canon, first enumerated by Chief Justice Marshall in *Murray v. The Schooner Charming Betsy*, U.S. courts are constrained to avoid interpreting ‘an act of congress’ in a manner that would ‘violate the law of nations, if any other possible construction remains,’ 6 U.S. (2 Cranch) 64, 118 (1804)—whether the statute at issue is meant to apply extraterritorially or not.” Brief of International and Extraterritorial Law Scholars as Amici Curiae in Support of Respondent, <[https://www.supremecourt.gov/DocketPDF/17/17-2/28256/20180118132126676\\_17-2%20bsac%20International%20and%20Extraterritorial%20Law%20Scholars--PDFA.pdf](https://www.supremecourt.gov/DocketPDF/17/17-2/28256/20180118132126676_17-2%20bsac%20International%20and%20Extraterritorial%20Law%20Scholars--PDFA.pdf)> (last visited 28 May 2018), at 3.

13 Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, p. 7, <[https://www.supremecourt.gov/DocketPDF/17/17-2/23655/20171213123137791\\_17-2%20ac%20European%20Commission%20for%20filing.pdf](https://www.supremecourt.gov/DocketPDF/17/17-2/23655/20171213123137791_17-2%20ac%20European%20Commission%20for%20filing.pdf)> (last visited 28 May 2018).



that is mindful of the restrictions of international law and considerations of international comity. The European Union's foundational treaties and case law enshrine the principles of "mutual regard to the spheres of jurisdiction" of sovereign states and of the need to interpret and apply EU legislation in a manner that is consistent with international law.<sup>14</sup>

- 14 In doing so, the Commission pointed to four different authorities. The first was *Treaty on European Union* (TEU) article 3(5) which reads as follows:

*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*

- 15 The second was TEU article 21(1) which makes clear that:

*[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*

- 16 The third was Case 52/69, *Geigy v. Commission*.<sup>15</sup> In this matter, the Court had to address a situation involving anti-competitive conduct within the EU but orchestrated from outside the EU.
- 17 The fourth and final authority the Commission referred to was Case C-366/10, *Air Transport Ass'n of America v. Sec'y of State for Energy and Climate Change*,<sup>16</sup> which made clear that: "the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union".<sup>17</sup>

14 Ibid.

15 11, ECLI:EU:C:1972:73.

16 123, ECLI:EU:C:2011:864.

17 Case C-366/10, *Air Transport Ass'n of America v. Sec'y of State for Energy and Climate Change*, para 101. See further Jääskinen and Ward, "The External Reach of EU Private Law in the Light of *L'Oréal versus eBay and Google and Google Spain*", in Cremona and Micklitz, *Private Law in the External Relations of the EU*, (OUP, 2016), pp. 125-146, at 131-132.

- 18 All the recent developments in EU law discussed below ought to be read keeping in mind the principles enshrined in these foundational treaties and case law.

## C. Article 3 of the General Data Protection Regulation

- 19 There has been considerable hype around the GDPR which came into effect on 25 May 2018. It has been celebrated, and it has been feared. It has been seen as going too far, and it has been seen as not going far enough. Perhaps it is a rather safe bet to predict that the true impact will fall somewhere between these extremes.

- 20 In any case, Article 3, outlining the Regulation's "territorial scope", is doubtless the Regulation's most important provision for anyone outside the EU. After all, it determines whether actors outside the EU need to take account of the GDPR or whether they safely can disregard it. In other words, it is Article 3 we must turn to in order to assess whether the GDPR forms part of any given contextual legal system. This crucially important provision reads as follows:

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
  - (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
  - (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.
3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

- 21 Here we may pause to consider the drafters' choice of attaching the label of "territorial scope" to Article 3. After all, if we briefly accept the conventional distinction between "territorial" and "extraterritorial", two of the three sub-sections are clearly dealing with what may be labelled the GDPR's

“extraterritorial scope”. In fact, given that Article 3(1) points to the Regulation applying regardless of whether the processing takes place in the Union or not, we may arguably point to an “extraterritorial” dimension of all three sub-sections.

- 22 Surprisingly, while the Article 29 Working Party has provided guidance on numerous aspects of the GDPR, no such guidance has been provided – at the time of writing – in relation to Article 3. Thus, actors outside of the EU have had preciously little to work with when seeking to assess whether they are caught by the GDPR. However, some guidance can be found in Recitals 22-25, most significantly, Recital 23 states that:

*In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller’s, processor’s or an intermediary’s website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.*

- 23 In addition, Recital 24 teaches us that:

*In order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.*

- 24 Furthermore, unlike the Recitals, the Article 29 Working Party’s general factsheet aimed at helping Asia Pacific Privacy Authorities understand the basic requirements included in the GDPR specifically includes the phrase “target individuals in the EU”.<sup>18</sup>

18 “The GDPR applies to data controllers and data processors with an establishment in the EU, or with an establishment outside the EU that target individuals in the EU by offering goods and services (irrespective of whether a payment is required) or that monitor the behavior of individuals in the EU (where that behavior takes place in the EU). Factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.”

This may be seen to place the “directing activities test” in the terminology of “targeting” more commonly used outside the EU. The same factsheet also includes the following example illustrating the practical application of Article 3: “A Japanese web shop, offering products, available online in English with payments to be made in Euros, processing multiple orders a day from individuals within the EU and shipping these products to them, should be compliant with the GDPR”.<sup>19</sup>

- 25 Unfortunately, this example raises more questions than it provides answers. We may, for example, wonder whether the Japanese web shop in question would avoid the GDPR simply by only accepting payment in non-EU currencies. And what if the Japanese web shop, rather than “processing multiple orders a day from individuals within the EU”, merely accepted such orders occasionally, or once a day? What are the actual thresholds that will be applied?
- 26 In the end, the reality is that the “targeting test”, while it looks like a neat solution on paper, gives preciously little practical guidance for the businesses, lawyers and indeed judges, who are tasked with assessing whether the test has been met in a given situation.<sup>20</sup>
- 27 Nevertheless, reading Article 3 together with the explanatory remarks in the mentioned Recitals and the Article 29 Working Party’s general factsheet aimed at helping Asia Pacific Privacy Authorities, it is clear that the GDPR has a considerable reach beyond the EU. This is no accident; rather it is the expression of a clearly articulated policy goal, namely that of ensuring that non-EU actors engaging on the EU market are caught by the GDPR so as to create what has been promoted as a “level playing field”.<sup>21</sup>

Article 29 Working Party, EU General Data Protection Regulation: General Information Document, p. 2, <[http://ec.europa.eu/newsroom/article29/document.cfm?doc\\_id=49751&lipi=urn%3Ali%3Apage%3Ad\\_flagship3\\_pulse\\_read%3BaEuuvVHcSFSSShxXB0Rnjg%3D%3D](http://ec.europa.eu/newsroom/article29/document.cfm?doc_id=49751&lipi=urn%3Ali%3Apage%3Ad_flagship3_pulse_read%3BaEuuvVHcSFSSShxXB0Rnjg%3D%3D)> (last visited 28 May 2018).

19 Ibid.

20 See, further, Oster, “Rethinking Shevill. Conceptualising the EU Private International Law of Internet Torts Against Personality Rights”, 26 Int’l Rev. L. Compu. & Tech. (2012), 113, at 118 and Svantesson, “Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation”, 5(4) Int’l Data Privacy L. (2015), 226-234.

21 See, e.g., Reding, “The EU Data Protection Regulation: Promoting Technological Innovation and Safeguarding Citizens’ Rights”, (Intervention at the Justice Council, Brussels, 4 Mar. 2014), <[http://europa.eu/rapid/press-release\\_SPEECH-14-175\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-175_en.htm)> (last visited 28 May 2018). A similar sentiment is expressed by Jan Philipp Albrecht in “Regaining Control and Sovereignty in the Digital Age”, in Wright and De Hert (eds), *Enforcing Privacy: Regulatory, Legal and Technological Approaches*, (Springer, 2016), pp. 473-88, at 476.

- 28 It is not difficult to see the political appeal of such a levelling of the playing field; after all, why should foreign businesses be given a competitive advantage by avoiding the EU's strict data protection laws when such an advantage comes at the cost of EU business and of EU consumers? The problem with this reasoning, however, is that it quite simply overlooks the fact that there is a big world outside the EU.
- 29 First, it overlooks the fact that countries outside the EU are used to adapting their data protection laws based on what the EU does. As a result, all EU-based businesses that may wish to engage on markets outside the EU will be more likely to have to incur the costs of ensuring compliance with multiple foreign data protection schemes. And while the EU's GDPR may be the strictest data protection regime as a whole, those who assume that compliance with the GDPR automatically ensures compliance with all other data protection schemes will soon be subject to a rude awakening.<sup>22</sup>
- 30 The second manner in which the levelling of the playing field argument fails to recognize the fact that there is a world outside the EU, relates to how foreign businesses will respond to the GDPR. The "big players" will, of course, take steps to adjust their behaviour so as to be GDPR-compliant. Indeed, they have already done so. But they are of a size and nature that means that they would have been doing so also with a much more modest, and more nuanced, claim of jurisdiction than that of GDPR Article 3. Of the small- to medium-sized businesses around the world, some may adjust their behaviour to the GDPR whether they are actually subject to it or not, but many will no doubt carry on as usual and hope they will not be subject to any enforcement actions. And given how many businesses outside the EU fall within Article 3, and taking account of the resources available for Data Protection Authorities enforcing the GDPR, perhaps the odds are in their favour. For EU citizens dealing with such businesses, it is difficult to see the GDPR bringing any improvements, and there will be no levelling of the playing field either. Furthermore, as there clearly will be more foreign businesses failing to comply with the GDPR than there are resources to investigate them, the actual application of the GDPR will necessarily be arbitrary, which arguably undermines the legitimacy of any enforcement actions taken.
- 31 Other small- to medium-sized businesses, and also some larger actors, around the world will simply use geo-location technologies to block users from the EU. For example, Europeans seeking to access the website of the *Chicago Tribune* (www.chicagotribune.com), are now met with the following message:
- Unfortunately, our website is currently unavailable in most European countries. We are engaged on the issue and committed to looking at options that support our full range of digital offerings to the EU market. We continue to identify technical compliance solutions that will provide all readers with our award-winning journalism.*
- 32 This type of situation represents a loss for EU citizens. Proponents of Article 3 will no doubt be quick to point out that EU citizens missing out on the goods, services and contents provided by such businesses is a reasonable sacrifice for the privilege of being protected by the GDPR. This may well be true. However, it misses the point. It need not have been the case that our only choice was between foreign businesses either complying with the GDPR in its entirety, or blocking out the EU market. From a consumer perspective, some aspects of the GDPR are more important than others in their dealings with foreign businesses. For example, the EU consumer community may well have preferred not to be blocked from many foreign services as long as those services were bound to comply with the GDPR's key provisions (such as the lawfulness requirements in Article 6), even where those same services did not necessarily comply with the more administrative/bureaucratic layer of the Regulation (such as Article 37 requiring a Data Protection Officer).
- 33 The decision to have one single jurisdictional threshold for the entire GDPR – an instrument that seeks to achieve so many diverse objectives – is a major blunder undermining the legitimacy of the GDPR as such.<sup>23</sup> Rather, the drafters ought to have adopted what I elsewhere<sup>24</sup> have referred to as a "layered-approach" in which the relevant substantive law (here the various substantive provisions of the GDPR) is divided into different layers, with a different jurisdictional threshold for the various layers. For example, it may have been fruitful to assign provisions such as Article 6 to an "abuse-prevention layer" in relation to which a far-reaching claim of jurisdiction may be justified. Provisions such as Article 37 could fall within an "administrative layer" in relation to which the jurisdictional threshold would be high. And provisions such as Article 15 (giving a right of access by the data subject) could fall within a "rights layer" in relation to which the jurisdictional threshold would be easier to satisfy than for the administrative layer, but more difficult to satisfy than for the abuse-

22 Consider, for example, the tremendous diversity of data privacy laws described in Greenleaf, *Asian Data Privacy Laws: Trade & Human Rights Perspectives*, (OUP 2014).

23 Svantesson, "Extraterritoriality and targeting in EU data privacy law", op. cit. *supra* note 20, 226-234.

24 Svantesson, "A 'layered approach' to the extraterritoriality of data privacy laws", 3(4) *Int'l Data Privacy L.* (2013), 278-286.

prevention layer.<sup>25</sup>

- 34 The only aspect of the GDPR in relation to which it may be said that there is a jurisdictional threshold derogating from that of Article 3 is in Article 27. There it is made clear that the obligation prescribed under Article 27 – that of controller and processors caught by Article 3(2) having an obligation to designate in writing a representative in the Union – does not apply to:

*processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing;*

- 35 Even so, against the background of the above, the reader will not be surprised by my conclusion that GDPR Article 3 performs poorly when assessed against the framework advanced above. I would argue that while Article 3 might meet the requirements imposed by the second principle in the framework – that is, the EU has a legitimate interest in what it is pursuing – it is highly questionable whether Article 3, and especially Article 3(2), captures only those matters that have a substantial connection to the EU. Further, I most definitely do not think enough regard has been given to other relevant interests, as is required under the third principle

## D. The Proposed e-evidence Directive and Regulation

- 36 The Proposal for a Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings and the Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters must be read together.
- 37 These instruments have been advanced to address a significant issue: namely to make it easier and faster for law enforcement and judicial authorities to obtain electronic evidence often held by foreign Internet companies. Unveiled in April 2018, these proposals were preceded by a considerable period of consultations.
- 38 Put in the fewest of words, the combined effect of the proposed Directive and the proposed Regulation is to

put in place a scheme under which service providers – including foreign service providers – are obligated to designate a legal representative in the Union. This is combined with the creation of a European Production Order and a European Preservation Order. The respective roles of the Directive and the Regulation are that, while the Directive “lays down rules on the legal representation in the Union of certain service providers for receipt of, compliance with and enforcement of decisions and orders issued by competent authorities of the Member States for the purposes of gathering evidence in criminal proceedings”,<sup>26</sup> the Regulation “lays down the rules under which an authority of a Member State may order a service provider offering services in the Union, to produce or preserve electronic evidence, regardless of the location of data.”<sup>27</sup>

- 39 To understand how this proposed arrangement will impact actors outside the EU, there are some key concepts that must be understood. First, the definition of the type of service providers caught by these instruments is broad and includes any natural or legal person that provides one or more of several types of services including, for example, “internet domain name and IP numbering services such as IP address providers, domain name registries, domain name registrars and related privacy and proxy services”,<sup>28</sup> certain electronic communications service,<sup>29</sup> as well as information society services “for which the storage of data is a defining component of the service provided to the user, including social networks, online marketplaces facilitating transactions between their users, and other hosting service providers”<sup>30</sup>.
- 40 To understand the jurisdictional scope, we need to start with the observation that both the Regulation and the Directive apply to service providers “offering services” in the Union or a Member State.<sup>31</sup> While this sounds broad, offering services in a Member State (or in the Union) means enabling legal or natural persons in a Member State to use the service and “having a substantial connection to the Member State” in question.<sup>32</sup> This, of course, fits neatly within the framework I have discussed above. However, an examination of the Recitals will rapidly quash any

<sup>25</sup> See, further, *ibid.*

<sup>26</sup> Proposed e-evidence Directive Art. 1(1).

<sup>27</sup> Proposed e-evidence Regulation Art. 1(1).

<sup>28</sup> Proposed e-evidence Directive Art. 2(2)(c) and proposed e-evidence Regulation Art. 2(3)(c).

<sup>29</sup> Proposed e-evidence Directive Art. 2(2)(a) and proposed e-evidence Regulation Art. 2(3)(a).

<sup>30</sup> Proposed e-evidence Directive Art. 2(2)(b) and proposed e-evidence Regulation Art. 2(3)(b).

<sup>31</sup> Proposed e-evidence Directive Art. 1(4) and proposed e-evidence Regulation Art. 1(1).

<sup>32</sup> Proposed e-evidence Directive Art. 2(3) and proposed e-evidence Regulation Art. 2(4).

feelings of excitement. Recital 13 of the Directive, similarly to Recital 28 of the Regulation, makes clear that a “substantial connection” does not need to be particularly substantial at all. Rather, a substantial connection to the Union exists where:

- (1) the service provider has an establishment in the Union; or
- (2) where the service provider does not have an establishment in the Union, but the service provider:
  - a. has a significant number of users in one or more Member States;
  - b. is targeting its activities towards one or more Member States; or
  - c. directs its activities towards one or more Member States as set out in Article 17(1)(c) of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

41 Thus, what we are really dealing with here is largely a targeting test that incorporates all the uncertainties, blemishes and warts typical of a targeting test, and which clearly has the potential to cater for far-reaching jurisdictional claims—thus, having little to do with any truly “substantial connection”.

42 Further, it is interesting to note the odd double use of the targeting test, first as a stand-alone measure specifically described as targeting (2(b) in my structure above) and then targeting as articulated in the context of Article 17(1)(c) of Regulation 1215/2012 (2(c) in my structure above).<sup>33</sup> In the context of the former, the Recital explains that:

*[t]he targeting of activities towards one or more Member States can be determined on the basis of all relevant circumstances, including factors such as the use of a language or a currency generally used in that Member State, or the possibility of ordering goods or services. The targeting of activities towards a Member State could also be derived from the availability of an application (“app”) in the relevant national app store, from providing local advertising or advertising in the language used in that Member State, or from the handling of customer relations such as by providing customer service in the language generally used in that Member State.*

43 While there are some additional examples included (such as the reference to the relevant national app store) this is, of course, the same targeting test as that of Article 17(1)(c) of Regulation 1215/2012.

Thus, this double use of “targeting” is both a sign and a potential source of confusion.

44 Against this background, the reader will already have guessed that, in my view, the approach adopted in the proposed Regulation and the proposed Directive fails to limit the jurisdictional reach of these instruments to those situations in relation to which they have a substantial connection. This is a disappointing conclusion particularly in the light of the fact that the drafters clearly were going in the right direction in that they were specifically referring to the need for a substantial connection.

45 As to the need for a legitimate interest – a term not used in the instruments – a more favourable conclusion may be reached. The drafters are clearly pursuing legitimate interests and have, for example, sought to limit the types of crimes in relation to which the measures in question may be taken.<sup>34</sup> Arguably some additional measures could have been taken in this context, but on the whole, the legitimate interest test may be seen to be met.

46 Finally, it is encouraging to see that a rather sophisticated interest balancing is a clearly articulated aspect of these instruments. This is particularly so in relation to Articles 15 and 16 of the Regulation. They aim to ensure comity with respect to the sovereign interests of third countries, to protect the individual concerned, and to address conflicting obligations on service providers by providing a mechanism for judicial review in cases of clashes with legal obligation stemming from the law of third states.<sup>35</sup> These provisions instruct the court to engage in an interest balancing exercise:

*weighing a number of elements which are designed to ascertain the strength of the connection to either of the two jurisdictions involved, the respective interests in obtaining or instead preventing disclosure of the data, and the possible consequences for the service provider of having to comply with the Order.*<sup>36</sup>

47 Thus, the final verdict must be that, to score well under the assessment framework applied in this article, these instruments mainly need to remove the Recital’s peculiar bastardization of the “substantial connection test”.

33 See *Pammer v Reederei Karl Schlüter GmbH & KG* (Case C- 585/ 08) and *Hotel Alpenhof GesmbH v Oliver Heller* (Case C- 144/ 09).

34 See, e.g., Proposed e-evidence Regulation, Art. 5(4).

35 Proposed e-evidence Regulation, Recital 47.

36 *Ibid.*, Recital 52.

## E. Bolagsupplysningen OÜ

48 Claims of jurisdiction over cross-border defamation have a long history of sparking controversy. This is perhaps not surprising given that any defamation action involves the complex balancing of competing human rights, one of them being freedom of expression. And, of course, in the context of cross-border defamation, the balancing will, by necessity, involve the even more complex, and even more sensitive, balancing of competing human rights as viewed in different countries.

49 The EU's approach to claims of jurisdiction over cross-border defamation is articulated in what is now Article 7(2) of the *Brussels I bis Regulation*, as interpreted in three key cases. Article 7(2) reads as follows: "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

50 The three key cases are *Shevill*,<sup>37</sup> *eDate*<sup>38</sup> and *Bolagsupplysningen OÜ*,<sup>39</sup> and it is the most recent of these – the *Bolagsupplysningen OÜ* case of October 2017 – that I am examining here. However, to understand the issues that arise from the CJEU's decision in *Bolagsupplysningen OÜ*, we must view it against its proper background which consists of *Shevill* and *eDate*.

51 *Shevill and Others*, C68/93,<sup>40</sup> involved an action for libel relating to a newspaper distributed in several Member States. The Court held that:

*the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.*<sup>41</sup>

52 The *eDate* decision of 2011<sup>42</sup> was in fact two cases that the Court dealt with jointly. The first – *eDate Advertising GmbH v X*<sup>43</sup> – involved allegedly

defamatory content about a German citizen having been placed on a website in Austria. The second – *Olivier Martinez, Robert Martinez v MGN Ltd*<sup>44</sup> – related to an infringement of personal rights allegedly committed by the placing of information and photographs on a website in another Member State. In its decision, the Court held that:

*in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.*<sup>45</sup>

53 Importantly, there are numerous indicators making clear that the Court, in both of these decisions, in speaking of "jurisdiction to award damages for all the harm caused by the defamation", is only referring to such harm occurring in Member States. For example, in *Shevill*, the only circulation discussed is that within Member States.<sup>46</sup> In no way did the Court suggest it was pointing to a competence as to award worldwide damages – the scope of jurisdiction is limited to the EU.

54 But let us now approach the most recent in this trilogy of key decisions. The dispute in *Bolagsupplysningen OÜ* related to proceedings brought regarding requests for the rectification of allegedly incorrect information published on a website, the deletion of related comments on a discussion forum on that website, and compensation for harm allegedly suffered. The CJEU held that:

*a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained*

37 *Shevill and Others*, C68/93, EU:C:1995:61.

38 Cases C-509/09 *eDate Advertising GmbH v. X* and C-161/10 *Olivier Martinez and Robert Martinez v. MGN Limited*.

39 Case C194/16 *Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB*.

40 EU:C:1995:61.

41 *Shevill and Others*, C68/93, EU:C:1995:61.

42 Cases C-509/09 *eDate Advertising GmbH v. X* and C-161/10 *Olivier Martinez and Robert Martinez v. MGN Limited*.

43 Case C-509/09 (Referring court Bundesgerichtshof,

Germany), ECLI:EU:C:2011:685, [2011] ECR I-10269.

44 Case C-161/10 (Referring court Tribunal de grande instance de Paris, France), ECLI:EU:C:2010:685, [2011] ECR I-10269.

45 Cases C-509/09 *eDate Advertising GmbH v. X* and C-161/10 *Olivier Martinez and Robert Martinez v. MGN Limited*, para 69.

46 *Shevill and Others*, C68/93, EU:C:1995:61, para 8: "On 17 October 1989 they issued a writ in the High Court of England and Wales claiming damages for libel from Presse Alliance SA in respect of the copies of *France-Soir* distributed in France and the other European countries including those sold in England and Wales."

before the courts of the Member State in which its centre of interests is located.<sup>47</sup>

- 55 This conclusion must be read in the light of the CJEU’s reasoning that:

*in the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal (see, to that effect, judgment of 25 October 2011, eDate Advertising and Others, C509/09 and C161/10, EU:C:2011:685, paragraph 46), an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage pursuant to the case-law resulting from the judgments of 7 March 1995, Shevill and Others (C68/93, EU:C:1995:61, paragraphs 25, 26 and 32), and of 25 October 2011, eDate Advertising and Others (C509/09 and C161/10, EU:C:2011:685, paragraphs 42 and 48), and not before a court that does not have jurisdiction to do so.<sup>48</sup>*

- 56 The limitation to the EU that was so clear in the *Shevill-eDate* case-law can perhaps be inferred here. After all, the CJEU does not expressly claim a worldwide scope of jurisdiction, and indeed, there is absolutely no discussion whatsoever about the serious consequences the CJEU’s decision would have if it is meant to extend beyond the EU. At the same time, however, by emphasizing that an application for the rectification and/or removal of information online is “a single and indivisible application”, the CJEU seems to be consciously going far beyond the *Shevill-eDate* case-law: from a focus on EU-wide orders to worldwide orders. This is highly problematic. It either means that the CJEU in *Bolagsupplysningen OÜ* perhaps expanded the reach of Article 7(2) of the *Brussels I bis Regulation* in a dramatic manner without engaging with the considerable implications that stem from such an expansion at all, or it means that the order in *Bolagsupplysningen OÜ* – if it is merely EU-wide so as to be consistent with the *Shevill-eDate* case-law – is in fact impossible to comply with on the CJEU’s reasoning that the rectification and/or removal of information online is “a single and indivisible application”.
- 57 Given the speed with which technology develops, it is also striking that both the Court and Advocate General Bobek, in deciding a case in 2017, sought guidance in an assessment of the state of technology made in 2011. Even if it was correct at the time of *eDate* – and I am not sure that it was – that the scope of the distribution of content placed online on a website is, in principle, universal, that assessment cannot be assumed to be correct also at the time

of *Bolagsupplysningen OÜ* some six years later. When assessing geo-location technology accuracy rates, it is important to be aware that they are: (i) time-specific; (ii) location-specific; and (iii) context-specific.

- 58 In light of how difficult it is to know for sure how *Bolagsupplysningen OÜ* should be read, assessing this development under the framework advanced above is not entirely uncomplicated. Thus, this analysis must be approached with an if/then method. If the CJEU in *Bolagsupplysningen OÜ* intended to extend the reach of EU law beyond the EU, then the claim of jurisdiction seems to fall foul of all three principles of the framework I use here.
- 59 However, even if the order the CJEU has in mind is restricted to the EU, there are complications stemming from the fact that EU law (namely the *Rome II Regulation*)<sup>49</sup> does not regulate choice of law in matters such as *Bolagsupplysningen OÜ*. Article 1(2)(g) of the *Rome II Regulation* excludes “non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation” from that Regulation. This exclusion is a direct result of the considerable differences that exist in the balancing between freedom of expression and the right to reputation amongst the Member States of the European Union. Thus, the choice of law question in non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, is left to the domestic law of the Member State that claims jurisdiction. This must clearly impact the assessment of *Bolagsupplysningen OÜ* under the principles I have advanced. At the minimum it raises issues under the third principle, as each Member State has a strong interest in its respecting balance between freedom of expression and the right of reputation being respected.

## F. A broad-brush analysis of trends

- 60 The examination above has focused on what may be criticized as being a rather eclectic selection of recent developments. Thus, we should, of course, be careful in drawing conclusions based on the examples above. It represents nothing but a snapshot of developments from the past two years.
- 61 Nevertheless, I have attended enough conferences and other events, and otherwise followed and taken part in the current discussions, to say with confidence that all three of the examined developments are major developments that have sparked considerable

<sup>47</sup> Case C194/16 *Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB*, para 50.

<sup>48</sup> *Ibid.*, para 48.

<sup>49</sup> Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

discussion both inside, and outside, the EU. This may indeed be important enough to amount to our first conclusion: the decisions that the EU makes as to how it engages with the online environment continues to both interest, and influence, the rest of the world. Thus, the steps the EU takes have the potential to significantly impact hyper-regulation, whether in a positive or negative direction.

62 Looking at the three developments examined, I think we can reach at least some additional significant conclusions. First, it seems likely that the idea of forced “rep localization” is here to stay as the EU’s weapon of choice in dealing with foreign Internet actors. Indeed, the more EU instruments that adopt this approach, the easier it is to argue for it in any given new context. For example, the fact that an obligation to designate a legal representative for service providers not established in the EU already exists in certain acts of EU law is emphasized in the Proposal for a Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.<sup>50</sup>

63 Nevertheless, it is clearly a most onerous approach for all those foreign companies that otherwise would not have any physical presence in the EU, and the extent to which the EU is able to enforce this on a big scale remains to be seen. The risk of arbitrary enforcement undermining the legitimacy of the scheme is an ever-present danger, and the EU’s call for rep localization is not entirely different to the much-criticized movement towards “data localization”.<sup>51</sup> To this may be added a purely practical matter; that is, how will a small- to medium-sized foreign company recruit a party willing to be its representative in the EU? And put in the reverse, who in the EU will be willing to assume the risk of being the representative of a small- to medium-sized foreign company with a limited presence on the EU market? The attractiveness of being a representative must surely be rather limited given that the designated legal representative can be held liable for the non-compliance of the service provider.<sup>52</sup>

64 Furthermore, it ought to be noted that rep localization as a response to the international nature of the Internet is not scalable. The EU approach may gain some acceptance from the fact that it is

sufficient to have representation in one Member State to be allowed to act in the entire Union. That may be a price many online actors are willing to pay. However, how does that translate to the rest of the world? If Afghanistan, Argentina and Australia adopt the same approach, will it be worthwhile for the Internet companies to have representatives in each of those states too? I imagine not. To this Europeans may say that how the (largely American) tech companies interact with Afghanistan, Argentina and Australia is not their problem; and they would have a point. What I am trying to emphasize, however, is merely the fact that (1) rep localization, even to the extent that it works for the EU, is not the solution for the rest of the world, and (2) one could make the claim that, given the EU’s appetite for inspiring the conduct of other states,<sup>53</sup> it could have done more to find a globally - or partially globally - viable solution.

65 At a first glance, it may be thought that rep localization demands such as these do not really contribute to hyper-regulation; after all, the EU could have extended its laws in the same manner without the rep localization requirement. However, as the likelihood of enforcement is a factor in the definition of hyper-regulation provided above, it is clear that rep localization demands do contribute to hyper-regulation.

66 Second, it seems clear that the targeting test has also gained in status via some of these recent developments. In fact, as seen in the proposed e-evidence Regulation and the proposed e-evidence Directive, the targeting test has also managed to infiltrate and negate direct articulations of the “substantive connection” principle – the latter being nothing but the pastry on top of a beautifully decorative pie; underneath the crust, the meat and gravy is still the distinctly unpalatable targeting test. While the targeting test may – at least in theory – be applied restrictively so as to minimize hyper-regulation, the EU’s approach is so vague and provides so little predictability that it rather adds to the state of hyper-regulation.<sup>54</sup>

50 “This is the case, for instance, in the General Data Protection Regulation (EU) 2016/679 (Article 27) and in Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union (Article 18).”, Proposed e-evidence Directive, at 3.

51 See, further, Cooper and Kuner, “Data Protection Law and International Dispute Resolution”, 382 *Recueil des cours* (2017), 9–174, at 72–76.

52 Proposed e-evidence Directive, Art. 3(8).

53 See, further, e.g. Scott, “The New EU ‘Extraterritoriality’”, 51 *C.M.L. Rev.* (2014), 1343; Scott, “Extraterritoriality and Territorial Extension in EU Law”, 62 *Am. J. Comp. L.* (2014), 87; Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU*, (Springer, 2016); Cremona and Micklitz, *op. cit. supra* note 17; Mills, “Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?”, 65(3) *Int’l and Comp. L.Q.* (2016), 541–579, doi:10.1017/S0020589316000208; Bradford, “The Brussels Effect”, 107 *Northwestern U. L. Rev.* (2012), 1.

54 See further Svantesson, “Extraterritoriality and targeting in EU data privacy law”, *op. cit. supra* note 20, 226–234 and Svantesson, “Pammer and Hotel Alpenhof – ECJ decision creates further uncertainty about when e-businesses ‘direct activities’ to a consumer’s state under the Brussels I Regulation”, 27(3) *Computer L. & Security Rev.* (June 2011), 298–304.



- 67 Third, the recent developments discussed here amplify the perception that the EU takes a rather schizophrenic approach to geo-location technology, managing to, on the one hand, fear its use to the degree of regulating against its use, and on the other hand, deny its legal relevance. For example, in outlining what amounts to a substantial connection, the proposed e-evidence Directive makes the point that: “provision of the service in view of mere compliance with the prohibition to discriminate laid down in Regulation (EU) 2018/302 [addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market] cannot be, on that ground alone, be considered as directing or targeting activities towards a given territory within the Union.”<sup>55</sup> At the same time, as hinted at above, the CJEU has rather consistently turned a blind eye to the impact of geo-location technologies. This is a clear illustration of the complications that stem from the EU’s “ad hoc approach for addressing the legal issues generated by globalization, the Internet, and other emerging technologies” that Jääskinen and Ward alert us to in their interesting 2016 book chapter.<sup>56</sup> At any rate, as geo-location technology may be used to limit the risk of hyper-regulation, both the limitation of its use<sup>57</sup> and the practise of ignoring its legal value may substantially contribute towards hyper-regulation.
- 68 Finally, it also seems fair to conclude that we are at a time at which the EU seems to be leaning towards a more aggressive stance on jurisdiction over online activities. Support for such a conclusion is hinted at in the above. But further support for this conclusion can arguably be found in the observation that this is not just a description of the EU’s situation, rather it is a description of the situation in many parts of the world. Many countries are starting to adopt a more aggressive stance towards jurisdiction over online activities.<sup>58</sup>
- 69 So, does that then mean that we are nearing the end of the paradigm where jurisdiction is – as I argue – founded in the three principles to which I have sought to bring attention? I think not, and to see why, we need only consider how states react to the jurisdictional claims of other states. Some readers will recall the transatlantic showdown between France and the US that took place around the turn of millennium in the context of Yahoo!’s auctioning

pages.<sup>59</sup> A similar situation arose recently between Canada and the US. In its June 2017 decision in *Google v Equustek*,<sup>60</sup> the Supreme Court of Canada ordered Google to de-index, with global effect, the websites of a company which, in breach of several court orders, was selling the intellectual property of another company (Equustek Solutions Inc.) via those websites. The decision was swiftly followed by a United States District Judge granting an injunction preventing the enforcement of the Canadian judgment.<sup>61</sup> Such countermeasures are natural given what is at stake and they make clear that states are still not prepared to accept wide jurisdictional claims (by others).

## G. Concluding remarks

- 70 In this article I have sought to discuss and evaluate three key developments in how the EU is seeking to delineate the external reach of its substantive law in this age characterised by extensive and frequent cross-border interactions due to the Internet. I applied one particular method but acknowledge that there are many other ways to engage with this task. And I opted to focus on the three most important recent developments, as I see it, acknowledging that there also are other developments that are relevant. The presence of subjectivity goes without saying. Nevertheless, at least on this analysis, the picture that emerges is a sombre one. While it may be said that the EU remains at the cross-roads, the indicators suggesting that the EU will opt for a path adding significantly to the troubling trend of hyper-regulation are more plentiful than those that give hope of a reversal of this development. The best way to counter this would, in my humble opinion, be to recognise the jurisprudential framework for jurisdiction that I outlined in the introduction as being incorporated in the EU’s foundational treaties. This could perhaps be achieved in more than one way, and such a move could arguably be motivated along the following lines:
- I. The European Union’s foundational treaties and case law enshrine the principle of mutual regard to the spheres of jurisdiction of sovereign states.
  - II. The jurisprudential framework for jurisdiction outlined above is an articulation of how international law approaches jurisdiction.

55 Proposed e-evidence Directive, Recital 13.

56 Jääskinen and Ward, *op. cit. supra* note 17, at 146.

57 I hasten to acknowledge that where geo-location technology is used to facilitate unjustified price-discrimination, and similar harmful practices, its use may obviously be legitimately restricted.

58 Consider, e.g., *X v. Twitter Inc.* [2017] N.S.W.S.C. 1300, and *Google Inc. v. Equustek Solutions Inc.*, 2017 S.C.C. 34, to mention merely two examples.

59 *International League Against Racism & Anti-Semitism (LICRA) v. Yahoo! Inc.* (2000) County Court of Paris, as followed by responses from US courts.

60 *Google Inc. v. Equustek Solutions Inc.*, 2017 S.C.C. 34.

61 *Google LLC v. Equustek Solutions Inc.*, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017).

- III. Thus, the said jurisprudential framework for jurisdiction is incorporated within the EU's foundational treaties.
- IV. And as EU legislation must be interpreted in a manner that is consistent with international law, the EU does not make jurisdictional claims that go beyond that framework.

71 Under the reasoning I advanced here, it would seem legitimate for courts in the EU to adopt the jurisprudential framework for jurisdiction, described in the introduction, as the standard against which jurisdictional claims are measured, and as the underlying guiding principles for the interpretation of the EU's jurisdictional claims.

72 At any rate, the secretariat of the Internet & Jurisdiction Policy Network – the leading multistakeholder organization engaging with the tension between the cross-border nature of the internet and national jurisdictions – frequently refer to the risk of “a legal arms race” resulting from the current jurisdictional climate online.<sup>62</sup> And without seeming overly alarmist, I suspect that we are at the brink of what could be a most harmful set of jurisdictional confrontation, in which the potential victims include fundamental human rights, commercial effectiveness, effective and fair law enforcement, consumer protection and indeed the Internet as we know it. The war of Internet jurisdictional claims is about to begin, and in that context, I am merely seeking to be a “jurisdictional peace activist”.

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<sup>62</sup> See, e.g., Internet & Jurisdiction Policy Network, “Towards Policy Coherence and Joint Action: Secretariat Summary and Ottawa Roadmap”, p. 3, <<https://www.internetjurisdiction.net/uploads/pdfs/Secretariat-Summary-and-Ottawa-Roadmap-second-Global-Conference-of-the-Internet-Jurisdiction-Policy-Network.pdf>> (last visited 28 May 2018).

# The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation

by Adèle Azzi\*

**Abstract:** The General Data Protection Regulation (GDPR) imposes a significant burden of compliance on overseas businesses which process personal data of EU individuals. An impressive number of articles warns about the new risks incurred by data processors around the world; be they one of the Internet giants, or a non-EU company which dared to offer goods to EU consumers, or that had the idea to use cookies on its website to track EU consumers. However, does the EU actually have the necessary means to ensure that the rules are followed by all? And if not, is the EU equipped to enforce compliance? Those are legitimate questions in the light of the context in which the EU has extended its jurisdiction. Not only has it been decided unilaterally, but such rules are to be enforced in cyberspace, in an international context, and on operators, which may not have any physical presence in the EU. One may think that processors have no reason to panic, there is little chance that the GDPR enforcers will find them and force them to comply under the threat of fines. Yet,

internet users witness an undeniable wave of change in the terms of the use and processing of data on a majority of websites. Does this phenomenon reveal a real power of enforcement on the EU side? This work attempts to answer this question by analysing two factors which greatly impact the efficiency of extraterritorial claims. First, the legitimacy of the extraterritorial claim. Through the application of international law principles, it will be seen that the extraterritorial claim of the EU, despite its broadness, is rather legitimate and even part of a shared tendency among jurisdictions around the world to extend the reach of data protection laws. Second, the enforcement tools of the regulation. This work reveals that the EU may benefit from some direct enforcement tools such as representatives and international cooperation, but also, and more importantly, through indirect means. In particular, the EU may rely on the risk of reputational damage, the incentives to self-compliance, and the rules on data transfers to third countries.

**Keywords:** Data protection; GDPR; compliance; overseas data processing; extraterritorial scope; enforcement; international law; international cooperation

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## A. Introduction

- 1 More than ever, any attempt to regulate data privacy has become highly complex and controversial.
- 2 The current features of data privacy have encouraged the Commission to reform the European Union (EU) data protection framework, but, at the same time, the very same features make this reform a real challenge.
- 3 First, data privacy ought to be protected as a fundamental right in the EU, under Article 8(1) of the Charter of Fundamental Rights and Article 16(1) TFEU. Since 1970, when the first data privacy act in the world was adopted in Germany, data privacy has developed in each Member State, then at the EU level, becoming the world's strictest and most influential data privacy regime.
- 4 Second, data have become a valuable and competitive asset, a currency, and even a commodity on its own. Facebook's motto: "It's free and always will be" is not exactly true. Raw data have always had a commercial value for businesses, but the current techniques of data processing, in addition to the wider amount of accessible data, have made it become a key asset for targeting and developing a demand. The role of data in the development of the economy is recognized worldwide, in particular in the EU.<sup>1</sup>
- 5 Last, but not least, data privacy has acquired a transnational aspect. While, not a long time ago, the data controller, the data subject and the means used for data processing were often located in one country,<sup>2</sup> the development of international trade, the new technologies and the new corporate structures of multinational companies have increased the importance of the international processing and transfer of data. This new borderless environment does not give much credibility to data protection laws with a domestic territorial scope. A "territorial scope 2.0"<sup>3</sup> is now required.
- 6 Since 2010, the Commission has been working on the creation of a new EU data protection framework,<sup>4</sup> which until now, was mainly contained in the 1995 Data Protection Directive ("the directive").<sup>5</sup> Years of debate and heavy lobbying have led to the adoption of the General Data Protection Regulation (GDPR, "the regulation") of 27 April 2016, which took effect on the 25th of May 2018.<sup>6</sup>
- 7 Much noise is made around the obligations imposed by the GDPR on controllers and processors (who will be called "operators"), for the processing of the personal data of individuals located in the EU. Undoubtedly, it brings about substantial changes in comparison to the directive. Nonetheless, the biggest change surely lies in the new territorial scope of the data protection rules. Under Article 3 of the GDPR, operators who used to be entirely out of the reach of EU data protection rules, despite heavily processing EU data, will suddenly have to comply with the highest data protection standards in the world. However, does the EU and its Data Protection Authorities (DPAs) have the means to effectively apply the regulation outside its borders? Who are the overseas operators?
- 8 The focus is often placed on the social networks, email providers, or search engine operators based in the US; but a large part of the processing today also takes place in Asia, particularly China. Many EU citizens use Chinese products such as the Huawei's smart phones, the search engine Baidu, their cloud computing services, banking services, etc.
- 9 The efficient application of the GDPR on those large non-EU companies, as well as smaller ones, is said to be dependent on some specific factors: first, the legitimacy of the extraterritorial claim, and second, the enforceability of the claim,<sup>7</sup> knowing that the former will greatly condition the latter. Indeed, it is acknowledged that "*where it is morally justifiable, it is perilous for the target of the claim to ignore it, and where it is not morally justifiable, it is perilous for the [country] to make the jurisdictional claim*".<sup>8</sup>
- 10 In the light of these factors, this essay assesses the challenges faced by the new territorial scope of the GDPR, in particular by focusing on Article 3(2) which embodies its extraterritoriality by extending jurisdiction over activities and operators located

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1 Communication from the Commission "Building a European data economy", COM(2017) 9 final, January 2017.

2 Paul de Hert and Michal Czerniawski, *Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context*, International Data Privacy Law, 2016, Vol. 6, No. 3.

3 Merlin Gömann, *The new territorial scope of EU data protection law: deconstructing a revolutionary achievement*, Common Market Law Review, 54, pp. 567 – 590, 2017.

4 Communication from the Commission "A comprehensive approach on personal data protection in the European Union", COM(2010) 609 final, November 2010.

5 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

6 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) [2016] OJ L 119/1.

7 Dan Jerker B Svantesson, *Extraterritoriality and targeting in EU data privacy law: the weak sport undermining the regulation*, International Data Privacy Law, 2015, Vol. 5, No. 4, p. 233.

8 (n 7).

outside of the EU.<sup>9</sup>

- 11 If the contractual freedom of the parties shall not enable them to derogate from the GDPR by agreement,<sup>10</sup> the efficiency of its extraterritorial scope keeps facing several challenges. The very limited nexus of jurisdiction, which does not require any physical presence in the EU, the immaterial features of cyberspace and the particularly burdensome duty of compliance imposed on operators, are, all together, casting doubt on the actual enforceability of the GDPR on non-EU businesses. Article 3(2) is supposed to put an end to any attempt of circumvention of EU data protection rules, but such an objective might only be a *façade*.
- 12 In other words, to reuse the terms of an author, does the GDPR provide “bark jurisdiction”, or “bite jurisdiction”?<sup>11</sup>
- 13 After an explanation of the extent of the extraterritorial claims of the GDPR (B.), this essay will assess the challenges that they face through two main angles: first, the legitimacy of the extraterritorial scope (C.); and second, its enforceability in the international online context (D.).

## B. The extraterritorial aspirations of the GDPR: from a territorial to a destination approach

- 14 It is acknowledged that the wider the jurisdictional claim, the more reasonable it will be for other states to refuse to recognise it.<sup>12</sup> But in the borderless context of Internet, where should the line be drawn? How can a European data protection framework reconcile the desire to protect EU personal data and the legal certainty that is owed to foreign businesses?
- 15 Through the combined use of a territorial and a “destination” justification, Article 3 of the GDPR incorporates the extraterritorial claims already made by the courts under the directive (B.I), and then pushes the boundaries further (B.II).

## I. The incorporation of previous solutions: the extraterritorial application of the directive

- 16 The scope of the directive should have followed a territorial approach, under which the EU data protection rules could only be applied to controllers that have a certain physical presence in the EU. However, this legal basis of application has been stretched and changed by the courts beyond recognition.
- 17 First, the directive applied when “*the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State*”.<sup>13</sup> Thus, in principle, the directive could not reach a controller processing EU data entirely outside the EU, even if the controller had some establishments within the EU, unrelated with the processing activity. As soon as technological developments made it possible to process data at a distance, the scope of the directive could easily be circumvented, until the Court of Justice intervened. In the *Google Spain* case, the processing was carried out by Google Inc., the US based company, but it was made profitable through the activities of the EU establishment Google Spain. According to the Court, the economic link between the EU establishment and the US processing entity amounted to a processing carried out “in the context of the activities” of the EU establishment. Therefore, the US entity was bound by the directive when processing EU data in the US territory.<sup>14</sup> From now on, these mental gymnastics are not required anymore because Article 3(1) specifies that the EU rules apply “*regardless of whether the processing takes place in the EU.*”
- 18 Second, when the controller was not established in the EU, the directive would apply if, “*for purposes of processing personal data, [the controller] makes use of equipment (...) situated [in the EU]*”.<sup>15</sup> At the time the directive was drafted, “equipment” probably referred to main-frame computers and servers. However, it has been extended so that the directive would apply to controllers without any physical equipment in the EU. The main extension was made by The Article 29 Working Party (“Art. 29 WP”), an independent EU advisory body on data protection. It considered the placing of “cookies” in personal computers in the EU as “making use of equipment” within the EU.<sup>16</sup> Under this interpretation, the user’s PC is

9 See for a definition of extraterritoriality, (n 7), p. 227.

10 Maja Brkan, *Data Protection and Conflict-of-Laws: A Challenging Relationship*, EDPL 3/2016, pp. 333 – 334.

11 Dan Jerker B. Svantesson, *The Extraterritoriality of EU Data Privacy Law – Its theoretical Justification and Its practical Effect on U.S. Businesses*, (2014) 50 *Stanford Journal of International Law*, 53, p. 58.

12 (n 11), p. 94.

13 Directive 95/46/EC, Article 4(1)(a).

14 Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317.

15 Directive 95/46/EC, Article 4(1)(c).

16 Article 29 Data Protection Working Party, ‘Working Document on determining the international application of EU data protection law to personal data processing on

seen as “equipment”. Moreover, it also considered JavaScript, banners and spywares as “equipment”, in the sense of Article 4(1)(c).<sup>17</sup> With the regulation, this artificial concept of equipment is replaced by Article 3(2)(b), since the provision extends the scope of EU rules to the processing related to the “monitoring” of the behaviour of people in the EU.

## II. The new and broader extraterritorial claims of the GDPR

19 The GDPR aims to protect the personal data of people located in the EU. However, a pure protective approach would bring uncertainty for foreign businesses. EU data may be found in a number of situations, sometimes unexpectedly. Hence, the Commission has drafted the regulation in a way which rather places emphasis on the conduct of the operator itself, following a “destination” approach. Actually, as we will see, the only difference lies on the better justifiability of the claim. In practice, it has almost the same effects as a protective approach, which would have been applied wherever EU data were processed.

20 Article 3(2) allows the application of the EU rules to non-EU operators who process the data of individuals in the EU in two situations: first, if it is related to the offering goods and services in the EU (B.II.1); and second, if it is related to the monitoring of the behaviour of people in the EU (B.II.2).

### 1. Offering of goods and services: “you are targeted if you target”

21 Under Article 3(2)(a), the regulation applies to non-EU operators where they process the personal data of individuals in the EU, in relation to the “offering of goods or services” to them, including free of charge. This is not an unusual basis for jurisdiction, but it raises some controversy in the internet world.

22 This basis for jurisdiction is not surprising. It is also found in Brussels 1 Regulation which provides that, as soon as the professional has directed by any means its activity towards the consumers domiciled in a certain Member state, those consumers cannot be deprived of the protective and non-derogable rules of the Member state<sup>18</sup>. It is the “targeting”

the Internet by non-EU based web sites’ (WP 56, 30 May 2002); see comments by Lokke Moerel, *The long arm of EU data protection law: Does the Data Protection Directive apply to processing of personal data of EU citizens by websites worldwide?*, International Data Privacy Law, 2011, Vol. 1, No. 1.

17 Lokke Moerel, (n 16).

18 Regulation (EU) No 1215/2012 of 12 December 2012 on

logic, under which “you are targeted by EU law only if you target”.<sup>19</sup>

23 The rationale, however, becomes more controversial in the context of online sales and worldwide accessible websites. In this context, one could ask in the case of “*who is targeting who in the transaction?*”<sup>20</sup> whether the consumer is specifically looking for the particular website? However, Recital 23 of the GDPR adds that the targeting should be “*apparent*”. To assert such intention, the accessibility of the website may be combined with the possibility of ordering goods and services in the language or with the currency of one or more Member States or the mentioning of EU customers.<sup>21</sup> The case law under Brussels 1 also provides additional relevant factors of targeting such as “*the international nature of the activity, mention of itineraries from other Member States (...), mention of telephone numbers with an international code, (...), use of a top-level domain name other than that of the Member State in which the trader is established (...)*.”<sup>22</sup>

24 In practice however, one may wonder whether the court will require an “active dis-targeting” on the part of the operator. In the US, under the targeting principle, a US court considered that it had jurisdiction over a Canadian website used by Americans, because the latter did not technically “prevent” access to its website by Americans who could access it by declaring that they were Canadian residents.<sup>23</sup> As Svantesson suggests, the use of geolocation technologies might be a solution, however access to this information always requires the consent of the user, even if not for monitoring purposes.

### 2. The monitoring of the behaviour of individuals located in the EU

25 Under Article 3(2)(b), the GDPR applies to non-EU operators who process the personal data of individuals in the EU where the processing is related to the monitoring of their behaviour, as far as their behaviour takes place in the Union. In light of this provision, what types of processing of EU data may actually fall out of the regulation? The answer is only very few.

jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art. 17(1)(c).

19 (n 2).

20 (n 2), p. 241.

21 GDPR, Recital 23.

22 Joined cases *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), §93.

23 *Twentieth Century Fox Film Corp v. iCraveTV*, Nos. 00-121, 00-120, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000).

- 26 First, the concept of monitoring receives a particularly broad definition. There is “*monitoring*” where “*natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.*”<sup>24</sup>
- 27 It follows that most of the processing of EU data will trigger the application of the GDPR, in particular when it is carried out by businesses. Nonetheless, it shall not apply to a non-EU entity which, for example, collects data on EU consumers in order to classify individuals based on their characteristics and obtain an aggregated overview of its clients without making any predictions about an individual.<sup>25</sup>
- 28 Secondly, the limits of the concept of “monitoring” is highly impacted by the definition given to “personal data”. They include, but are not limited to, the user’s personal preferences, interests, location or movements.<sup>26</sup> The regulation specifies that online identifiers like IP addresses and cookie identifiers can serve to profile natural persons<sup>27</sup> and thus be qualified as personal data. As a result, the monitoring does not even “mainly” concern social networks, email providers, or search engine operators, but impacts the vast majority of websites that collect the “click stream data” (surfing behaviour),<sup>28</sup> either through the use of cookies, ad banners or JavaScript.
- 29 In conclusion, Article 3(2) significantly increases the scope of EU data protection rules in a unilateral way, and to a greater extent than any other jurisdiction in the world has done until now. Even if it refers to the alleged voluntary conduct of the operator to justify the application of the regulation, in practice the application of the regulation almost “follows” the EU data. Given the sudden application of EU rules to many websites around the world, one may wonder on which legal basis does the regulation ground its legitimacy and authority.

24 GDPR, Recital 24.

25 Article 29 Data Protection Working Party, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (wp251rev.01), p. 7.

26 GDPR, Art.4.

27 GDPR, Recital 30.

28 Lokke Moerel, (n 16).

## C. The legitimacy and legal basis for an extraterritorial application of the GDPR

- 30 The Regulation amounts to a unilateral expansion of the application of European law to non-EU businesses. No one could deny that this expansion is justified by the borderless domain of the Internet, which in response requires also a borderless application of the law. In a way, there is no doubt that effective data protection on the Internet does not get along with a domestic scope of application. Nonetheless, the EU dares to go much further than any other state on this aspect, and with the highest level of standards in the world. It is not only challenging state sovereignty, but also imposing a particularly heavy burden of compliance on overseas businesses, not to mention the high costs of the administrative fine.
- 31 On which legal basis can the EU unilaterally extend its authority over non-EU entities and justify or legitimate these new self-acquired powers in the eyes of the world?
- 32 The unilateral expansion of jurisdiction out of the borders is not a rare phenomenon and has been carried out by most countries, in particular in relation to criminal matters. Such extraterritorial claim must however respect some specific rules. Indeed, when doing so, jurisdictions, including the EU and its institutions,<sup>29</sup> are bound to respect public international law. It is therefore necessary to review the conditions under which public international law legitimates an extraterritorial claim, knowing that the outcome of this assessment may either seriously challenge such expansion or, on the contrary, support it and deem it hardly questionable.<sup>30</sup>

## I. The identification of the international rules governing extraterritorial claims

- 33 Article 29 Working Party has held that cross-border cases in data protection law is “a general question of international law”<sup>31</sup>. In general, there is a principle, stated by the seminal case *Lotus*, that states have “a wide measure of discretion (...) to adopt the principles which it regards as best and most suitable”.<sup>32</sup> Nonetheless, the fundamental principles

29 Case C-366/10 , *Air Transp. Ass'n of Am. and Others v. Sec'y of State for Energy and Climate Change*, 2011, §101.

30 (n 11), p. 76.

31 Article 29 Data Protection Working Party, (n 16), p. 2.

32 PCIJ, *SS Lotus, (France v Turkey)*, PCIJ Reports, Series A, No 10, p. 19 (1927).

of state sovereignty and non-interference require some limitations.<sup>33</sup> Such limitations are not easy to draw in light of the sometimes very creative grounds invoked to justify jurisdiction. One may however refer to “the most authoritative outline” of the sources of international law, provided by Article 38 of the Statute of the International Court of Justice.<sup>34</sup> Under this article, the legitimacy of extraterritorial claim may be assessed in light of “*international conventions [...] establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; (and) the general principles of law recognized by civilized nations [...]*”.

- 34 Regarding international conventions, no international treaty is directly related to data protection, so it may not be the most relevant factor to consider. Admittedly, the principle of privacy protection is clearly enunciated at least by two interventional conventions, i.e. the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). It does not however provide guidance to assess the legitimacy of the scope of the GDPR.
- 35 Therefore, the focus will be placed, first, on international custom, which will indicate the degree of acceptance of these claims (C.II.) and second, the general principles of law recognized by civilized nations, which will allow for a comparison with other states’ extraterritorial claims in data protection (C.III.).

## II. The limited support of international customs

- 36 To consider a jurisdictional basis as an international custom, it is required to satisfy conditions of duration, uniformity and constancy of the practice, and the authority of the jurisdictional basis will vary accordingly.
- 37 To begin with, the “territorial principle” undoubtedly constitutes an international custom as it is the most universally accepted jurisdictional basis. It consists, merely, in determining jurisdiction by reference to the place where the offence is committed<sup>35</sup>.
- 38 A more controversial basis, although increasingly common, is the “effects doctrine”. It bases jurisdiction upon the fact that a conduct which

took place outside the state has effects within the state.<sup>36</sup> It is particularly relevant in antitrust law and has been recognized, for example, by the US Supreme Court which stated that “*acts done outside a jurisdiction, but intended to produce and producing detrimental effect within it, justify a state in punishing the cause of the harm as if he had been present at the effect*”.<sup>37</sup> However, the problem with this basis, as noted by Kuner, is that it is “open-ended”, in particular in a globalized economy, where “*everything has an effect on everything*”.<sup>38</sup>

- 39 Finally, jurisdiction is sometimes based on the passive personality principle. This ground, which determines jurisdiction by reference to the nationality of the victim, does not reach the statute of international custom as it remains a highly controversial basis.
- 40 In light of these grounds, it seems that Article 3(2) of the GDPR is based on the “effect doctrine”, which remains a controversial basis of jurisdiction. The GDPR places the focus on the location of the potential harmful effects and discards the location of the processing of the operator. It is worth noting that, initially, the 2012 draft of the GDPR founded jurisdiction on the passive personality principle, applying the EU rules to EU *residents*. In the final version, the term “resident” has disappeared from Article 3 and has been replaced by the vague terms “data subjects who are in the Union”.
- 41 While the assessment of international custom allows us to identify the approach chosen by the GDPR and provides a first overview of its level of acceptance, further details are provided by the General Principles of Law.

## III. Legal basis in regard of the General Principles of Law Recognized by Civilized Nations

- 42 This source is subsidiary to customary law and consists in mapping the domestic laws of states and, more specifically, their respective jurisdictional scope in terms of data protection. Without going through all domestic data protection laws, the assessment of a few regimes is quite indicative of the degree of legitimacy that may be recognized by the GDPR, and hence its authority.
- 43 Regarding data privacy, extraterritorial claims become widespread. For example, in Australia, the 1988 Privacy Act applies to any organisation

33 Christopher Kuner, *Data protection law and international jurisdiction on the Internet (Part 1)*, International Journal of Law and Information Technology, Oxford University Press 2010, p. 186.

34 (n 11), p. 76.

35 Introductory Comment to the *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. Int’l L. 439, p. 455.

36 (n 11), p. 82.

37 *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

38 (n 33), p. 190.



or small business operator with an “Australian link”, in particular where such entity carries on business in Australia.<sup>39</sup> In Singapore, the Personal Data Protection Act of 2012 applies to organisations collecting personal data from individuals in Singapore whether or not the organisation itself has a presence in Singapore.<sup>40</sup> In the US, the Children’s Online Privacy Protection Act (COPPA) applies to foreign-based websites that are either directed to children in the US or which knowingly collect personal information from children in the US. This formulation inevitably resembles the scope of the GDPR.

- 44 Reference can also be made to other fields, in particular to the US. The US is indeed generally not reluctant to extend the territorial scope of their law, and the best illustration is provided by the US Foreign Corrupt Practices Act (“FCPA”).<sup>41</sup> Its scope has been extended by the courts to issuers of securities on the US markets, and even acts of bribery committed through the use of a US-based email provider.<sup>42</sup> This fact is not only relevant to identify general principles of law, but also to show that the US, despite the important impact of the GDPR on their businesses, are not in the best position to object to such territorial scope.
- 45 In consequence, while the international custom was displaying rather shy support for the scope of the GDPR, the General Principles of Law reveal a tendency to broaden the reach of data protection laws. Many countries seem to acknowledge the need to apply the data protection rules outside their borders. However, should the new scope of application be considered as “bark jurisdiction or bite jurisdiction”?<sup>43</sup>

#### D. “Bark jurisdiction or bite jurisdiction”: the enforcement issues

- 46 The capacity of enforcement faces a lot of difficulties in an environment which combines non-physical aspects (cyberspace) with extraterritoriality. As noted by Goldsmith and Wu, “*with few exceptions, governments can use their coercive powers only within their borders and can control offshore Internet*

*communications only by controlling local intermediaries, local assets and local persons*”.<sup>44</sup> Besides, obstacles against enforcement can arise at several stages of the procedure, from the beginning of investigations to the application of a sanction. However, surprisingly, the literature related to the enforcement of the GDPR in non-EU countries is rare, if not non-existent. Although it seems to be an unspoken issue, it has appeared in several guides drafted by law firms that the enforcement of the GDPR over non-EU companies remains “unlikely”.

- 47 After a brief description of the related powers of supervisory authorities (D.I.), this essay will examine the different solutions which may beat the odds and preserve the efficiency of the GDPR and the authorities’ powers in non-EU cases. They comprise of direct means of enforcement (D.II.) and indirect ones (D.III.).

#### I. The broad investigative and corrective measures in the hands of supervisory authorities

- 48 In the GDPR, the investigative powers and ability to sanction are both extremely broad.
- 49 A supervisory authority is allowed to order the operator to communicate information, to carry out data protection audits, to obtain access from the operator to all personal data necessary for the performance of its tasks, and to obtain access to any premises of the operator, including data processing equipment.<sup>45</sup>
- 50 In terms of corrective powers, the authority can, among other measures, issue a warning to an operator, impose a temporary or definitive limitation such as a ban on processing, order the rectification or erasure of personal data and impose an administrative fine.<sup>46</sup> The fine goes up to 4% of the total worldwide annual turnover for the most serious breaches, which actually includes most of the substantial obligations imposed by the regulation. It applies to violations of the requirement of consent and all the basic principles for processing, the data subject’s rights such as the “right to be forgotten”, the rules on data transfer to third countries, and for the non-compliance with an investigative or corrective measure.

39 Privacy Act 1988, Section 5B, paragraph 3(b), accessible on <<https://www.legislation.gov.au/>>.

40 <<https://www.dlapiperdataprotection.com/index.html?t=law&c=SG>>.

41 Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. (“FCPA”).

42 French National Assembly Information Report n°4082, 5 Oct. 2016, on the Extraterritoriality of American laws.

43 (n 11), p. 58.

44 Jack Goldsmith and Tim Wu, *Who controls the internet?, Illusions of a Borderless World*, Oxford University Press, 2006, p. 159.

45 GDPR, Art.58(1).

46 GDPR, Art. 58(2).

## II. The possible direct means of enforcement of the GDPR against non-EU operators

51 Direct solutions of enforcement involve the role of representatives, the cooperation between jurisdiction, and possible international measures against non-compliers.

### 1. The role of representatives

52 A response to the difficulties of international enforcement may be found in the role of representatives.

53 Under Article 27, any operator which is subject to Article 3(2) and does not have an establishment in the EU shall designate a representative in the EU, in one of the Member States in which the data subjects are located.<sup>47</sup> Operators may designate only one representative, a legal entity or an individual for the whole territory of the EU. Representatives differ from Data Protection Officers (“DPOs”), even though their role overlaps in some ways. The role of the representative, as its name implies, is to represent foreign operators with regard to their obligations and create a point of contact between them and the EU authorities. More specifically, the representative is required to cooperate with the authorities regarding any action ordered to ensure compliance with the regulation.<sup>48</sup>

54 However, its role may go beyond this function and actually elevate the representative as a primary tool of enforcement. Indeed, recital 80 provides that the designation of such a representative does not affect the responsibility or liability of the operator, but adds that the representative “*should be subject to enforcement proceedings in the event of non-compliance by the controller or processor*”. In a previous draft of the regulation, this statement was made under Article 27, before being displaced to the preamble of the regulation. Unfortunately, the regulation does not provide any details on the enforcement mechanisms in question.

55 There is much controversy as to whether a representative may incur some sort of liability, in addition to the operator, and no guidance has been issued by the Art. 29 WP. Meanwhile, as the first Member State to have implemented the regulation, Germany has interpreted this provision law as

enabling civil law proceedings to be directed against the representative.<sup>49</sup> Further, in a recent case against WhatsApp, held under the directive, the Netherlands has considered that the DPO could incur liability in case of non-compliance with the directive,<sup>50</sup> despite this not being specified by the directive. In response, WhatsApp claimed that it could not find any officer ready to endorse such liability, but the “impossibility” argument has been rejected. The Dutch court added that the parties could agree in contract to indemnify the officer in case of liability. Besides, the IAPP, a non-profit organisation which share best practices for privacy management issues, has also interpreted Article 27 of the regulation in this sense: “*it seems likely the EU representative would be required to at least initially incur the legal and other costs for addressing enforcement actions and be responsible for paying administrative fines and damage suit awards*”.<sup>51</sup>

56 From those observations and considering the influence that may have the first implementation law on other Member States, there is a real possibility for representatives to be subject to enforcement measures. Of course, the law would be more effective if such power of coercion could be exercised locally. Besides, it would reduce the costs inherent to cross-border litigation.

57 However, a number of objections temper this possibility. First, as it was claimed by WhatsApp, operators might encounter a real difficulty in finding a representative eager to incur a potentially significant liability. Second, a representative may not actually have much influence over the foreign operator and may not have sufficient financial or material means to deal with the sanctions. Finally, even though the obligation to appoint a representative is sanctioned by a fine of up to 2% of the global turnover, there might well be some operators who decide to ignore it and not respond to any sanctions.

58 It follows that the existence of representatives in the EU territory will probably facilitate the enforcement of the regulation in some cases, but can only be seen as one the possible means to achieve an effective enforcement abroad.

<sup>47</sup> This obligation does not apply to processing that is occasional, does not involve sensitive data and is unlikely to result in a risk to the rights and freedoms of natural persons.

<sup>48</sup> GDPR, Recital 80 and Art. 31.

<sup>49</sup> Section 44(3) of the Federal Data Protection Act of 30 June 2017 (Federal Law Gazette I p. 2097).

<sup>50</sup> Administrative Court of The Hague, 22 November 2016, SGR 15/9125.

<sup>51</sup> International Association of Privacy Professionals (IAPP), <<https://iapp.org/news/a/how-do-the-dpo-and-eu-representative-interplay/>>.

## 2. The cooperation between jurisdictions

### a.) The cooperation for investigation measures

- 59 Under international law, it is prohibited for a state to perform an act on foreign territory when it falls within the exclusive competence of the foreign state officials, such as investigation. The consent of the foreign state must be obtained, regardless of the consent of the parties.<sup>52</sup> This rule is shared by every country, including China which codified it under Article 277 of CiPL.
- 60 Some authors mention the possibility of resorting to international cooperation agreement, such as agreement of mutual legal assistance (MLA). Currently, the vast majority of those treaties are related to criminal cases.
- 61 Regarding data protection, some punctual authorisations have been given. It happened for the first time in 1996, when the German DPA obtained the consent of Citibank to conduct an on-site audit of the data processing facilities of its US subsidiary, which had received the credit card data of German customers.<sup>53</sup> A further example is given by the Spanish DPA, which also conducted an audit on the processing equipment of a data recipient in Colombia, on the basis of a contractual clause authorising such an investigation.
- 62 These cases raise the question as to whether the cooperation could actually be organised through contractual clauses. Actually, some standard contractual clauses for data transfers outside the EU already contain a prior authorisation given to the relevant DPA.<sup>54</sup> However, as noted by Christopher Kuner, the consent of the relevant government authorities will always be required and, according to him, was obtained by the German and Spanish DPAs in the cases mentioned.<sup>55</sup>
- 63 An EU DPA may also overcome the reluctance to consent of the foreign authorities by asking its DPA to conduct the measures itself, on behalf of the EU DPA, but an agreement would have to be reached as to the costs incurred by the operation.

52 Christopher Kuner, *Data protection law and international jurisdiction on the Internet (Part 2)*, International Journal of Law and Information Technology, Oxford University Press 2010, p. 232.

53 (n 52), p. 233.

54 See Commission Decision 2001/497 of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries under Directive 95/46/EC, 2001 O.J. (L 181/19).

55 (n 52), p. 233.

### b.) The cooperation for the enforcement of a judgment or administrative decision

- 64 To understand the possibilities of enforcement of judgments from EU courts or DPAs, it is necessary to briefly recall some principles of international law.
- 65 To be efficient abroad, a judgment needs to be *recognized* and *enforced* by the foreign court. The basic theories on which it is done are, first, the “comity” theory, which often requires reciprocity or a treaty between the states, and second, the “obligation theory”, under which it would be fair to the parties to enforce it.
- 66 In China, in theory, recognition and enforcement of foreign judgment (“REJ”) are possible if there is, among other conditions, a treaty of mutual judicial assistance or reciprocity.<sup>56</sup> Until recently, it was almost impossible to obtain REJ absent a treaty of mutual judicial assistance, which is rare and usually focused on criminal cases. However, lately, Chinese courts have shown more willingness to enforce foreign judgment on the basis of reciprocity and have adopted a pro-active attitude in triggering the reciprocity cycle.<sup>57</sup>
- 67 Beyond comity and reciprocity, the existence of shared values of privacy protection with the foreign jurisdiction and the legitimacy of the extraterritorial claim will significantly impact the likelihood of foreign enforcement. The more limited the nexus for jurisdiction is, the more likely it is that the foreign jurisdiction will not enforce the decision.
- 68 Jurisdictional claims regarded as illegitimate in light of those two factors may even lead to the adoption of a “blocking statute”. Such legislation may forbid the production of evidence or any documents in foreign proceedings, prohibit compliance with orders of foreign authorities, etc.<sup>58</sup> As extreme as it may sound, it is actually quite common.<sup>59</sup> For example, in the US it may be unlikely to obtain the enforcement of a decision relating to the GDPR’s “right to be forgotten”, which affects freedom of

56 Article 282 of China’s Civil Procedure law.

57 Wenliang Zhang, *Sino-Foreign Recognition and Enforcement of Judgments: A Promising “Follow-Suit” Model?*, Chinese Journal of International Law, Volume 16, Issue 3, 1 September 2017, pp. 515 – 545.

58 Senz and Charlesworth, *Building Blocks: Australia’s Response to Foreign Extraterritorial Legislation*, 2 Melb. J. Int’l L. (2001), p. 27.

59 See for instance in Australia, Section 7 of the Foreign Proceedings Act 1984 (Cth); in Switzerland, Art. 271 of the Swiss Criminal Code; in the EU, Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (which has been recently reactivated in response to the US embargo on Iran).

expression, protected by the First Amendment. Indeed, the Congress has already adopted a blocking statute concerning what they see as “libel tourism”: it makes mandatory the non-recognition of foreign defamation judgments where a US Court would have reached a different judgment under the First Amendment.<sup>60</sup>

69 In conclusion, cooperation with foreign jurisdiction may be relied on for the enforcement of the GDPR outside Europe to the extent that the jurisdictional claim is reasonable and legitimate (and with the consent of the State for investigation measures). It follows that it would probably require more than the mere utilisation of cookies to enforce a judgment abroad through the sole means of international cooperation.

### 3. Other possible direct measures against the operator

70 Of course, when an operator is not established in the EU but possesses assets in the EU, the question of enforcement is not an issue anymore, even though it may require a preliminary asset-freezing order to prevent it from taking its property out of the EU once the action is brought forward.

71 When the foreign operator does not possess assets in the EU, or sufficient assets, other measures might however impact it sufficiently to force it to comply with the DPA’s decision.

72 As recalled by Svantesson, the government may introduce “market destroying measures” to penalise the operator. It consists of prohibiting the party to trade within the jurisdiction or make the debts owed to that party unenforceable within the jurisdiction.<sup>61</sup> The impact of this measure depends on the importance of the market for the operator.

73 There are other creative ways of affecting its commercial interests to force it to comply. A DPA could obtain a court injunction against the local business partners that are indirectly using the processed personal data. A court injunction could also allow the blocking of the websites of the operator or its partners, or the associated internet connections (*via* injunctions applied to internet service providers).<sup>62</sup>

74 In spite of those options that should allow enforcement of the GDPR in serious cases of non-compliance, it is undeniable that those measures do not entirely fill the gap between the scope of the GDPR and the scope of its enforceability. The efficiency of the regulation should be enhanced by indirect but more reliable means of enforcement.

## III. Indirect means of enforcement of the GDPR against non-EU operators

### 1. The reputational impact

75 As noted by a law firm, in the *Google Spain* case, “Google’s prompt compliance with the *Google Spain* decision could suggest that companies will be loath to risk the reputational damage incurred from refusing to comply with a data protection enforcement notice, rendering the practical difficulties of enforcement irrelevant.”<sup>63</sup> The reputational image will always play a role as soon as the company’s failure to comply may be mediated and the claim is morally justifiable.

76 Actually, the reputation is so crucial that it may even have the capacity to broaden the scope of the GDPR. Facebook is currently facing this issue since its declaration in April 2018. Mark Zuckerberg announced that Facebook would apply “*in spirit*” the GDPR to the rest of the world. It has resulted in a change to its terms and conditions so as to remove from the Irish jurisdiction the 1.5 billion non-EU users (70% of the members) to the US jurisdiction. It triggered a global uproar.<sup>64</sup> The Transatlantic Consumer Dialogue has publicly written to Facebook: “*We write to you on behalf of leading consumer and privacy organizations (...) to urge you to adopt the [GDPR] as a baseline standard for all Facebook services. There is simply no reason for your company to provide less than the best legal standards currently available to protect the privacy of Facebook users.*”<sup>65</sup>

77 Although this is the case for companies subject to the pressure of public opinion, the reputational damage will be unlikely to raise great concerns for smaller non-consumer businesses.<sup>66</sup>

60 (n 11), p. 95; 28 U.S.C. §4102 (2012).

61 (n 11), p. 98.

62 <<https://medium.com/mydata/does-the-gdpr-apply-in-the-us-c670702faf7f>>.

63 Slaughter and May, *New rules, wider reach: the extra-territorial scope of the GDPR*, June 2016.

64 <<http://www.bbc.co.uk/news/technology-43822184>>.

65 <<http://tacd.org/tacd-calls-on-facebook-to-adopt-same-privacy-standards-for-all-consumers-and-give-details-on-how-to-congress/>>.

66 (n 63).

## 2. Self-compliance: a comprehensive enforcement at low cost for DPAs

- 78 The GDPR encourages self-compliance and the adoption of codes of conduct by operators subject to the regulation, but also by their business partners.<sup>67</sup>
- 79 The incentives to be self-compliant are again partly related to the protection of the company's image. Indeed, the regulation provides that the codes of conduct will be made available to the public by any means and encourages the establishment of certification mechanisms to demonstrate the compliance of the operator with the GDPR.<sup>68</sup>
- 80 From a practical view, it may also ease the enforcement of the GDPR since it should provide to DPAs a useful insight as to how the operator processes data and what sort of mechanisms can allow it to comply with the regulation.
- 81 The adoption of compliance programme is therefore another way to enhance the efficiency of the regulation, at a lower cost for EU authorities.

## 3. The rules of data transfer to third countries, a minimal safeguard

- 82 Similarly to the directive, under the Chapter V the regulation provides rules applying to the transfer of personal data to third countries. Mainly they require an "adequate" level of protection in the third country.
- 83 While these rules made sense under the restrictive territorial scope of the directive, one may wonder why they are still necessary considering the new (extra)territorial scope of the regulation. This co-existence is even more surprising since data transfer requirements are minor compared to Article 3, which imposes a full compliance to the regulation.
- 84 To illustrate the incoherence, we may take the example of an EU consumer who buys a product on a U.S. website, to be delivered to the UK. In this simple operation, the consumer will have entered its credit card details on a U.S. website, and the performance of the sale operation is likely to involve third parties who will receive some kind of personal data from the consumer, such as the billing or delivery address. Besides, it is very likely that the website will have set up cookies to track the consumer. Often, the information collected by the cookies is then transferred to a third party, such as Google Analytics, the web analytics service provided by Google.

<sup>67</sup> GDPR, Art.40(1) and (3).

<sup>68</sup> GDPR, Art.40(11) and 42(1).

- 85 In this very simple example, there are multiple occasions on which a DPA may characterize a data transfer. For instance, where a web analytics service has no direct link with EU consumers but processes their data, should it respect the whole regulation under Article 3(2)(b) or should it only be subject to adequacy rules? It is very likely that a DPA would make it fall under the entire regulation, even though the operation involved an international data transfer.
- 86 This demonstration aims to reveal that data transfer rules safeguard, in a way, the efficiency of the GDPR. While it is acknowledged that the GDPR will not always be individually enforceable against foreign operators, data transfer rules fill the gap through a general guarantee that, at least, an *adequate* level of protection in the third countries is applied. This is even more likely with regard to the absence of a definition of "data transfer" in the regulation, and hence its flexible application.
- 87 Consequently, Chapter V of the regulation is an indirect way of preserving the efficiency of the data privacy principles underlying the regulation.

## E. Conclusion

- 88 In light of the international context and other domestic laws, the extraterritorial scope of the GDPR cannot be considered as an exception. It is part of a global trend to extend the scope of data protection laws to make them reflect the borderless nature of the Internet. However, the EU distinguishes itself by concurrently applying a very limited nexus for jurisdiction with, not only a heavy burden of compliance - in particular for small businesses - but also a substantial level of administrative fines.
- 89 Other examples of law, such as the US FCPA against corruption, demonstrate that a law can be efficient even with an extremely limited basis for jurisdiction. However, to succeed in subtracting billions of dollars from European companies, the US does not use "traditional" investigation and enforcement measures. As it is asserted in an official report from the French National Assembly, the enforcement in those conditions is made possible through the action of the FBI, for which the fight against corruption is its second priority.<sup>69</sup> Of course, in such circumstances, all the obstacles for investigation, such as the consent of the local authorities, are removed.
- 90 However, for the GDPR to apply through conventional investigation measures, and with a limited nexus for jurisdiction, a number of obstacles remain. This

<sup>69</sup> French National Assembly Report, (n 42).

essay has shown, nevertheless, that the EU rather benefits from the “legitimacy” of the extraterritorial claims and is equipped with the relevant tools to enforce it abroad. That being said, it is necessary to develop those instruments further.

- 91 Besides, for those who remain convinced that the EU is not capable of effectively enforcing the GDPR outside Europe, it must be noted that unenforceable extraterritorial claims might still have some interests. Indeed, it is actually acknowledged by several jurisdictions with extraterritorial data protection laws that such laws - despite difficulties of enforcement - stand as a deterrence for overseas undertakings to engage in illegal processing and have the merit to “*provide consistent treatment for local vis-à-vis overseas organisations*”.<sup>70</sup> As stated by Svantesson, even though a law that lacks the means to be enforced may undermine the legal system, “*morally justifiable law, including morally justifiable law that cannot be enforced, has a quality that cannot, and should not, be ignored*”.<sup>71</sup>

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70 Public Consultation Issued by the Ministry of Information, Communications and the Arts of Singapore *Proposed Personal Data Protection Bill* (19 March 2012) p. 6.

71 (n 11), p. 59.

# The EU Directive on the Protection of Trade Secrets and its Relation to Current Provisions in Germany

by Thomas Hoeren\*

**Abstract:** In June 2018, the deadline for the implementation of a new act reforming the trade secret law expired. This contribution examines the underlying EU Directive on the protection of trade secrets (Directive (EU) 2016/943, hereinafter "Directive")

and outlines the differences compared to the current legislation concerning trade secrets in Germany. Furthermore, the legal nature of trade secrets and possible consequences for the industrial practice are illustrated.

Keywords: Know how protection directive; whistleblowing; implementation

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## A. Introduction

1 Valuable information can leak from a company in several ways; for example, employees with special knowledge leave the company or disclose trade secrets by photographing and storing documents. Further, companies can be victims of cyber-attacks and e-mails can be intercepted and read. The estimated damage caused by industrial espionage amounts to around 50 billion euros per year in Germany.<sup>1</sup> Internationally, the industrialized countries have taken precautions through Article 39 (2) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. As a minimum standard, the Member States of TRIPS have committed themselves to protect information against unauthorized outflow as long as the information is confidential. Information is assumed to be confidential, if it:

- is not generally known or readily accessible to persons within the usual business circles;
- has commercial value because it is secret; and
- has been subject to reasonable steps under the circumstances to keep it secret.

2 In Germany, a special protection for trade secrets exists in the traditionally criminal law provisions of Sections 17 to 19 of the Unfair Competition Act (UWG). These statutory offenses are sanctioned under civil law as well (section 3 UWG, Section 823 (2) German Civil Code (BGB)). The standards of the UWG had already existed when the TRIPS Agreement became effective. Accordingly, the regulatory objectives of the TRIPS Agreement and sections 17 to 19 UWG are not identical. New challenges occur concerning the proof of the confidential character of information and concerning obligations to provide evidence of appropriate confidentiality agreements. So far, there are huge differences concerning trade secret protection within the European member states.<sup>2</sup> This persuaded the Commission to initiate

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1 Based on a statement of the former German secretary of the interior Friedrich: <<https://www.handelsblatt.com/politik/deutschland/wirtschaftsspionage-50-milliarden-schaden/8705934.html?ticket=ST-997336-p9E0C0UzIRMXdjfuARTh-ap4>>.

2 See Ohly, in: *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 2014, p. 1.

two comparative studies on the protection of trade secrets in the European context in the years 2011 and 2013. The studies came to the conclusion that the protection of secrecy in Europe resembles a patchwork carpet.<sup>3</sup> Thereupon, the Commission adopted a first draft of a harmonizing Directive in November 2013.<sup>4</sup> A common text followed in May 2014, which was adopted by the Council of Ministers. One year later – in June 2015 – the Parliament presented its report on the draft Directive.<sup>5</sup> Based on the report, the European Commission, the Council and Parliament drafted a proposal through (unofficial) trialogue negotiations, which was published in December 2015.<sup>6</sup> Finally, the Directive was adopted in June 2016<sup>7</sup> and was to be transposed into national law by June 2018.<sup>8</sup> This led to the discussion on the national level regarding whether the protection of trade secrets should be included in a comprehensive set of rules of intellectual property rights,<sup>9</sup> or at least regulated by a special law.<sup>10</sup> In Germany, the election for the Bundestag caused a discontinuity of the preliminary drafts of the former coalition. Thus, the Federal Ministry of Justice

(BMJV) was required to reintroduce a draft bill into the parliamentary debate. It was certain that the deadline of implementation, which was June 2018, could not be met. It is now clear that the ministry plans an implementation by creating a special law, implementing sections 17 to 19 of the UWG.<sup>11</sup>

## B. Regulatory objectives

- 3 The Directive aims to harmonize the various existing national rules.<sup>12</sup> It is supposed to serve as a complementary or alternative measure to intellectual property rights (recital 2). The Directive does not determine its relation to the UWG (recital 10). Besides, the Directive is supposed to contain only a minimum standard of harmonization for now<sup>13</sup> (Article 1 (1)). It should also be considered that the EU has no competence for criminal law and does not intend to regulate work council constitution law or press law (Article 1 (2)). It is astounding that the Directive does not contain any regulation on private international law. It could be linked to the criminal law, intellectual property rights, or the UWG. This problem of classification underlines that the legal nature of the newly created system is unclear. If the system is classified in terms of intellectual property rights, the Directive applies to all acts of use with reference to the EU. Instead, the UWG asks for the final market intervention or the intended use of the product.

## C. The concept and legal nature of trade secrets

- 4 The cornerstone of the Directive is the concept of trade secrets.<sup>14</sup> It is broadly defined, wider than with accordance to section 17 of the UWG.<sup>15</sup> A secret is

3 Study on Trade Secrets and Confidential Business Information in the Internal Market, MARKT/2011/128/D (April 2013), pp.12 f., 23, available at: <[http://ec.europa.eu/internal\\_market/ipenforcement/docs/trade-secrets/130711\\_final-study\\_en.pdf](http://ec.europa.eu/internal_market/ipenforcement/docs/trade-secrets/130711_final-study_en.pdf)>.

4 Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM/2013/0813 final -2013/0402 (COD), available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0813&from=EN>>.

5 Report on the proposal for a Directive of the European Parliament and of the Council on the protection of disclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0199+0+DOC+XML+V0//EN>>.

6 Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure – Analysis of the final compromise text with a view to agreement, available at: <<http://data.consilium.europa.eu/doc/document/ST-15382-2015-REV-1/en/pdf>>.

7 Directive 2016/943/EU from June 6, 2016, ABIL 157 I from June 15, 2016, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0943>>.

8 Kalbfus, in: GRUR 2016, p. 1009; Ann, in: Gewerblicher Rechtsschutz und Urheberrecht-Prax [GRUR-Prax] 2016, p. 465.

9 Mc Guire, in: GRUR 2016, pp. 1000, 1007 ff. with reference to Italy and Portugal.

10 Like in Sweden for instance: Act on the Protection of Trade secrets (1990), available at <[http://wipo.int/wipolex/en/text/jsp?file\\_id=241716](http://wipo.int/wipolex/en/text/jsp?file_id=241716)>; see also AIPPI Report Q 2010, p. 215; Tonell, in: Kellezi/Kilpatrick/Kobel, Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How 2017, pp. 541 ff.

11 The draft is available at: <[http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE\\_GeschGehG.pdf?\\_\\_blob=publicationFile&v=1](http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_GeschGehG.pdf?__blob=publicationFile&v=1)>; McGuire, in: GRUR 2016 pp. 1000, 1008 had assumed that section 17 of the UWG must be overruled or changed. Kalbfus in: GRUR 2016, pp. 1009, 1016 pleaded for a general law with civil law provisions and for the incorporation of criminal law provisions especially in the event of intentional form of breaches in this general law.

12 Ann, in: GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT-Prax [GRUR-Prax] 2016, p. 465; Koos in: MultiMedia und Recht [MMR] 2016, p. 224.

13 Different the Commission draft, COM/2013/0813 final – 2013/0402 (COD) (supra note 2); see also Kalbfus/Harte-Bavendamm, in: GRUR 2014, p. 453.

14 Klein/Wegener, in: GRUR-Prax 2017, p. 394.

15 Kalbfus, in: GRUR 2016, pp. 1009, 1011 f. presents a slightly different thesis, according to which the German jurisdiction concerning section 17 of the UWG essentially complies with the Directive. Nevertheless, he considers the transposition



already supposed to be existent if the information is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question. The definition of those circles remains unclear.<sup>16</sup> Even the existence of an outsider or a hacker makes information factually accessible. However, this issue was already known concerning section 17 of the UWG. The jurisprudence based its decisions on whether gaining specific information requires a great expenditure of time and costliness and focused on the perspective of the circle of experts.<sup>17</sup> In addition, the trade secret must embody a commercial value, lying precisely in its secrecy.<sup>18</sup> This is completely unknown to German readers, as section 17 of the UWG neither asks for the value of information, nor the existence of a secret. Instead, the German law has always been based on the requirement of an objectively existing economic interest. Thus, secrets without economical value have been protected on the condition that the disclosure of these secrets can cause damage.<sup>19</sup> The definition is based on Article 39 of the TRIPS agreement. Henceforth, it will be necessary to document the value of information steadily before the courts.<sup>20</sup>

- 5 On the one hand, this postulates a financial accounting of trade secrets. And on the other hand, a proof of confidentiality must be provided as a status quo. Therefore, one will have to prove the existence of a comprehensive secret management system that goes all the way to encryption of e-mails and IT security.<sup>21</sup> But that is not all - it must be proven that the information has been subject to reasonable steps to keep it secret (Article 2 (1) (c)). Therefore, proactive and continuous secrecy measures are needed in order to preserve the confidential character of the information. This requires comprehensive, notably long-term measures that are state-of-the-art.<sup>22</sup> It is

a novelty in Germany that legitimate confidentiality measures are a requirement of protection. So far, they only played a role in evidence law. The Federal Supreme Court (BGH) had so far decided that a desire for secrecy resulting from the nature of the matter was sufficient and even the absence of any explicit confidentiality agreement was regarded as unproblematic.<sup>23</sup> For this reason, many people are concerned about the meaning of the term “reasonable steps”.<sup>24</sup> The Directive does not clarify this concept. It does not require the optimal or most effective protective measures, but appropriate standards of protection.<sup>25</sup> Thus, concrete steps have to be defined for the intra-corporate implementation. The first step is to define clear responsibilities for protecting trade secrets within the company. Subsequently, the potentially relevant know-how must be identified and then evaluated and categorized according to the size and industrial sector of the company. Ultimately, precise protective measures must be defined, including special contractual agreements, IT security measures and the organization of workflows.<sup>26</sup> In the automotive industry, for example, care is taken to ensure that measures are carried out and audited concerning building technology, information security and organization. The certification of the IT security sector is carried out in accordance with IS. 27001.<sup>27</sup>

- 6 Moreover, the dogmatic question remains unanswered whether or not the trade secret is recognized as a subjective right, similar to traditional intellectual property rights. The legal nature of trade secrets is highly disputed in Germany.<sup>28</sup> The focus lies on the personal attribution of the right and its exclusionary effect, which is rejected by the majority concerning secrets because the character of secrecy can easily disappear.<sup>29</sup> Secrecy protection does not intend to grant an exploitation right, but

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of the Directive into a special German law as necessary.

- 16 McGuire, in: GRUR 2016, p. 1000 with the main proposal for embedding the protection of secrecy into the system of intellectual property.
- 17 BGH (Federal Supreme Court) Feb. 12, 1980, KZR 7/79, Wettbewerb in Recht und Praxis [WRP] 1980, pp. 403, 404 – Pankreaplex II; BGH (Federal Supreme Court) Feb. 23, 2012 – IZR 136/10, WRP 2012, pp. 1230, 1232 – MOVICOL-application for approval.
- 18 Sausa e Silva, in: Journal of Intellectual Property Law & Practice 2014, p. 923.
- 19 Kalbfus, in: GRUR 2016, pp. 1009, 1011.
- 20 See also Hermann, in: Compliance Berater [CB] 2016, pp. 368, 369.
- 21 Pacini/Placid/Wright-Isak, in: International Journal of Law and Management 2008, p. 121, with the presentation of a “trade secret compliance plan” including different measures that can be taken as well as different variables that have to be considered depending on the company.
- 22 Kalbfus, in: GRUR-Prax 2017, p. 391; Börger/Rein, in: CB 2017, p. 118; to the special feature in the automotive sector Steinmann/Schubmehl, in: Corporate Compliance

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Zeitschrift [CCZ] 2017, p. 194.

- 23 BGH (Federal Supreme Court) April 27, 2006 – I ZR 126/03, WRP 2006, pp. 1511, 1513 – Customer data program.
- 24 See Kalbfus, in: Know-how-Schutz in Deutschland zwischen Zivilrecht und Strafrecht- welcher Reformbedarf besteht? 2011, pp. 65 ff.; Kalbfus in: GRUR-Prax 2017, p. 391.
- 25 Kalbfus, in: GRUR-Prax 2017, pp. 391, 392; inapplicable Steinmann/Schubmehl in: CCZ 2017, pp. 194, 198, who are aiming for a purely factual protection of secrecy and fail to recognize that the Directive has quite normative ideas about the protection of secrets.
- 26 Kalbfus, in: GRUR-Prax 2017, pp. 391, 391 ff.
- 27 Steinmann/Schubmehl, in: CCZ 2017, pp. 194, 197.
- 28 For the classification of trade secrets as absolute rights see Köhler, in: Köhler/Bornkamm, UWG, 35. Aufl. 2017, §17 Rn. 53; GRUR 1967, pp. 1, 6; different opinion Ann, in: GRUR-Prax 2016, p. 465; McGuire, in: GRUR 2015, pp. 424, 426; Hauck in: Neue juristische Wochenzeitschrift [NJW] 2016, pp. 2218, 2221.
- 29 Ann, in: GRUR-Prax 2016, p. 465, GRUR 2015, pp. 424, 426; Hauck in: NJW 2016, pp. 2218, 2221.

rather a protection against unfair access. Recital 16 of the Directive states that the new provisions of the protection of innovation and competition do not create an exclusive right of know-how or information, which is protected as a trade secret. However, there are several reasons to define the character of trade secrets as a minor intellectual property right. The preamble in recital 2 openly characterizes the protection of secrecy as a supplement or an alternative to the traditional intellectual property rights. Concurrently, recital 3 states that trade secrets are one of the most common forms of protection of intellectual creations and innovative know-how. Even the scope of optional sanctions argues in favor of a minor intellectual property right, which is for example protected by a triple damage calculation like traditional intellectual property rights. Therefore, a trade secret is protected just like an intellectual property right. Pursuant to Article 2 No. 2, the proprietor of a trade secret is the natural or legal person lawfully controlling a trade secret. Thus, it is not the creator who is essential, but the person exercising the lawful control. Yet, the meaning of the term “control” remains unclear. If the factual access possibility is taken into account, the employee would be the original proprietor as long as the employer has not received the information. However, the Directive focuses on the protection of companies; that is why there are no regulations about secondary acquisitions of rights. Through the characteristic of reasonable steps of protection, an original acquisition by the entrepreneur is established. This entails the obligation for companies to create confidentiality structures by contractual and operational attendance and thereby establish matters of original acquisition.<sup>30</sup>

## D. The central prohibition

- 7 The central prohibition can be found in Article 4 (1) of the Directive. It should be noted that Article 3 emphasizes the principle of freedom of access. Therefore, the Directive firstly lists fair commercial practices. In any case, Article 4 includes only exceptions for certain constellations in which the principle of freedom of access cannot be applied. This requires the Member States to ensure that the trade secret holders are entitled to apply for all the measures, procedures, and remedies to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret. These measures are specified in Article 4 (2) and (3).
- 8 First of all, the acquisition of secrets is prominent (Article 4 (2)). The English version of the Directive refers to the term acquisition. However, in this case

the official German translation (“Erwerb”) is not quite correct. It is not a question of acquisition in return for payment, but rather of a factual obtaining. If certain matters are given, the obtainment is illegal without the consent of the copyright holder. This includes unauthorized access to, appropriation of, or copying of documents, materials or electronic files that contain trade secrets or from which the trade secret can be deduced.

- 9 These restrictive prohibitions of appropriation are extended in Article 4 (2) (b), where any other conduct will be sanctioned if it is considered contrary to honest commercial practices. Yet, this term is very imprecise and hard to define. It is proposed to outline it according to Article 39 (2) of the TRIPS agreement.<sup>31</sup>
- 10 The list of prohibitions does not regulate the transfer of individual information from an employee’s brain. If an employee working as a programmer reads company-owned programs and saves the source code, this would not constitute a prohibited conduct. Therefore, it can be assumed<sup>32</sup> that the use of information from an employee’s brain is free. However, it may be possible to apply Article 4 (2) (b) in certain cases of abuse. Yet, Article 1 (3) of the Directive dictates that no provision of this Directive may be interpreted as a basis for restriction to the mobility of workers. Especially, the Directive is not a basis for any restriction of the use of experience and skills honestly acquired by workers through the standard procedures of their employment. Moreover, it is not a basis for imposing additional contractual restrictions.
- 11 The use and disclosure of trade secrets is regulated in Article 4 (3) of the Directive. People who have unlawfully acquired the trade secret or have breached a confidentiality agreement or other confidentiality obligations are prohibited from using the trade secret without the consent of the rights holder. It remains unclear why the Directive includes two different breaches of contract. This regulation results in the enforcement of contractual obligations by means of the UWG. The validity of the agreement is irrelevant. The term ‘legally binding’, which was originally included in earlier drafts of the Directive, has been deleted without substitution.<sup>33</sup> It is also

<sup>31</sup> See Koos, in: MMR 2016, pp. 224, 226.

<sup>32</sup> BGH (Federal Supreme Court) May 03, 2001 – I ZR 153/99, WPR 2001, pp. 1174, 1176 – “injection molding tools”; BGH (Federal Supreme Court) March 03, 1955 – I ZR 111/53, GRUR 1955, pp. 424, 425; BAG (Federal Labor Court) June 15, 1993 – 9 AZR 558/91, Neue Zeitschrift für Arbeitsrecht [NZA] 1994, pp. 502, 505; BAG (Federal Labor Court) Dec. 15, 1987 – 3 AZR 474/86, NEUE NZA 1988, pp. 502, 504.

<sup>33</sup> Kalbfus, in: GRUR 2016, pp. 1009, 1014 sees section 18 of the Unfair Competition Act (UWG) as a counterpart to the new regulation and demands its abolition in favor of a general

<sup>30</sup> Klein/Wegener, in: GRUR-Prax 2017, pp. 394, 396.

new that an unlawful interference on Article 4 of the Directive is sufficient for sanctions. The limitation of intent and gross negligence, which were originally intended in the draft, are not included in the final text.<sup>34</sup> For this reason, the question of intention or negligence only plays a role in the compensation of damages according to Article 14 of the Directive. This also does not correlate with the applicable German law, which always presupposes at least negligence of the defendant. In accordance with the Directive, the secret holder can enforce claims for injunctive relief and omission in the event of a mere breach of secrecy. This corresponds with the current legal situation in the case of breach of intellectual property rights (cf. Sec. 14 (5) of the trademark law (MarkenG), Sec. 139 (1) of the patent law (PatG). Consequently, the Directive extends the protection of trade secrets and brings them into line with intellectual property rights.

## E. Unlawful pre-acquisitions and the extended liability of the manufacturer

- 12 Further new regulations are included in Article 4 (4) and (5) of the Directive. These extended matters of liability are generally unknown to German law and therefore dangerous.
- 13 Accordingly, the acquisition of secret information is prohibited, if the person knew or negligently did not know that that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully (Article 4 (4) of the Directive). It is astounding that even the indirect use of the external trade secret is sufficient. Thus, the new system is different from the old system of the UWG. Due to contractual protection, third parties can only be held responsible in the matters of Section 17 (1) or (2) No.1 of the UWG. The new regulation is now directed against any unlawful pre-acquisition of third parties. Section 17 focuses on stricter subjective elements (intent) than the Directive (intent or negligence).<sup>35</sup>
- 14 In accordance with Article 4 (5), the production, offering or placing on the market of infringing goods or the importation, export or storage of infringing

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regulation of trade secrets.

34 This modification was demanded among others by the Max Planck Institute: Knaak/Kur/Hiitty, in: *International Review of Intellectual Property and Competition Law* 2014, p. 953.

35 In addition to this see Wiese, in: *Die EU-Richtlinie über den Schutz vertraulichen Know-hows und vertraulicher Geschäftsinformationen. Inhalt und Auswirkung auf den gesetzlichen Schutz des Unternehmensgeheimnisses*, Dissertation Münster 2017, pp. 141 ff.

goods for those purposes, are considered an unlawful use of a trade secret. However, this only applies if the person who carried out these activities had knowledge of the fact or should have known the fact under the specific circumstances that a trade secret had been used illegally. In some cases, such breaches of secrecy are prohibited by Section 17 (2) No. 2 of the UWG, because the production of a good is considered an exploitation along the meaning of the provision.<sup>36</sup> In accordance with the Directive the use of supplier-related data, obtained illegally by third parties, is related to the production. Thus, legal protection exists against any person who is part of the downstream distribution chain, even if he or she is unaware of the secret and even if the secret is not embodied in the product.<sup>37</sup>

## F. Exceptions and limitations

- 15 These are the innovations that evidently go beyond the matter of fact of Section 17 of the UWG. In compensatory terms, the matter of fact of the limitations and exceptions of the directive has grown exorbitantly in the course of the negotiations. Such limitations can be found in Article 3 and 5 of the Directive. The placement of the central prohibition in Article 4 is unfamiliar, surrounded by Article 3 and Article 5. The delimitation of the specific matter of facts is also unclear. While Article 5 states 'exceptions', Article 3 mentions 'lawful acquisition, lawful use and lawful disclosure'. It is problematic how these linguistic nuances can be reflected in the implementation. For example, Article 3 of the Directive could be an exempting element, while Article 5 could be seen as a justification. Therefore, Article 3 would be understood as a limitation and Article 5 as an exception. The current ministry draft follows this evaluation.

### I. Limitations and exempting elements (Article 3)

- 16 Article 3 (1) (a) defines independent discovery or creation as legitimate. The concept of discovery refers to patent law, while creation is a typical term in copyright law. In fact, in the event that an identical invention has been made independently of one another by several persons, patent law regulates that the right is vested in the person who first applied for the invention at the Patent Office (Sec. 6 (3) of the patent law (PatG), Article 60 (2) EPC). The subsequent applicant is then protected, if necessary, by a right of prior use (Sec. 12 (1) patent law (PatG)).

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36 Kalbfus, in: GRUR 2016, pp. 1009, 1014.

37 Kalbfus, in: GRUR 2016, pp. 1009, 1014.

The phenomenon of double-creations is also known in copyright law. This is not an infringement of rights, but a black mark on the copyright map and a bizarre constellation of exceptions in which both authors can assert their rights.

- 17 Article 3 (1) (b) regulates the general freedom of testing. The regulation permits the analysis and testing of a product which has been made public or is lawfully in the possession of the purchaser of the information. Thus, the Directive is breaking new ground. It is a European regulation on reverse engineering, which is known from US law. In Germany, reverse engineering is traditionally considered as prohibited.<sup>38</sup> Traces of reverse engineering can be found in copyright law (Sections 69d (3), 69e of copyright law (UrhG)) and are regulated in detail in patent law (section 11 No. 1 and 2 PatG). The semiconductor protection law implies a detailed permission of reverse engineering (section 6 (2) No. 1 and 2 HalblSchG). It regulates the reproduction of topographies for the purpose of analysis, evaluation or education, as well as the commercial exploitation of topography as a result of an analysis or evaluation. The freedom of testing refers to a product that has been made accessible to the public or is lawfully owned by the acquirer of the information. The principle goes far beyond the exhaustion doctrine of the copyright and patent law and also relates to rented products. According to an astonishing small addition, the acquirer of the information must be exempt from legal obligations in order to use the secret. Therefore, it is allowed to limit the freedom of testing contractually. Thus, an indication on reverse engineering should be included in supply contracts and cooperation agreements and such conduct should be excluded. In addition, in recital 17 of the Directive, the Commission has given some thought to cases of parasitic copying, where a regulation in the UWG (product piracy or slavish counterfeiting) should also be considered. However, contractual limitations are usually pointless if there are no contracts at all. No one can prevent a producer from purchasing a competing product on the free market and rebuilding it by means of testing. Article 3 (1) (c) regulates the right of work council to pass on information under the application of other European or national law. There is a provision for this in Germany in Section 84 of the Works Constitution Act (BetrVG), which provides

an explicit right for the employee to complain to the work council. However, the Directive explicitly allows in recital 12 that work councils may have agreed to secrecy with the employer. Nevertheless, Section 79 of the BetrVG binds the members of the work council to not disclose or exploit trade secrets. There is a similar provision for individual personal measures in sections 99 (1) (2), 102 (2) (5) of the BetrVG.

- 18 Article 3 (1) (d) permits all other forms of conduct, which are consistent with legitimate business practices. Therein lies an opening clause for the benefit of the judiciary based on the fair-use limitation of US law. Recital 18 mentions the disclosure of trade secrets in audit law as an example.

## II. Exceptions and justifications (Article 5)

- 19 The regulation of exceptions in Article 5 of the Directive is new. Firstly, companies are exempted in the field of press and freedom of information. A reference is made expressly to Article 11 of the Charter of Fundamental Rights. Thereby, not only traditional press companies are addressed but possibly bloggers as well.
- 20 Article 5 (b) contains the second institution, which is still foreign to European law, namely whistleblowing.<sup>39</sup> Whistleblowing is defined as the disclosure of misconduct, wrongdoing or illegal activities. The distinction between these matter of facts remains unclear. It is also unclear whether a minor infringement is sufficient as a justification of disclosing misconduct. Moreover, the whistleblower can only refer to the limitation if he has acted in the general interest.<sup>40</sup> It is undetermined whether the intended purpose should be considered as subjective or objective. Recital 20 refers to a conduct which objectively serves the general interest. In addition, the preamble of recital 20 excludes conduct which, according to national court judgments, can be qualified as good faith. The Directive is in line with European and national initiatives to strengthen the whistleblower protection. For a long time, the only existing regulation in Germany was the Occupational Health and Safety Act (Arbeitsschutzgesetz). Furthermore, in individual cases Section 34 of the Criminal Code (StGB) and the duty to disclosure in accordance with Section 138 of the StGB have been considered. Apart from this, the labor law

<sup>38</sup> RG Jan./ Nov. 22, 1935 – II 128/35, RGZ (decision of the Imperial Court) pp. 149,329,331 – Stiefelsenpresse; also compare OLG Hamburg (Higher Regional Court Hamburg) Oct. 19, 2000 – § U 191/98, Gewerblicher Rechtsschutz und Urheberrecht-RR [GRUR-RR] 2001, p. 137; In addition to this Beater in: Nachahmen im Wettbewerb – Eine rechtsvergleichende Untersuchung zu Paragraph 1 UWG 1995, p. 136. Kochmann in: Schutz des “Know-how” gegen ausspähende Produktanalysen (“Reverse Engineering”) 2009, p. 140.

<sup>39</sup> Groß/Platzer, in: NZA 2017, p. 1097; Eufinger in: Zeitschrift für Rechtspolitik [ZRP] 2016, p. 229.

<sup>40</sup> Lapousterie/Geiger/Olszak/Desaunettes, in: European Intellectual Property Review 225 2016, Centre for International Property Studies (CEIPI) Research Paper No. 2015-02, pp. 8 ff.

jurisdiction was very restrictive and prohibited the complaint, in particular in the public eye, before making use of internal compliance systems. Thus, on July 2nd 2016 the Financial Services Supervision Act (Finanzdienstleistungsaufsichtsgesetz) already exempted employees of the financial sector from prosecution who reported maladministration in the company to the Federal Supervisory Office for Insurance. Contrary to previous and restrictive German law, the Directive allows the disclosure of maladministration in the press without the consideration of company-internal remedies.<sup>41</sup>

- 21 The burden of proof for the accuracy of whistleblowing is difficult to ascertain. The exceptional nature of Article 5 of the Directive indicates that the whistleblower must prove that the disclosure of the questionable trade secrets serves the protection of public interest. However, it is also conceivable that the company has to provide evidence for the accuracy or inaccuracy of the whistleblowing. This evidence is incumbent on the company, while the whistleblower must prove that he acted in the public interest.
- 22 Article 5 (c) mostly excludes the communication between employees and work council from the protection of trade secrets. A limitation of complaints or the notification of maladministration is not conducted. In any event, all communication is exempted if it is necessary for the practice of work councils. There is a general clause in Article 5 (d) according to which any legitimate interest justifies a limitation that is permitted by Union law or national law.

## G. Sanctions

- 23 No criminal sanctions are regulated as the EU has no competence in this regard. It is rather intended to bind the member states to introduce a civil sanction system. This involves numerous legal consequences that have so far only been granted for monopoly rights and an extensive protection against illegal acquisition, as well as illegal use and disclosure of trade secrets. Included are claims for destruction or release of documents, objects, materials, substances, or electronic files which contain the secret. Furthermore, it also includes a recall claim for infringing products and the removal as well as the destruction of them. Claims for damages are also regulated in detail. However, there is no right for

information, which is provided by other property rights (see Section 140 (b) Patent Law (PatG) and Section 242 BGB).

- 24 It is now up to the Ministry of Justice to clarify to what extent individual sanctions already exist in German law. The Federal Supreme Court (BGH) recognized the option of triple damage calculation<sup>42</sup> for section 17 of the UWG. A new system of recall and removal from the distribution channels is likely.
- 25 Compensatory to this bouquet of claims is the new extensive regulation of abuse control (Article 7). The Member States must establish opportunities to protect the defendant from abusive claims. These measures go beyond Section 8 (4) of the UWG. These sanctions of abuse include damages for the defendant, sanctions against the plaintiff, or the dissemination of information concerning court decisions. Such measures are currently unknown in Germany. Known is only a claim for damages in the case of unjustified protective right warnings, i.e. in the case of warnings from special industrial protective rights. In the UWG it is recognized that a careless warning, as a false assertion, justifies a claim for damages as an illegal encroachment on the established and exercised business.<sup>43</sup>
- 26 The measures of legal remedies include in particular the interim injunction (Article 12), which is focused on injunctive omission, cancellation, and prohibition of sale. Instead of the injunctive relief a right of compensation (license analogy) can be considered, regardless of negligence or fault (Article 13 (3)). The compensation for damages (Article 14) applies to the triple damage calculation, including lost profit, infringing profit of the violator, or license analogy. The option of increase in the event of moral risks of harm is remarkable. It was not noted in the Directive that additional claims may occur for example in Germany from Section 812 and 687 (2) of the BGB.<sup>44</sup> Moreover, the statutory limitation shall not exceed six years.<sup>45</sup>

## H. Conclusion

- 27 The Directive will permanently change European secrecy law. Compared to current German regulations, important differences can be observed,

41 BAG (Federal Labor Court) Dec. 07.2006 – 2 AZR 400/05, NZA 2007, 502; implementation of the case law of the BVerfG (Federal Constitutional Court) July 2, 2001 – I BvR 2049/00, NJW 2001, p. 3474 in the decision of the BAG (Federal Labor Court) July 03, 2003 – 2 AZR 235/02, NZA 2004, pp. 427, 430; Ohly, in: GRUR 2014, pp. 1, 7.

42 BGH (Federal Supreme Court) Feb. 18, 1977 – I ZR 112/75, WRP 1977, pp. 332, 335 – on-line computer.

43 LG Hamburg (Regional Court Hamburg) May 8, 2012 – 407 HKO 15/12, BeckRS 2012, p. 18887.

44 See Hauck, in: NJW 2016, p. 2218.

45 It is not intended to deal with the procedural changes made in the Directive, such as the correction of the Düsseldorf model.

concerning for example the definition of a trade secret or the legitimacy of reverse engineering. Therefore, the final implementation of the Directive can be suspenseful. In the meantime, companies are summoned to conduct concrete confidentiality measures and to adjust to the changed field of secrets. In this context, extended nondisclosure agreements and a strategy to deal with the freedom of reverse engineering are most important. A new culture of secrecy in companies and with suppliers must be added.

# Sponsored Blog Content

## What do the Regulations Say? And what do Bloggers Say?

by **Sophie C. Boerman, Natali Helberger, Guda van Noort and Chris J. Hoofnagle\***

**Abstract:** Influencer marketing – the use of opinion leaders such as bloggers with many followers and readers to disseminate product messages – is gaining advertisers' interest. This paper presents the law and self-regulative provisions concerning blog advertising in both Europe and the US and documents the actual practice of disclosing blog advertising: whether and if so how, bloggers disclose influences from advertisers, and how these disclosures align with the regulations in place. The Federal Trade Commission Act and related guides in the US, and self-regulative provisions in Europe urge advertisers and endorsers, such as bloggers, to disclose any commercial relationship. These disclosures should be clear and conspicuous because advertising to consumers should be recognizable as such. Although advertisers increasingly encourage bloggers to promote products, it is unclear whether bloggers comply with disclosure requirements. To test compliance with disclosure requirements, we performed a content analysis of 200 blog posts drawn from the top-20-ranked sites in the Netherlands and the

United States. We found that 65% of the posts mention brands and products. Yet, only 15% of the blog posts provided some commercial sponsorship disclosure. To determine whether posts mentioning brands were organic, unsponsored endorsements, we made repeated attempts to contact authors. Of those that responded, most claimed that their writing was not sponsored, but a small number received remuneration and did not disclose it. Furthermore, among the disclosing bloggers, we found regular problems in their sponsorship disclosures: many only state 'sponsored' or 'affiliated link'; only 1/3 stated the name of the actual sponsor; most require the users to "scroll down,,"; and most are in the same font as ordinary text. Our findings raise several regulatory issues; namely, the need for more concrete guidance on disclosure format, and it highlights the difficulty of monitoring compliance with the existing provisions. In so doing, our findings also provide important input for the European Commission's Regulatory Fitness and Performance exercise, which tackles, among others the Unfair Commercial Practice Directive.

**Keywords:** Native advertising; advertorial; influencer marketing; sponsored content; advertising regulation; unfair commercial practice; legal comparison (US, European Law)

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## A. Background

- 1 Advertisers are shifting their dollars away from traditional media to digital media.<sup>1</sup> Influencer marketing – the use of opinion leaders such as bloggers with many followers and readers to disseminate product messages – is gaining advertisers' interest.<sup>2</sup>
- 2 Advertisers think that influencers, such as bloggers have a considerable impact on their readers – on what they wear, eat, drink, and buy. Moreover, bloggers can reach a large audience and are considered to be trustworthy sources.<sup>3</sup> Therefore, advertisers and social-media-focused agencies approach bloggers to review or promote their brand and products by sending bloggers free products, by promising benefits, or by paying them for writing a review.<sup>4</sup>
- 3 Thus, blog posts often include product proselyting. Sometimes this expression is the organic, honest opinion of the blogger, other times it is in the service of an advertiser. Therefore, there is a risk of blurring the boundaries between the blogger's opinion and advertising, misleading readers about the commercial character of a blog, and making it difficult for the reader to discern commercial from non-commercial content. Consumer protection law demands that its commercial nature be adequately

disclosed. The disclosure command is intended to help the consumer understand the context of the expression and recognize when blog content is advertising, so they can cope with the message accordingly.<sup>5</sup>

- 4 In Europe and the US, provisions about unfair commercial practices exist (See Section 5 of the FTC Act and the Unfair Commercial Practice Directive) aiming to protect users from misleading blends of opinion and advertising. These rules have been further interpreted and developed through the Federal Trade Commission (FTC) in the US,<sup>6</sup> as well as through case law and self-regulation.<sup>7</sup> In Europe the Unfair Commercial Practice Directive is, moreover, subject to initiatives at the European level to prepare consumer law for the challenges of the digital economy and increasing transparency for consumers on platforms.<sup>8</sup> An important aspect in this context is increased transparency for hidden advertising.<sup>9</sup> In addition, especially in Europe, self-regulation is an important instrument with regards to adding further details and guidance on how to comply with the often very general norms of the Unfair Commercial Practice Directive and can sometimes even go beyond what is required by law.<sup>10</sup>

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- 1 Interactive Advertising Bureau [IAB], *DIGITAL ADVERTISING REVENUES HIT \$19.6 BILLION IN Q1 2017, CLIMBING 23% YEAR-OVER-YEAR, ACCORDING TO IAB (2017)*, available at <<https://www.iab.com/news/ad-revenues-hit-19-6b/>>.
- 2 AJ Agrawal, *WHY INFLUENCER MARKETING WILL EXPLODE IN 2017* (2016), available at <<https://www.forbes.com/sites/ajagrawal/2016/12/27/why-influencer-marketing-will-explode-in-2017/#47a71d0120a9>>.
- 3 Marijke de Veirman, Veroline Cauberghe, and Liselot Hudders. *Marketing through Instagram influencers: The impact of number of followers and product divergence on brand attitude*. *INTERNATIONAL JOURNAL OF ADVERTISING* 36, 798-828 (2017).
- 4 Long-Chuan Lu, Wen-Pin Chang, and Hsiu-Hua Chang. *Consumer attitudes toward blogger's sponsored recommendations and purchase intention: The effect of sponsorship type, product type, and brand awareness*. *COMPUT HUM BEHAV.* 34, 258-266 (2014).; June Zhu and Bernard Tan. *Effectiveness of blog advertising: Impact of communicator expertise, advertising intent, and product involvement*. (2007) ICIS 2007 PROCEEDINGS, MONTREAL, available at <<http://aisel.aisnet.org/cgi/viewcontent.cgi?article=1278&context=icis2007>>.

5 Sophie C. Boerman, Eva A. Van Reijmersdal and Peter C. Neijens. *Sponsorship disclosure: Effects of duration on persuasion knowledge and brand responses*. *JOURNAL OF COMMUNICATION.* 62, 1047-1064 (2012).

6 Federal Trade Commission [FTC] *THE FTC'S ENDORSEMENT GUIDES (2015)*, available at <<https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>>.

7 Word of Mouth Marketing Association [WOMMA]. *WOMMA SOCIAL MEDIA DISCLOSURE GUIDELINES (2017)*, available at <<http://womma.org/wp-content/uploads/2017/05/WOMMA-Social-Media-Disclosure-Guidelines-2017.pdf>>; *THE DUTCH ADVERTISING CODE WITH INFORMATION ABOUT THE WORKING PROCEDURES OF THE ADVERTISING CODE COMMITTEE AND THE BOARD OF APPEAL (2017)*, available at <<https://www.reclamecode.nl/bijlagen/SRCNRCEngelsmei2017.pdf>>; *SOCIAL CODE, RICHTLIJNEN VOOR RECLAME IN ONLINE VIDEO (2017)*, available at <[https://www.cvdm.nl/wp-content/uploads/2017/11/Social\\_Code\\_YouTube.pdf](https://www.cvdm.nl/wp-content/uploads/2017/11/Social_Code_YouTube.pdf)>.

8 European Commission, *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. A New Deal for Consumers, COM/2018/0183 final*, Brussels, 11.4.2018.

9 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, Brussels, 11.4.2018 COM(2018) 185 final, (p. 18, though primarily for the situation of search engines).

10 See e.g. International Chamber of Commerce (ICC), *Advertising and Marketing Communication Practice, Consolidated ICC Code*, Paris, 2011.



- 5 Sponsorship disclosures in blogs can help consumers recognize advertising and change consumers' responses to sponsored posts.<sup>11</sup> However, little is known about the disclosures that are actually provided in blogs. Gaining insight into the disclosures that are currently used is important, as research has shown that consumers respond differently to different types of disclosures.<sup>12</sup> Insights in the characteristics of disclosures in blog advertising could set the scene for disclosure effect research, providing a framework or typology of disclosures that can be tested for their effectiveness.
- 6 Therefore, this study 1) presents the law and self-regulative provisions concerning blog advertising both in Europe and the US, and 2) documents the actual practice of disclosing blog advertising: if, and if so how, bloggers disclose influences from advertisers, and how these disclosures align with the regulations in place. We first discuss the codes and regulations addressing social media advertising and the requirement of disclosures in Europe, using The Netherlands as a case study, followed by the US. Second, we describe what is currently known from academic research about the effects of sponsorship disclosures. Third, we introduce and report our content analysis to examine how the regulations are actually put in practice by bloggers.
- 7 This study is the first to systematically assess blog advertising disclosure and provides an opportunity to advance our knowledge of social media advertising, influencer marketing, and the recent regulations and provisions regarding

this phenomenon. To reach the research aims we present a comparison of the regulations regarding blog advertising in the US and Europe, and a content analysis of 200 blog posts stemming from the 40 most popular blogs in the Netherlands and the US. Based on the content analysis, and prior empirical research on the effectiveness of disclosures, we can articulate recommendations for improving regulations. Moreover, the insights of this study provide a valuable foundation for future research investigating the impact of disclosures and can contribute to the development of theories that may explain this impact.

## B. What Do the Regulations Say?

### I. Codes and Regulations Addressing Social Media Advertising Disclosure

#### 1. Europe: The Case of The Netherlands

- 8 The recognizability of advertising is a key element in consumer protection law, in the Netherlands and in Europe. The failure to inform readers about the blogger-brand relationship could constitute a misleading practice under the rules about unfair commercial practices in the Dutch Civil Code. More specifically for the media context, using editorial content to promote products and services without making it clear that a trader has paid for that promotion is also listed on the so-called blacklist of commercial practices. Any practices listed on the blacklist (Annex 1 of the Unfair Commercial Practice Directive) are always considered unfair. Similar prohibitions can be found in e-commerce and media law (for broadcasting and certain video services).<sup>13</sup>
- 9 It is important to notice, however, that the provisions about unfair commercial practices in principle only apply for the behavior of a trader toward consumers.<sup>14</sup> A "trader" is a person who acts for purposes that relate to his trade or business, or

11 Caleb T. Carr and Rebecca A. Hayes. *The effect of disclosure of third-party influence on an opinion leader's credibility and electronic word of mouth in two-step flow*. JOURNAL OF INTERACTIVE ADVERTISING 14, 38-50 (2014).; Yoori Hwang and Se-Hoon Jeong. "This is a sponsored blog post, but all opinions are my own": *The effects of sponsorship disclosure on responses to sponsored blog posts*. COMPUT HUM BEHAV 62, 528-535 (2016).; Eva A. Van Reijmersdal et al. *Effects of disclosing sponsored content in blogs: How the use of resistance strategies mediates effects on persuasion*. AM BEHAV SCI. 60, 1458-1474 (2016).; Jonas Colliander and Susanna Erlandsson. *The blog and the bountiful: Exploring the effects of disguised product placement on blogs that are revealed by a third party*. JOURNAL OF MARKETING COMMUNICATIONS 21, 110-124 (2015).; Veronica Liljander, Johanna Gummerus, and Magnus Söderlund. *Young consumers' responses to suspected covert and overt blog marketing*. INTERNET RESEARCH 25, 610-632 (2015).; Chris J. Hoofnagle, and Eduard Meleshinsky. *Native advertising and endorsement: Schema, source-based misleadingness, and omission of material facts*. TECHNOLOGY SCIENCE (2015).

12 CARR AND HAYES supra note 7; HWANG AND JEONG supra note 7; Bartosz Wojdyski and Nathaniel Evans. *Going native: Effects of disclosure position and language on the recognition and evaluation of online native advertising*. JOURNAL OF ADVERTISING 45, 157-168 (2016).; Nathaniel Evans, Joe Phua, Jay Lim and Hyoyeun Jun. *Disclosing Instagram influencer advertising: The effects of disclosure language on advertising recognition, attitudes, and behavioral intent*. JOURNAL OF INTERACTIVE ADVERTISING, 1-12 (2017).

13 For video content on social media the self-regulatory initiative by a number of "YouTubers for YouTubers" is worth mentioning, in which YouTubers under the auspice of the Dutch Media Regulator, i.e. the authority for the regulation of advertising in video content, commit to observing transparency in reporting about commercial influences (but also where YouTubers bought products), and give concrete examples how this should be done, Social Media Code: YouTube, 2017, available at <[https://www.cvdm.nl/wp-content/uploads/2017/11/Social\\_Code\\_YouTube.pdf](https://www.cvdm.nl/wp-content/uploads/2017/11/Social_Code_YouTube.pdf)> and <<https://www.desocialcode.nl/>>.

14 DIRK WILLEM FREDERIK VERKADE. *ONEERLIJKE HANDELSPRAKTIJEN JEGENS CONSUMENTEN*. VOL 49. KLUWER (2009).

who acts ‘in the name or behalf of a trader’. Bloggers who write a review about a game or book because of purely personal, non-commercial reasons (e.g., because they found it interesting or liked it) will typically not qualify as a trader, with the effect that their practices do not fall under unfair commercial practice law, even if those reviews are, de facto, advertising. There is one exception, however; namely that the blogger who is not acting for his own trade can fall under the provisions regarding unfair commercial practices, especially if he can be considered to “act on behalf of the trader” (Art. 193a (b) Dutch Civil Code, transposing Art. 2(b) of the Unfair Commercial Practice Directive).<sup>15</sup>

- 10 Also in the Netherlands, advertising self-regulation is playing an important role in providing guidance and adding further details to the legal framework. The Dutch Advertising Code Authority, which is the self-regulatory body for advertising in the Netherlands, provides for example, some additional guidance on the question of when a user can be considered to act on behalf of the trader in its Advertising Code Social Media<sup>16</sup> and stipulates the obligation to inform about instances of social media advertising. The pre-condition is that the blogger has been offered a benefit (which can be a payment but also in natura) and that benefit does actually affect the credibility of the social media message. Being self-regulatory, adherence to the code and its provisions is in principle voluntary. For participating organizations, however, non-compliance of the code can lead to a compliance procedure before the Dutch Advertising Code Authority –thereby adding an additional layer of complaint procedures against irresponsible advertising. In addition, advertising that is non-compliant with the code could also constitute an unfair commercial practice itself.<sup>17</sup> The latter could potentially lead to enforcement actions before the Dutch Authority for Consumers and Markets (ACM), which is the regulatory authority that is responsible for monitoring compliance with consumer law and competition law (and certain provisions in data protection law), and that is, among others, tasked with enforcing the rules on unfair commercial practices (and able to impose fines, unlike the Dutch Advertising Code Authority).<sup>18</sup>

15 Art. 2 (b) Unfair Commercial Practice Directive. Note that falsely claiming or creating the impression that a trader is not acting for purposes if his trade or represents himself as a consumer constitutes an unfair commercial practice, according to No. 22 of the Annex I of the Unfair Commercial Practice Directive.

16 THE DUTCH ADVERTISING CODE *supra* note 6.

17 Not at least because Art. 193 g of the Dutch Civil Code, according to which claiming to be committed to self-regulation, while not acting in accordance with that regulation constitutes a commercial practice that is always unfair, Art. 193g (1) of the Dutch Civil Code.

18 The Dutch Advertising Code Authority can only publish

- 11 The code clarifies that professional advertisers as well as bloggers (distributors) can be held responsible for compliance with the provisions in the code. A further amendment in 2017 clarified that that the code also applies to vloggers, and the Data Driven Marketing Association, a self-regulatory instance, issued new guidance on vloggers.<sup>19</sup> What is more, unlike the provisions about unfair commercial practices, this code specifically suggests how bloggers and advertisers can inform consumers about the fact that social media advertising is taking place, for example by stating (translated from Dutch into English) “I received product XXX from brand YYY” or “Brand YYY encouraged me to write this blog.”
- 12 Interestingly, the code also foresees a specific duty of the advertiser to inform bloggers (distributors) about the relevant provisions and to proactively encourage distributors to obey the rules and act if they fail to do so. Only if the advertiser does so, he can exonerate himself from the failure to comply with the rules.<sup>20</sup> Children below 12 years may not be engaged as vloggers, and advertising (also on social media) that is directed at children must inform children about the commercial character in a way that children can understand.<sup>21</sup>
- 13 The Social Media Advertising Code is still fairly new (dating from January 2014) and has so far only led to few complaints, some of them directed at the blogger<sup>22</sup> and some at the company.<sup>23</sup> In 2016, the Dutch Authority for Consumers and Markets (ACM) initiated an investigation into online reviews. The consultation resulted in guidelines that are only directed at companies and marketing service providers in situations where consumers write the reviews for review websites, not individual users that engage in social media advertising.<sup>24</sup>

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findings of non-compliance and, if necessary, bring them to the attention of the Dutch Authority for Consumers and Markets, who then can decide to initiate an enforcement action.

19 DDMA. VLOGGEN: HOE HEURT HET EIGENLIJK? (2017) available at <<https://ddma.nl/actueel/eerste-hulp-bij-reclame-in-vlogs/>>.

20 THE DUTCH ADVERTISING CODE *supra* note 6.

21 THE DUTCH ADVERTISING CODE *supra* note 6.

22 RCC 17 November 2015, 2014/00917 (Daniel Wellington & Influencers).

23 RCC 2 October 2017, 2017/00518 (Rivella & Doutzen Kroes); RCC 26 October 2017, 2017/00650 (Corendon & Influencer).

24 ACM. ACM CALLS FOR INCREASED TRANSPARENCY IN ONLINE REVIEWS (2017), available at <<https://www.acm.nl/en/publications/publication/17222/ACM-calls-for-increased-transparency-in-online-reviews/>>; ACM. Richtlijnen voor ondernemers voor gebruik online reviews. (2017), available at <<https://www.acm.nl/nl/publicaties/publicatie/17218/Richtlijnen-voor-ondernemers-voor-gebruik-online-reviews/>>.

## 2. The US

- 14 In the US, the Federal Trade Commission (FTC) employs a catch-all statute to address problems of unfairness and deception, Section 5 of Federal Trade Commission Act (FTCA). The Act broadly prohibits deceptive trade practices, but leaves these undefined, empowering the FTC to use its expertise and enforcement power to apply the mandate to new circumstances as they arise.<sup>25</sup> The FTCA also broadly prohibits “unfair” trade practices; however, the use of this legal theory is disfavored, and the US is less reliant on a blacklist approach of enumerated unfair acts.
- 15 The FTC has long held that undisclosed financial connections in seller expression is wrongful. Among the FTC’s first reported cases concerned a vacuum sales company that falsely claimed in advertisements that it was an impartial expert on the devices, when in reality, it had a special arrangement to earn higher profits from two models.<sup>26</sup>
- 16 Turning to news publications, the FTC issued an advisory opinion in 1968 warning advertisers that clothing commercial messages—even truthful ones—in the garb of news copy was deceptive.<sup>27</sup> With the rise of social media, the FTC began warning both brands and endorsers of disclosure obligations. The FTC investigated a 2014 advertising campaign by Lord & Taylor, a US department store, in which the store paid “fashion influencers” on Instagram to photograph themselves wearing a “Paisley Asymmetrical Dress.” Lord & Taylor settled the case.<sup>28</sup> In September 2017, the FTC settled a case against two social media “influencers” who did not disclose their stake in a gambling website that they promoted through effusive messages, such as “Made \$13k in about 5 minutes on [the website] betting. Absolutely insane.”<sup>29</sup>
- 17 In addition to enforcement actions, the FTC encourages compliance with the FTCA by issuing “Guides” on various marketing and advertising issues. These Guides are opinions—not binding law—of the Commission and notionally they set enforcement priorities and act to warn the private sector about deceptive practices.<sup>30</sup> Thus, the full spectrum of commands included by guides may never have been litigated and upheld by a court.

Nonetheless, companies acting in good faith will follow the guides, because a mere investigation by the FTC can cost tens of thousands of dollars in lawyer fees to resolve.

- 18 Unlike the Dutch Advertising Code, the guidelines are *not* an instance of self-regulation but rather meant to inform companies on the FTC’s perspective and interpretation of the rules, to enable and promote compliance.
- 19 The Endorsement Guides were updated in 2016 to also reflect new marketing techniques, such as blogging, native advertising, and social marketing.<sup>31</sup> With an annual budget of just over \$300mm, the FTC cannot possibly police all advertising. Thus, the FTC explained that it would not monitor individual bloggers.<sup>32</sup> The FTC left the possibility intact that it could investigate on a case-by-case basis against individual bloggers; however, it did announce that the focus of its investigations would be on the advertiser, not the endorser.
- 20 As the Endorsement Guides explain, any connection between the endorser and the seller of the advertised product that can “materially affect the weight or credibility of the endorsement” (i.e., the connection is not reasonably expected by the audience)<sup>33</sup> must be fully disclosed.<sup>34</sup> While the FTC illustrates the scope of the code with various examples, it also makes explicit that it does not require specific wording; neither do the Endorsement Guides give any specific guidance regarding the wording of the disclosure. According to the FTC, “What matters is effective

25 CHRIS J. HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY*, CAMBRIDGE UNIVERSITY PRESS (2016).

26 *FTC v. Muenzen*, 1 F.T.C. 30 (1917).

27 Advisory Opinion 191, *Advertisements which appear in news format*, Dk. No. 683 7080, 73 F.T.C. 1307. February 16, 1968.

28 In the Matter of Lord & Taylor, LLC, No. 152 3181 (2016).

29 In the Matter of CSGOLotto, Inc. et al., No. 162 3184 (2017).

30 THE FTC’S ENDORSEMENT GUIDES *supra* note 5.

31 THE FTC’S ENDORSEMENT GUIDES *supra* note 5; US Government Publishing Office. *ELECTRONIC CODE OF FEDERAL REGULATIONS* (2017), available at <<https://www.ecfr.gov/cgi-bin/text-idx?SID=de10601c673ac6ac7500291dbfecca38&mc=true&node=pt16.1.255&rgn=div5>>; FTC. *NATIVE ADVERTISING: A GUIDE FOR BUSINESSES* (2015), available at <<https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>>; Mediakix. *FTC ENDORSEMENT GUIDELINES FOR 2016 [INFOGRAPHIC]*, (2016), available at <<http://mediakix.com/2016/09/the-ftc-endorsement-guidelines-for-2016-infographic/#gs.Mp5ibVc>>.

32 THE FTC’S ENDORSEMENT GUIDES *supra* note 5.

33 The FTC cites the example of a film star who advertises a product. Here the audience can reasonably expect that the film star has been paid, making it unnecessary to disclose that connection. See also the definition in the guidelines of the WOMMA (2017, p. 1): “A “material connection” is any relationship between a speaker and a company or brand that could affect the credibility audiences give to that speaker’s statements or influence how the audience feels about that company or brand; (for example, because of perceived bias); this can include any benefits or incentives such as monetary payment, free product, exclusive or early access, value-in-kind, discounts, gifts (including travel), sweepstakes entries, or an employer/employee or other business relationship.”

34 THE FTC’S ENDORSEMENT GUIDES *supra* note 5.

communication, not legalese.”<sup>35</sup> That being said, the FTC does provide some suggestions, including formulations such as: “#ad”, “Company X gave me this product to try ...” or “Some of the products I’m going to use in this video were sent to me by their manufacturers”.<sup>36</sup>

- 21 Unlike the Dutch Code, the FTC Endorsement Guides do not speak about concrete responsibilities of advertisers in relation to endorsers. However, in the FAQ document as well as in the examples mentioned in the Endorsement Guides, the FTC does make clear its view that advertisers and intermediaries are responsible for endorsers’ compliance, and therefore, are expected to teach endorsers to adequately disclose their endorsements, and to monitor compliance.<sup>37</sup> A similar line of interpretation has been recently confirmed in one of the few enforcement actions of the Guides in relation to social media advertising thus far.<sup>38</sup>
- 22 Some self-regulatory codes exist in the US. For example, the Word of Mouth Marketing Association (WOMMA) issued social media disclosure guidelines,<sup>39</sup> which by and large reflect the FTC policies, suggesting a number of possible formats for disclosure. As a piece of self-regulation, compliance with its provisions is voluntary, but to the extent that members bind themselves to such provisions and do not comply, the FTC can investigate and pursue them for deceptive trade practices.

## C. What Do Bloggers Say?

### I. Research Addressing Disclosures and Research Questions

- 23 Next to the developments in the social media advertising codes and regulations, some empirical studies have looked into the effects of the disclosure of blog advertising. For instance, research showed that, depending on its content, a disclosure of the

commercial purpose of a blog can influence the credibility and perceived influence of a blog, the credibility of the blogger, and the attitude toward the message.<sup>40</sup> Revealing the commercial nature of a blog can also reduce readers’ willingness to share the message and purchase intentions of the advertised product.<sup>41</sup> In addition, Campbell, Mohr and Verlegh<sup>42</sup> showed that disclosing advertising in blogs can - depending on the timing - affect consumers’ brand recall and brand attitudes. In the context of recommendations in interpersonal communication, explicitly acknowledging a financial reward for the recommendation (“I am satisfied with the institute, but I am also happy about receiving a reward for my recommendation”) reduced the evaluation of the recommended institute.<sup>43</sup> This effect was only found in communication among strong ties, and therefore could also apply to bloggers and their loyal readership. Furthermore, research has shown that disclosures can increase the recognition of a blog post as advertising, which consequently induces resistance and lowers brand attitudes and purchase intentions of the product reviewed in the blog post.<sup>44</sup> Together these studies indicate that disclosures can empower media users to recognize advertising in blogs and have some (undesirable) effects on responses to blogger, the blog, and the advertised brand or product.

- 24 But do bloggers actually provide disclosures, and if so how? With respect to this question, only one empirical article exists to our knowledge; Kozinets et al.<sup>45</sup> investigated a “seeding” campaign in which 90 influential bloggers were given a new mobile phone and were encouraged, but not obligated, to blog about it. Although 84% mentioned the phone in their blog, certainly not all of them disclosed their connection to the brand. The researchers conclude that whether and how bloggers disclose their participation depends on the type of blogger and narrative. Whereas some of them emphasized their honesty and not being “bought,” others expressed their disbelief (“I thought it was a scam”) and even defended and authenticated their claims

35 THE FTC’S ENDORSEMENT GUIDES *supra* note 5.

36 THE FTC’S ENDORSEMENT GUIDES *supra* note 5; Federal Trade Commission [FTC]. .COM DISCLOSURES. HOW TO MAKE EFFECTIVE DISCLOSURE IN DIGITAL ADVERTISING. (2013), available at <<http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>>.

37 THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING. (2015), available at <<https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>>.

38 Final consent order in the matter of ADT LLC, DOCKET NO. C-4460 (2012), <available at <http://www.ftc.gov/system/files/documents/cases/140624adtdo.pdf>>.

39 WOMMA *supra* note 6.

40 CARR AND HAYES *supra* note 7; HWANG AND JEONG *supra* note 7; COLLIANDER AND ERLANDSSON *supra* note 7.

41 LILJANDER, GUMMERUS, AND SÖDERLUND *supra* note 7.

42 Margaret C. Campbell, Gina S. Mohr, and Verlegh Peeter W.J. *Can disclosures lead consumers to resist covert persuasion? The important roles of disclosure timing and type of response.* JOURNAL OF CONSUMER PSYCHOLOGY 23, 483-495 (2013).

43 Peeter W.J. Verlegh, Gangseog Ryu, Mirjam A. Tuk, and Lawrence Feick. *Receiver responses to rewarded referrals: The motive inferences framework.* JOURNAL OF THE ACADEMY OF MARKETING SCIENCE 41, 669-682 (2013).

44 VAN REIJMERSDAL ET AL. *supra* note 7.

45 Robert V. Kozinets, Kristine de Valck, Andrea C. Wojnicki, and Sarah J. S. Wilner. *Networked narratives: Understanding word-of-mouth marketing in online communities.* J MARKET 74, 71-89 (2010).

about the phone. Others intentionally concealed their participation in the campaign. This study shows that there is a considerable variation in the use of disclosures, and that certainly not all blog advertising is being disclosed.

- 25 Despite some evidence for the effects of disclosures and the variation of disclosures, little is known about how often blog posts actually contain advertising, and if and how this advertising is disclosed. Therefore, we propose the first research question:

*RQ1: How often do bloggers provide disclosures of advertising?*

- 26 Second, the regulations provide some specific guidelines about the disclosure format. Rules in the Netherlands and in the US require bloggers to disclose any connection to an advertiser. In addition, the Dutch Advertising Code states that a disclosure should explicitly communicate any compensation (in money or in kind) the blogger received from the advertiser. In line with these regulations, empirical research has demonstrated the importance of the explicitness and content of a disclosure. Carr and Hayes<sup>46</sup> found that when the connection with a third party was explicitly disclosed, it positively influenced the perceived credibility of the blogger, making the blog more influential. However, when the disclosure was more implicit, and only hinted at a possible commercial connection between the blogger and the brand, this reduced the credibility of the blogger. These findings are in line with those of Hwang and Jeong.<sup>47</sup> Their experiment showed that when consumers are skeptical toward product review posts, a simple disclosure stating that the blog was sponsored by a third-party reduced the blogger's credibility and consumers' attitude toward the message. However, a disclosure that stressed that the blog post was sponsored but that contents were based on the blogger's own opinions, did not have such negative effects, and resulted in the same levels of credibility and attitudes as no disclosure. These effects can be explained by the idea that the more explicit a blogger is about the commercial connection, the more honest and credible that person is perceived to be. Therefore, consumers do not appreciate impartial, equivocal (i.e., technically true), and deceitful disclosures.<sup>48</sup>

- 27 To test whether the disclosures used in practice are consistent with the rules, we study whether disclosures explicitly mention the advertiser (i.e., the brand or product name), providing information about the relationship between the blogger and the advertiser, and whether it provides information

about any compensation received. In addition, as the guidelines<sup>49</sup> also instruct that a disclosure should be clearly legible and noticeable, we also examine the font size.

- 28 Furthermore, research has demonstrated that the positioning of a disclosure influences its impact. Campbell et al.<sup>50</sup> showed that the effects of a disclosure depend on its timing. Participants inferred greater influence of the placement when the disclosure was presented after, rather than before, blog advertising. Moreover, a disclosure resulted in a correction of brand attitudes when presented after, but not when presented before the blog advertising. Additionally, the FTC's .Com Disclosures document directs that a disclosure should preferably be designed in such a way that "scrolling" is not necessary to find it, emphasizing the importance of the positioning of a disclosure.<sup>51</sup> Therefore, we investigate where disclosures are provided (e.g., above or below blog advertising) and whether it is necessary to scroll down to see it.

- 29 Altogether, because the regulations provide very specific examples of how to disclose blog advertising, and empirical research implies that different forms of disclosures result in a different impact on the blog reader, it is important to assess disclosure format. Examining disclosure format allows for identifying different types of disclosures. It further allows an overview of the disclosures that are used in practice, which can be tested in further studies to disentangle which disclosures can help consumers to recognize blog advertising. Therefore, our second research question is:

*RQ2: In what way is advertising in blogs disclosed?*

- 30 Third, in an attempt to gain some understanding of the relevance of existing legal and self-regulatory provisions of social media advertising, we investigate how frequently brands are mentioned in blogs and compare this to the frequency of disclosures. Analyzing this brand-disclosure co-occurrence provides insight into the discrepancy between the provision of disclosures and the existence of blog advertising and allows us to speculate about the actual level of compliance with the regulations. In addition to the content analysis, we asked the bloggers to verify whether the inclusion of brands and products was indeed advertising. By doing so, we aim to assess how prevalent the practice of blog advertising is. Therefore, we enquire:

46 CARR AND HAYES *supra* note 7.

47 HWANG AND JEONG *supra* note 7.

48 CARR AND HAYES *supra* note 7.

49 THE FTC'S ENDORSEMENT GUIDES *supra* note 5; THE DUTCH ADVERTISING CODE *supra* note 6.

50 CAMPBELL, MOHR, AND VERLEGH *supra* note 37.

51 FTC .COM DISCLOSURES *supra* note 31.

*RQ3: How often do blogs mention brands and products, and do bloggers provide disclosures when blogs contain advertising?*

- 31 Fourth, the social media advertising regulations between countries are similar in many ways, but there are also differences. In the US, social media advertising was implicitly covered by the FTCA but only recently addressed specifically in a guide. However, in the Netherlands further interpretation and specification of existing laws is a fairly recent development and primarily the result of self-regulation. Therefore, one might expect greater awareness among US bloggers and more compliance with the regulations than among Dutch bloggers. On the other hand, in the Netherlands bloggers are held responsible for compliance with the regulations, whereas in the US the focus is more on the advertisers. From this point of view, one might expect more strict use of disclosures among bloggers in the Netherlands. Our research question states:

*RQ4: Are there any observable differences in the extent to which bloggers provide disclosures (RQ1), the disclosure format (RQ2), and brand-disclosure co-occurrence (RQ3) between the US and the Netherlands?*

- 32 Fifth, we examine differences among the four most popular blog themes, which are food, beauty, fashion, and tech(nology). Advertising could be more natural and suitable for one blog theme (e.g., fashion blogs about clothing, and beauty blogs about make-up) than for another (e.g., food). Therefore, our last research question states:

*RQ5: Are there any observable differences in the extent to which bloggers provide disclosures (RQ1), disclosure format (RQ2), and brand-disclosure co-occurrence in blogs (RQ3) between blog themes?*

## D. Method

- 33 We conducted a content analysis comparing 200 blog posts from the US and the Netherlands. To determine the four biggest blog categories (categories that comprised the highest number of blogs) within the US and the Netherlands, we used [www.technorati.com](http://www.technorati.com). The identified themes were food, fashion, beauty, and technology. Next, the five most popular blogs (with the most unique visitors per month) per theme were selected for both countries (a complete overview can be requested from the authors). For these blogs the five most recent posts were selected for the analyses. This resulted in 100 blog posts from Dutch and American blogs ( $N = 200$ ). Blog posts were collected between June 2014 and October 2014, so for all blog posts the current regulations did apply.

## I. Coding Procedures

- 34 Two independent coders, blind to our research questions, coded the blog posts. Both coders were trained for all variables by one of the authors. A codebook was used that was specifically developed for this study. The training procedure took approximately one month, and in this period 18% ( $n = 36$ ) of the total blog posts were double coded in order to calculate the inter coder reliability. This training sample included five blog posts of each of the four blog themes for the Dutch blogs and four blog posts per theme for the American blogs. Based on this initial coding, Krippendorff's Alpha was calculated ( $\alpha = 0.78$ ) for each variable and ranged from 0.53 to 1 (see Table 1).<sup>52</sup> Inconsistencies found among the coders were extensively discussed in order to reach agreement. Parts of the codebook were altered and information was added because of insights that arose during the training process. Subsequently, the remaining 164 blog posts (80 Dutch blog posts and 84 American blog posts) were divided between the coders and coded by them.

35 **Table 1. Overview of Inter-coder Reliability**

Variable	Krippendorff's Alpha ( $\alpha$ )
Disclosure provided	1
Disclosure: Mentioned brand name	1
Disclosure: Mentioned product name	0.62
Disclosure: Mentioned receiving of compensation	0.63
Size of the disclosure	0.62
Position of disclosure	0.81
Brand names mentioned in blog post	0.71
Promotional features mentioned in blog post	
Discount	1
Direct link to a branded and/or selling website	0.74
Giveaway or free sample	Constant
Slogan	0.53

## II. Variables

- 36 The codebook included several variables in six areas: disclosure presence, disclosure format, brands and products mentioned in blog posts, general information about the blog and blogger, general information about the blog post, and comments on the blog post. Only the relevant variables for this study are reported below.

52 Andrew F. Hayes and Klaus Krippendorff. *Answering the call for a standard reliability measure for coding data*. COMMUNICATION METHODS AND MEASURES 1, 77-89 (2007).

## 1. Disclosure Presence

37 We coded whether the blog post contained one or more disclosures. A disclosure is operationalized as a statement with the purpose to clarify the commercial motives of the blog advertising. All disclosures in the blog post were listed (see Table 3).

## 2. Disclosure Format

38 We coded whether the disclosure included: *brand name*, *product name*, and the *receiving of compensation*. In addition, we coded the *size of the disclosure* (i.e., if the disclosure was coded as smaller, the same size, or larger than the text in the blog post); and the *placement of the disclosure*, (i.e., in title, above the text, in the text, between sentences, or below the text of the blog post).

## 3. Brands Mentioned

39 We also coded whether *brand names* were mentioned in the blog post and the *number of brand names* mentioned in the post. A brand was operationalized as “a distinctive commercial term used by a firm to identify and/or promote itself or one or more of its consumer products or services.”<sup>53</sup> All brands mentioned in the post were listed and the *type of promotion* (i.e., whether the blog post included the official slogan of the brand, a direct link to a branded and/or selling website, a giveaway action, or a discount for the blog readers) was coded.

40 To verify that the blog posts that mentioned brands or products were actually cases of blog advertising, we sent emails to all bloggers about these specific branded blog posts in addition to the content analysis. For the specific blog posts, we asked them whether they (1) received a payment or any form of compensation to write about these brands. And, (2) if so, what they received for this (e.g., money, a product, or a voucher), and finally (3) from whom they received this.

## E. Results

### I. RQ1: Use of Disclosures in Blogs

41 The results of the content analysis can be found in Table 2 and Figure 1. A total of 29 (15%) of the 200 coded blog posts provided one or more disclosures. Most of the blog posts ( $n=20$ ) provided one disclosure, whereas three blog posts gave two, five provided three, and one provided four disclosures. This left us with a total of 45 disclosures of commercial sponsorship.

42 **Table 2. Disclosure Presence, Disclosure Format, and the Mention of Brand and Products in the Netherlands and the US**

	NL		US		Total	
	No	%	No	%	No	%
<b>Disclosure Presence</b>						
Blog posts with disclosures	14 <sup>a</sup>	14%	15 <sup>a</sup>	15%	29	15%
Branded blog posts with disclosures	13 <sup>a</sup>	22%	15 <sup>a</sup>	21%	28	22%
<b>Disclosure Format</b>						
	N=17		N=28		N=45	
Mentions brand or product name	7 <sup>a</sup>	41%	8 <sup>a</sup>	29%	15	33%
Mentions receiving of compensation	2 <sup>a</sup>	12%	6 <sup>a</sup>	21%	8	18%
<b>Size</b>						
Font smaller than text blog post	4 <sup>a</sup>	23%	9 <sup>a</sup>	32%	13	29%
Font same as text blog post	12 <sup>a</sup>	71%	17 <sup>a</sup>	61%	29	64%
Font larger than text blog post	1 <sup>a</sup>	6%	2 <sup>a</sup>	7%	3	7%
Scrolling necessary to see disclosure	11 <sup>a</sup>	65%	20 <sup>a</sup>	71%	31	69%
<b>Position of disclosure</b>						
Above the blog post	2 <sup>a</sup>	12%	7 <sup>a</sup>	25%	9	20%
Between sentences of blog post	1 <sup>a</sup>	6%	3 <sup>a</sup>	11%	4	9%
Below the blog post	9 <sup>a</sup>	53%	14 <sup>a</sup>	50%	23	51%
In text of blog post	3 <sup>a</sup>	18%	3 <sup>a</sup>	11%	6	13%
First word or sentence	2 <sup>a</sup>	12%	0 <sup>a</sup>	0%	2	4%
In title	0 <sup>a</sup>	0%	1 <sup>a</sup>	4%	1	2%
<b>Brand and products</b>						
Blog posts that mention brands	58 <sup>x</sup>	58%	71 <sup>y</sup>	71%	129	65%
Verified as advertising	6	10%	1	1%	7	5%
<b>Type of promotion</b>						
Discount	0 <sup>x</sup>	0%	3 <sup>y</sup>	3%	3	2%
Direct link to website	25 <sup>a</sup>	25%	43 <sup>b</sup>	43%	68	34%
Giveaway or free sample	1 <sup>a</sup>	1%	2 <sup>a</sup>	2%	3	2%
Slogan	0 <sup>a</sup>	0%	0 <sup>a</sup>	0%	0	0%

Note. <sup>a,b</sup> Numbers with a different superscript in the same row differ significantly between countries at  $p < .05$ ; NL = The Netherlands; No=Number; %=Percentage.

<sup>x,y</sup> Numbers with a different superscript in the same row differ significantly between countries at  $p < .10$ .

53 Monroe Friedman. *The changing language of a consumer society: Brand name usage in popular American novels in the postwar era*. JOURNAL OF CONSUMER RESEARCH 11, 927-938 (1985).

## II. RQ2: Disclosure Format

43 Because some blog posts provided more than one disclosure, a total of 45 individual disclosures were analyzed. Format varied a lot, as can be seen from the 33 unique disclosures that were found (see Table 3). Of all disclosures, 15 mentioned the brand or product name (which is 33% of all disclosures), and only eight mentioned compensation received from the advertiser. Furthermore, most of the disclosures ( $n = 29$ , which is 64% of all disclosures) had the same font size as the blog post text. Only three had a larger font, making it stand out from the blog post, whereas 13 had a smaller font size, making it harder to notice. Despite FTC regulations stating that scrolling down should not be necessary to see the disclosure, in 31 (69% of all disclosures) of the cases it was necessary to scroll down. In line with this finding, 23 of the disclosures were located below the blog post (which is more than half, 51%, of all disclosures). Nine disclosures (20%) were positioned above the text, six (13%) within the text, and two were in the first sentence (4%). One disclosure was part of the title.

## III. RQ3: Brand-Disclosure Co-Occurrences

44 In total, 65% of the blog posts mentioned brands. On average, blog posts mentioned 1.49 brands ( $SD = 1.77$ ). Most blog posts ( $n = 69$ ) cited one brand, whereas 13 of the blog posts mentioned the maximum number of six brands. When selecting the 129 branded blog posts, the mean number of brands mentioned was 2.30 ( $SD = 1.73$ ). This means that many blog posts contain brands or product names, and when they do, they typically mention more than two.

45 Three of the blogs included a discount for the brand or product, three advertised a giveaway or free sample, but none cited a slogan. Of all blog posts, 34% provided a direct link to the website of the brand or a website selling the brand. Most of these blog posts ( $n = 48$ ) provided one hyperlink, and two provided a maximum of six links. In addition, 31 of the blog posts contained videos, and in 58% ( $n = 18$ ) of them, one or more brands were mentioned.

46 Of the 129 branded blog posts, 22% ( $n = 28$ ) included a disclosure. One Dutch blog post provided a disclosure but did not mention any brands in the blog (making the total of blog posts with disclosure 29). The disclosure itself said: "This trip was offered to me by Visit Valencia.com and Tix; see my disclaimer here" (Table 3, Case 2, The Netherlands). In this case the blog post was advertising a trip to the Spanish city and a travel website. This shows that disclosures are necessary, even when the commercial relationship does not revolve around a specific brand.

47 The low level of brand-disclosure co-occurrence of merely 22% indicates a low level of compliance with the social media advertising regulations. Before drawing any conclusions regarding bloggers' compliance with the regulations, we had to verify whether these branded blogs were actually advertising. The 129 branded blog posts stemmed from 38 unique blogs (Min = 1 branded blog post stemming from a blog, Max = 5). We were able to send 31 blog(gers) an email about 109 of the branded blog posts to verify the purpose of the brand or product mentions. These emails included 15 direct emails to the blogger, 16 indirect emails via the website contact form, 'info' email address, or the bloggers' management. The remaining seven blogs, responsible for 20 of the branded blog posts, did not provide any contact information (for an overview see Figure 1).

48 We received an answer to our emails from 10 bloggers (32% of the sent emails). These 10 emails were about 27 different blog posts. Two of the responses did not address the questions about the blog posts, so for four blog posts the background remained unclear. This means we got an answer to whether 23 (of a total of 129) branded blog posts were actually a case of blog advertising.

49 **Table 3. Disclosures Provided in Coded Blog Posts (in Random Order)**

The Netherlands		US	
1.	Sponsored	15.	Sponsored (4x)
2.	This trip was offered to me by Visit Valencia.com and Tix, see my disclaimer here.*	16.	Sponsored post (2x)
3.	Advertorial (3x)	17.	The babes on her team sent me some line-sheets, and told me to pick whatever I wanted.
4.	This review contained products that were sent to me by the company. Read my disclaimer.* (2x)	18.	Thanks for being an outrageously rad partner!
5.	This is a sponsored post.*	19.	This post is in partnership with Cadillac.
6.	This post was created in collaboration with Vodafone.	20.	They sent me a whole lot.
7.	Submitted statement.*	21.	This post is in partnership with McCormick. All thoughts, words and images are my own. Thank you for supporting the sponsors that support Love & Lemons!
8.	During the shows I talked about the Instagram account of Boohoo Fashion and therefore got the opportunity to pick a nice outfit at their press office.*	22.	The products in this entry were provided by the manufacturer for consideration. For information about my posting policy, please see my Disclaimer.
9.	In collaboration with A&F I choose this overall, because for me this is the perfect summery looking jeans-item.	23.	Disclosure: This post contains an affiliate link. Read my full disclosure statement here.



10. I was totally styled by ModeMust-haves and I think this was a really nice outfit.*	24. Affiliate link (3x)
11. Disclaimer: this article is part of the series "The Internet of Everything stories", made possibly by Cisco.*	25. PR sample (2x)
12. This message is an advertorial. Read our disclaimer here!*	26. Shot in partnership with McQ by Alexander McQueen
13. P.S. Here, here and here you can read more about sponsored reviews about coffee.*	27. Lead image courtesy of Voodoo Ray's, all others by Cajsja Carlson
14. (This article was created in collaboration with Vodafone Firsts)	28. Thank you so much to Betsey for hooking me up with these SWEET SWEATS! Meow!
	29. This post was brought to you by Hanes and Style Coalition.
	30. This post is sponsored by Purina Pro Plan #proplancatpartner. For information about my posting policy, please see my Disclaimer.
	31. Sponsored by Purina Pro Plan Cat food
	32. Disclosure: This post contains an affiliate link. Read my full disclosure statement here.
	33. Disclosure: This post contains a PR sample/affiliate link. Read my full disclosure statement here. (2x)
	34. The products in this entry were provided by the manufacturer for consideration. For information about my posting policy, please see my Disclaimer.

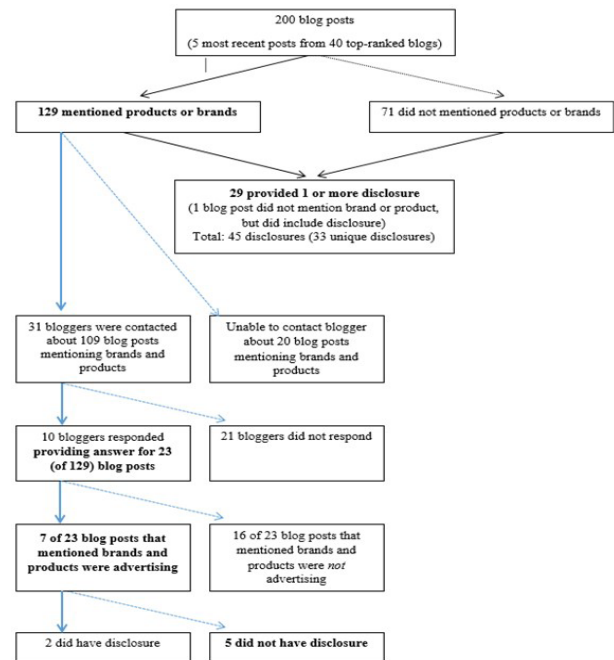
Note. \* Disclosures from Dutch blogs that were translated into English.

50 For 16 blog posts, the bloggers said they did not receive any compensation to write about the brands mentioned in them. Seven of the 23 blog posts mentioning brands were a result of a commercial relationship: one blogger was paid to write a blog post about the brand, one was a PR deal, one received a trip, one blogger made a deal with a restaurant, and three received the product to review it on their blog. Interestingly, five of these seven blog posts containing advertising did *not* include a disclosure of this relationship to the brand. Although six of the ten bloggers we emailed, explicitly told us to always disclose any commercial relationship (without us asking them), our small sample of blog advertising ( $n = 7$ ) shows bloggers certainly do not always comply with the social media advertising regulations.

#### IV. RQ4: Differences between Countries

- 51 To answer RQ4, we compared the two countries by conducting chi-square analyses for the dichotomous variables, and ANOVAs for the continuous variables. We found little significant differences between the two countries. For brevity and clarity, we only report the significant differences. Results showed that there is a marginal significant difference between the countries with respect to the number of blog posts that mentioned brands,  $\chi^2(1) = 3.69, p = .055$ . The American blog posts seem to include brands more often (71%) than Dutch blog posts (58%).
- 52 With regard to the type of promotion, the Dutch blog posts provided no discounts for a brand or product, whereas a few (3%) American blog posts did. This difference was marginally significant,  $\chi^2(1) = 3.05, p = .081$ . Moreover, the American blog posts provided direct links to a website selling the brand or the website of the brand itself (43%) more often than the Dutch blog posts (25%),  $\chi^2(1) = 7.21, p = .007$ . In addition, the American blog posts ( $M = 0.78, SD = 1.28$ ) provided significantly more links than the Dutch blog posts ( $M = 0.33, SD = 0.67$ ),  $F(1, 198) = 9.67, p = .002, \eta^2 = .05$ .

53 Figure 1. Overview of content analysis and results of contact with bloggers



## V. RQ5: Differences among Blog Themes

- 54 To answer RQ5, we compared the four blog themes by conducting chi-square analyses for the dichotomous variables, and ANOVAs for the continuous variables. Again, we only report the significant differences.
- 55 There was a marginal significant difference in the use of disclosures,  $\chi^2(3) = 7.54, p = .056$ , and a significant difference in the number of disclosures provided per blog post,  $F(3, 196) = 4.93, p = .003, \eta^2 = .07$ , among blog themes. The figures clearly show that most disclosures (26%) are provided in beauty blogs. Bonferroni post hoc comparisons showed that blog posts on beauty blogs ( $M = 0.52, SD = 1.03$ ) contained significantly more disclosures, compared to food ( $M = 0.12, SD = 0.48$ ), fashion ( $M = 0.14, SD = 0.40$ ), and tech ( $M = 0.12, SD = 0.33$ ) blogs.
- 56 Comparing the 45 disclosures provided in the blog posts revealed significant differences in the blog themes with regard to mentioning brands or products in the disclosure,  $\chi^2(3) = 13.16, p = .004$ : Disclosures used in fashion blogs most often mentioned brand or product names.
- 57 Furthermore, there were significant differences in the mentioning of brands,  $\chi^2(3) = 29.59, p < .001$ , and the number of brands mentioned,  $F(3, 196) = 9.10, p < .001, \eta^2 = .12$  among the blog themes. Mostly fashion (78%) and beauty (80%) blogs mentioned brands (tech 66%, food 34%). Post hoc analyses using the Bonferroni adjustment showed that there were significantly more brands mentioned in fashion blogs ( $M = 2.28, SD = 2.08$ ) compared to food ( $M = 0.60, SD = 1.21$ ) and tech ( $M = 1.30, SD = 1.54$ ) blogs, and significantly more brands mentioned in beauty blogs ( $M = 1.76, SD = 1.73$ ) compared to food blogs. In other words, fashion and beauty blogs mentioned the most brands and product names.
- 58 When selecting only the 129 branded blogs, the number of disclosures significantly differed between blog themes,  $F(3, 125) = 3.34, p = .022, \eta^2 = .07$ . Bonferroni post hoc analyses showed that beauty blogs ( $M = 0.65, SD = 1.12$ ) provided significantly more disclosures than fashion blogs ( $M = 0.18, SD = 0.45$ ), and marginally significantly more than tech blogs ( $M = 0.18, SD = 0.39$ ), but not compared to food blogs ( $M = 0.29, SD = 0.77$ ). All other comparisons were not significant. This indicates that beauty blogs most often mention brands and also provide the most disclosures of advertising.

## F. Conclusion and Discussion

- 59 This study presented the regulations in the EU - specifically The Netherlands - and the US on blog advertising, and systematically assessed actual practice of disclosure by studying a sample of popular blog posts. The FTCA and related guides in the US, and self-regulative provisions in Europe urge advertisers and endorsers, such as bloggers, to disclose any commercial relation. These disclosures should be clear and conspicuous<sup>54</sup> because advertising to consumers should be recognizable as such. However, our legal and content analyses show a significant discrepancy between legal rules and actual practice. Accordingly, our content analysis of 200 blog posts from the 40 most popular blogs across four different blog themes and two countries, provided us with five insights about what bloggers actually say and do, which are particularly relevant to the current regulations.
- 60 First, our study shows that 15% of all blog posts provided one or more blog advertising disclosures. This demonstrates that at least some blog posts were in compliance with the legal and self-regulatory provisions and provided blog advertising disclosures.
- 61 Second, a comparison of the 45 blog advertising disclosures in the sample shows that there is great diversity in the way disclosures are presented. This demonstrates that there is certainly not one uniform disclosure format. Although the codes and regulations in both the Netherlands and the US require a blogger to specifically mention any connection with an advertiser, only one-third of the disclosures mentioned the brand or product name (as required by the rules). Many of the disclosures only stated “sponsored,” “affiliated link,” “PR sample,” or “advertorial.” Moreover, very few disclosures stated that the blogger had received compensation. An important note to this issue is that we cannot determine which of the blogs actually did receive compensation and did not mention this. This could indicate that bloggers do not often receive compensation, or that when bloggers are paid, they rarely mention it.
- 62 Concerning the size of the disclosure, we found that most (64%) are presented in the same font as the text of the blog post, but many also use a smaller font. Most of the time, disclosures are placed below the blog post, often requiring scrolling to see the disclosure. This is not in accordance with the requirement that a disclosure must be presented in a clear and accessible manner and should ideally be visible without scrolling. However, research on the

54 WOMMA *supra* note 6; THE DUTCH ADVERTISING CODE *supra* note 6; FTC .COM DISCLOSURES *supra* note 31.

positioning of disclosures<sup>55</sup> showed that disclosures at the end of a blog can be effective. Thus far, we can conclude that the existing rules could be improved by being better informed by empirical evidence in actual user behavior.

- 63 According to the FTC .Com Disclosure document, “The ultimate test is whether the information intended to be disclosed is actually conveyed to consumers”.<sup>56</sup> Overall, our findings indicate that, although disclosures are sometimes provided, bloggers usually do not make an effort to create a prominent disclosure, making it difficult for the consumer to notice it, and calling in question the efficacy of those disclosures that are provided. Additionally, many disclosures do not provide sufficient information to understand the connection between the blogger and advertiser.
- 64 Third, our study shows that blogs do often mention brands and product names. Of the 200 blog posts coded, two-thirds mentioned one or more brands and product names. An important limitation of a content analysis, however, is that we cannot be sure whether the brands and product names are mentioned because of a commercial connection with this brand. In an attempt to verify whether the blogs mentioning brands were actually advertising, we contacted the bloggers behind these blogs. Although very few responded, this did show that many blog posts mentioning brands or products were not based on a commercial relationship (70%, i.e., 16 of 23), but it could also mean that the bloggers in question were not willing to disclose that relationship to the researchers. If anything, these findings point to some of the difficulties with monitoring for compliance.
- 65 Fourth, our study reveals some interesting differences between the Netherlands and the US. The American blog posts appear to include brands more often than Dutch blog posts, and they include more promotional features, such as discounts and links to a brand’s website, or websites selling specific brands. Based on this, American blogs may be more commercial in nature than their Dutch counterparts. However, we found no differences in the use of blog advertising disclosures.
- 66 Fifth, our results demonstrated some distinctions among the four most popular blog themes (i.e., food, beauty, fashion, and tech). Blogs about fashion and beauty contained the most brand and product names. Probably these blogs often include posts about makeup and clothing from specific brands, making it more likely to include brands than food and technology blogs. Interestingly, the use of disclosures is also highest within these themes.

Fashion blogs in particular mentioned brand or product names, clearly informing readers about a commercial connection. These are promising findings, indicating that blog themes in which the mentioning of brands is most natural and most often used shows greater compliance with the regulations requiring disclosures. Future research may specify how this develops for other blog themes.

- 67 An important limitation of our study is that we analyzed blog posts from 2014. Although the codes and regulations already urged the disclosure of sponsored content in 2014, since then, the codes and guides have been updated (e.g., the US Endorsement Guides were updated in 2016 and the Dutch Advertising Code was updated in 2017). In addition, as the FTC noticed that many influencers did not clearly and conspicuously disclose their relationships to brands, they sent out more than 90 letters warning and reminding influencers and marketers of their obligation to disclose commercial relationships.<sup>57</sup> Future research is needed to investigate whether these new developments have affected whether and how bloggers disclose blog advertising, and to ascertain how effective these new measures and efforts have been.

## I. Theoretical implications

- 68 Our findings provide some important implications for the theoretical development of the effects of sponsorship disclosures and further research. Table 3 shows an overview of the disclosures used in real life. The Persuasion Knowledge Model is often used as a theory that can explain why disclosures may influence consumer’s responses to sponsored content.<sup>58</sup> The archetypes of disclosures derived from this study should be tested to examine whether these disclosures are clear and understandable (a requirement in the regulations for both the Netherlands and US) and thus whether they can actually increase the use of persuasion knowledge. This is not something we can derive from this content analysis. The existing variety and lack of standardization may lead to confusion among users. More research could provide vital information about the extent to which consumers understand the disclosures, the best format to effectively inform consumers about the commercial nature of a blog post, and whether there is a need for standardization.
- 69 Although the advertisers are responsible for compliance with the regulations, they are also

55 CAMPBELL, MOHR, AND VERLEGH *supra* note 37.

56 FTC .COM DISCLOSURES *supra* note 31.

57 FTC STAFF REMINDS INFLUENCERS AND BRANDS TO CLEARLY DISCLOSE RELATIONSHIP. (2017), available at <<https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>>.

58 BOERMAN *supra* note 4; HWANG AND JEONG *supra* note 7.

responsible for training their endorsers to use adequate disclosures. Other possible areas for research include the level of awareness of the rules among bloggers, the extent to which the existing rules match with social norms and ethical perceptions among bloggers, the extent to which advertisers develop monitoring and training schemes, and the way in which they ensure (or fail to ensure) compliance with the rules. Furthermore, further research in the legal area could relate to the broader question about the extent to which professional parties can be held legally accountable or responsible for the actions of amateur users.

the side of users.

### Acknowledgements

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## II. Legal implications

- 70 Finally, these findings also have important implications for law and policy. Transparency and disclosures are a central element in consumer protection and in the context of social media advertising. The current findings suggest that for the time being, compliance with the rules for blog advertising may be rather low. In case bloggers do provide disclosures, the format varies, which can possibly lead to further confusion among users, and may be an argument in favor of stipulating clearer guidance on or even standardization of the disclosure format. This is in light of the fact that bloggers will typically be legal laymen, and in the absence of clear guidance, will find it difficult to judge when a disclosure is in compliance with the regulations.
- 71 This study has also demonstrated how difficult it is for the monitoring authorities to actually ascertain whether a conflict with the existing regulations is present. Though blogs do seem to mention brands frequently, it is difficult to conclude from this alone the existence of a relevant relationship or connection to an advertiser and rule out other explanations, such as social habits and the way the mentioning of brands is integrated in the way users communicate. In addition, given the large variety of disclosures provided in blogs, also the disclosures themselves are difficult to recognize and monitor. Finally, even if empirical evidence finds instances of non-compliance, clear standards are still missing on how solid this evidence needs to be to be externally valid and justify intervention. Therefore, while this study suggests that the rules are relevant, it also suggests that monitoring and compliance would need to focus on the advertisers (as the FTC has already indicated). Additional arguments in favor of concentrating on advertisers is that here the incentives to comply are probably the lowest (as disclosure can have a potentially adverse effect on the advertising outcomes), as well as the potential invasiveness and privacy-intrusiveness of monitoring compliance on

# 'We want Artists to be Fully and Fairly Paid for their Work'

## Discourses on Fairness in the Neoliberal European Copyright Reform

by **Ananay Aguilar\***

**Abstract:** Elaborating on the President of the European Commission Jean-Claude Juncker's agenda, EC Vice-President and Commissioner for the Digital Single Market Andrus Ansip wrote on his blog on 18th November 2015, "we want artists to be fully and fairly paid for their work"—the phrase that serves as the title to this article and that has reappeared in different guises throughout the process of EU copyright reform. By examining a case study on the Fair Internet for Performers Campaign—a campaign advanced in the context of the ongoing European copy-

right reform—I shed light on the powerful discourses on fairness that have dominated and shaped the reform process. Using discourse analysis, I found the concept of fairness to be mostly dependent on the stakeholders' relative bargaining power and framed by hegemonic neo-liberal thought. Drawing on interviews, fieldwork, media, and the documentation produced by the European Union's government throughout the process, the case study also illustrates the contested nature of copyright reform today.

**Keywords:** Fairness; discourse analysis; copyright reform; EU; neo-liberalism

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### A. Introduction

*So what better alternative is there than an agreement between citizens themselves reached under conditions that are fair for all?*

John Rawls, *Justice as Fairness*, para. 6.1

1 The quote above is based on Rawls's theory of justice, where the concept of justice is one based on fairness.<sup>1</sup> To achieve fair terms of cooperation between citizens regarded as free and equal, Rawls proposes a hypothetical scenario—the 'original position' thought experiment—in which a group of people is set the task of reaching an agreement

regarding the political and economic structure in which they are prepared to live.<sup>2</sup> Each individual, however, has to act behind a 'veil of ignorance', that is, not knowing the physical or material attributes that characterises them.<sup>3</sup> They lack knowledge, for example, of their gender, race, age, intelligence, skills, wealth, education, and religion. The idea is that people are unlikely to propose structures that are fundamentally unjust on the basis of any of these attributes.<sup>4</sup> Rawls's theory is founded on a hypothetical scenario, an ideal to which we all ought to aspire.<sup>5</sup> But what would a real-life scenario look like, one that is historically contingent and in which the conditions for a fair agreement are mired in factual constraints, including not simply relative bargaining power, but also the influence of ideology?

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1 John Rawls, *Justice as Fairness: A Restatement* (2<sup>nd</sup> Revised edition edition, Harvard University Press 2001).

2 *ibid* 6.1.

3 *ibid* 6.2.

4 *ibid* 6.4.

5 John Rawls, *The Law of Peoples* (Harvard University Press 1999) 89.

2 In this article, I put one such scenario under detailed examination: the latest, ongoing, EU copyright reform. Taking the Fair Internet for Performers Campaign as a case study, I focus on the way in which EU stakeholders in the copyright debate conceive of fairness. I pay particular attention to the political process leading to copyright reform and less so to the normative considerations of the rights being campaigned for or indeed of the concept of fairness itself. Instead, I consider how discourse about fairness is employed and ideologically framed in relation to this particular performers' rights campaign, including discourse as found in the media, reform documents, and in stakeholder interactions. As part of a larger project on performers' rights in the UK music industries, my perspective of the lobbying process reflects a UK position in its approach to the EU. Differences in music copyright are significant across jurisdictions, but it is important to recognise that debates around music copyright reproduce the international status of campaigning stars and multi-national corporations.

3 Serious discussion about a new copyright reform at the European level since the last major overhaul in 2001 through the InfoSoc Directive, began in the context of the 2014-2019 European Commission presidency of Jean-Claude Juncker. His political guidelines set out 10 priorities of which 'A connected digital single market' provided the context to 'modernis[e] copyright rules in the light of the digital revolution and consumer behaviour'.<sup>6</sup> With the dramatic technological changes of the last 15 years, including the rise of Spotify, YouTube and Netflix, the time was ripe for such reform.

4 Since at least 2013, when Thom Yorke complained about the exploitative strategies of the record industry by describing Spotify as the 'last fart of a dying corpse', many more artists had expressed their dissatisfaction with the direction that the record industry was taking with streaming services.<sup>7</sup> Taylor Swift has been perhaps the most outspoken about the small fees offered by music streaming sites. In November 2014, Swift removed most of her catalogue from Spotify, explaining her decision on a Yahoo! interview: 'I'm not willing to contribute my life's work to an experiment that I do not feel fairly compensates the writers, producers, artists and creators of this music', she said referring to Spotify's free tier.<sup>8</sup> Half a year later, on the day of the

launch of Apple's streaming site, Swift wrote an open letter published on her Tumblr account expressing her outrage at Apple's free three-month trial, during which musicians would not be compensated: 'Three months is a long time to go unpaid, and it is unfair to ask anyone to work for nothing'.<sup>9</sup> Her appeal was effective: Apple immediately backtracked that proposal.

5 Nonetheless, Swift has not been the only one protesting against the streaming sites' poor pay. Other artists have taken a stance on streaming: Beyoncé and Kanye West have offered exclusives with high mark-ups on Tidal, while Adele has refused to launch new music on streaming. Although not alone in her campaign for better pay from streaming companies, Swift was one of the most visible contenders to introduce the concept of fairness into these public debates. Acknowledging that these artists operate in different jurisdictions and have a variety of different claims to copyright, it is this fraught relationship with streaming services that launched the concept of fairness into the mainstream and formed the backdrop of campaigns such as the Fair Internet for Performers Campaign (henceforth the FIPC).<sup>10</sup>

6 The FIPC was launched in May 2015 in the context of the European process of copyright reform. It seeks to secure royalty payments for performers when their recorded performance is played on streaming and other on-demand services offered by digital service providers (DSPs), such as Spotify and Netflix. Currently, record labels (and some label services) only negotiate royalty payments in relation to use on DSPs with featured artists. In contrast, the majority of performers do not have the bargaining power to negotiate standard contracts: record companies offer performers a one-off fee in return for assigning them the performers' exclusive right of making available to the public.<sup>11</sup>

7 The legal instrument proposed by the campaign to address this problem is the addition of an *unwaivable* equitable remuneration right to the existing exclusive making-available right. This would secure collective remuneration whilst leaving the possibility

(11 June 2014).

9 Peter Helman, 'Read Taylor Swift's Open Letter To Apple Music' (21 June 2015) <<https://www.stereogum.com/1810310/read-taylor-swifts-open-letter-to-apple-music/news/>> accessed 19 January 2018.

10 There's at least one other EU-level campaign using the term 'fair' in its title: see <<https://www.fairtermsforcreators.org/who-we-are.html>>.

11 Copyright, Designs and Patents Act 1988 (c 48), s.182CA and WIPO Performance and Phonograms Treaty 1996, Art. 10, transposed in the EU via Directive 2001/29/EC, Art. 3 (2a) and implemented in the UK through the Copyright and Related Rights Regulations 2003, Reg. 7.

6 Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission.' 6.

7 Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission.'

8 Chris Willman, Interview with Taylor Swift, 'Exclusive: Taylor Swift on Being Pop's Instantly Platinum Wonder... And Why She's Paddling Against the Streams'

of negotiating the exclusive right untouched.<sup>12</sup> The campaign is targeted at the European Union, with the aim of arriving at a legal solution within the current copyright reform. When the campaign entered the reform process, discussion about ‘fair remuneration’ for authors and performers was slowly gaining traction. However, the tool chosen by the European Commission in its 2016 proposal to address the low bargaining power of the majority of creators was different to that of the FIPC: the EC proposed to regulate transparency and combine it with contractual mechanisms to give authors and performers greater contractual bargaining power.<sup>13</sup>

8 In this article I trace the concept of ‘fairness’ throughout the European process of copyright reform. I draw on two main sets of data: on the one hand, I examine primary literature from the European Commission (EC) and Parliament, including the EC political guidelines, the EC Proposal for Copyright in the Digital Single Market, and key documents created by the Parliament in response to the proposal. On the other, I interrogate the accounts of stakeholders involved in the reform process as related in personal interviews. I build on current research that investigates the processes by which copyright law is reformed<sup>14</sup> and that considers how rights holders employ discourse strategically in order to advance and legitimate their claims within the current copyright regime.<sup>15</sup> As Street, Laing and Schroff argue, it is only by focusing on otherwise loosely employed terminology that the impact of legal and political reform can be assessed.<sup>16</sup>

Edwards et al. in particular, attend to the fact that, in justifying their positions, stakeholders often appeal to principles of general interest that already enjoy some degree of legitimacy.<sup>17</sup> For example, ‘arguments that associate legal consumption with moral integrity are countered by discourses that reveal the inequitable nature of industry structures’.<sup>18</sup> The concept of ‘fairness’ has particular resonance in this context, where every stakeholder claims that this term is associated with equality, justice and legitimacy for him or herself.

9 By analysing the EC presidential guidelines, I present the setting within which the concept of fairness begins to be used within this presidential cycle. Drawing on Foucault’s idea of the net-like circulation of power, I describe the increase in currency of the word fairness throughout the reform process as generated by a ‘feedback loop’.<sup>19</sup> From its first use by Juncker to the EC Proposal and surrounding discourse (presented here in chronological order) this feedback loop develops its own self-reinforcing cycles of signification. Here the appropriation and re-appropriation of the word ‘fairness’ by members of the same conversation transform it into a buzz phrase for ‘a more balanced playing field in contractual relations between authors and performers and their contractual counterparts’. This feedback loop is not a random process: commissioners, politicians and campaigners deliberately echo Juncker’s choice of keywords and imbue them with their own meaning hoping to gain traction in the debate. Those who are successful in pushing their agendas will have their meaning adopted by the reform documents.

10 Yet this feedback loop does not occur in a vacuum. As I demonstrate, fairness is understood by the majority of stakeholders within a wider discourse dominated by neoliberal thought. Here, in stark contrast to Rawls’s ideal theory, fairness is one that allows market forces to act freely with minimum regulation. When regulation is introduced, this is done to address perceived market failures that affect individual entrepreneurialism, not collective labour. The language used especially by the Commission, but also by the Parliament, is one that refers to citizens in a distant, non-committal, manner. The only citizens worth mentioning in any detail are entrepreneurs, who are juxtaposed with corporations. The FIPC, which conceives of its population as the creative industries’ labour force, is thus confronted with a steep climb - that of challenging current dominant thought.

12 Fair Internet Coalition, ‘Fair Internet for Performers: Questions and Answers’ <<http://www.fair-internet.eu/campaign-docs/>> accessed 28 November 2016.

13 European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 2016 [2016/0280 (COD)] Articles 14-16.

14 Agnieszka Vetulani-Cegiel, ‘EU Copyright Law, Lobbying and Transparency of Policy-Making: The Cases of Sound Recordings Term Extension and Orphan Works Provisions’ (2015) 6 *Journal of Intellectual Property, Information Technology, and E-Commerce Law* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2673596](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673596)> accessed 20 September 2017; Stef van Gompel, ‘Copyright, Doctrine and Evidence-Based Reform’ (2017) 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 304.

15 Hector Postigo, ‘Capturing Fair Use for the YouTube Generation: The Digital Rights Movement, the Electronic Frontier Foundation and the User-Centered Framing of Fair Use’ (2008) 11 *Information, Communication & Society* 1008; Simon Lindgren, ‘PIRATE PANICS’ (2013) 16 *Information, Communication & Society* 1242; Lee Edwards and others, ‘Discourse, Justification and Critique: Towards a Legitimate Digital Copyright Regime?’ [2014] *International Journal of Cultural Policy*; John Street, Dave Laing and Simone Schroff, ‘Regulating for Creativity and Cultural Diversity: The Case of Collective Management Organisations and the Music Industry’ [2016] *International Journal of Cultural Policy*.

16 Street, Laing and Schroff (n 15) 3–7.

17 Edwards and others (n 15) 63.

18 *ibid.* 72.

19 Michel Foucault, *Power-Knowledge: Selected Interviews & Other Writings- 1972-1977* (Colin Gordon ed, Pantheon Books 1980) 98.

## B. The Fair Internet for Performers Campaign: what is it?

- 11 The Fair Internet for Performers Campaign was launched by four international organisations representing 500,000 musicians, actors and dancers: the Association of European Performers' Organisations (AEPO-Artis), which is the European association of performers' collective management organisations; the European branch of the International Federation of Actors (EuroFIA); the International Federation of Musicians (FIM), and the International Artist Organisation of Music (IAO), which represents featured artists. As I will explain in more detail below, although these groups converge in the campaign, they represent slightly different interests and have different agendas for supporting the campaign.
- 12 As outlined above, the campaign seeks the addition of a collective remuneration right for the exclusive right of making available, which is already in existence across EU member states.<sup>20</sup> This addition of an equitable remuneration right would be unwaivable: performers would not be able to license or assign it through contract, except to a collective management organisation managing these rights on their behalf. Thus, every performer whose recorded performance was made available on on-demand services would need to be paid royalties regardless of contractual agreements. In defence of powerful record companies that offer contracts in which performers are asked to assign all of their exclusive rights for a one-off fee, it could be claimed that performers are not forced to accept these terms. However, in the music industries, where the labour market is characterised by oversupply, performers with low bargaining power do not feel that they have a choice.<sup>21</sup>
- 13 This type of right is not a new idea. The right represents the counterpart to the UK's unwaivable equitable remuneration right for communication to the public, which entitles performers to royalty payments when their recorded performances are broadcast and played in public spaces such as public houses, clubs, bars, retail stores and other

commercial and non-commercial establishments.<sup>22</sup> The license fees for these rights are collected by collective management organisations (CMOs) for record companies on behalf of their contracted performers. In the UK, record companies then split this income on a 50/50 basis with performers.

- 14 The implementation of the making available right varies between EU member states; however, where equitable remuneration rights were introduced (e.g. Spain), the principle established with the equitable remuneration right for communication to the public remains the same. In order to cover running costs, European CMOs retain a percentage of the collected license fees (often in the region of 15 to 20 per cent). In interviews, I heard both good and negative comments about the efficiency and effectiveness of CMOs,<sup>23</sup> but the campaigners seem to agree that their job is good enough to trust them with the management of the proposed right.
- 15 The campaign demands that the cost of this new right be borne by digital service providers. Considering that the income of DSPs is limited, all the other stakeholders in the business of DSPs are uneasy about this campaign, as they would have to accommodate a new payee. As I will examine in detail below, these include users, record labels, and the DSPs themselves. Featured artists and their managers are often in a position to negotiate favourable contracts, so they are not entirely sure of the benefit of a collectively managed right.
- 16 Do performers need another equitable remuneration right? It is not my objective to determine whether the FIPC is indeed fair in a normative sense, but I explain both fundamental positions briefly. It could be argued against the FIPC that collectively managed rights erode the bargaining potential of exclusive rights. This is because exclusive rights allow performers to trade each of their rights for the perceived value of their performance, which varies from performer to performer. In contrast, a collectively managed right is often negotiated by the CMOs in collaboration with the relevant trade union on behalf of all performers, which results in a (low) set fee with management costs (at about 15 per cent for Phonographic Performance Limited [PPL]). Alternatively, if this right is added to an exclusive right, powerful record companies could claim that the license fee for that particular right (in this case

20 Art.3(2), 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 (InfoSoc Directive) implemented in the UK in 2003 as CDPA s.182CA(1).

21 Paul M Hirsch, 'Processing Fads and Fashions: An Organization-Set Analysis of Cultural Industry Systems' (1972) 77 *American Journal of Sociology* 639; Richard A Peterson and David G Berger, 'Cycles in Symbol Production: The Case of Popular Music' (1975) 40 *American Sociological Review* 158.

22 Art. 8, Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental Directive) introduced in the UK in 1996 as CDPA s.182D; not to be confused with CDPA s.20, which applies only to authors, not performers.

23 Ananay Aguilar, 'PPL and Performers' Rights: A Story of Conflicting Interests' (School of Law, University of East Anglia, Norwich, 9 May 2018).



the making available right) has already been taken care of collectively. They then will pull back at attempts to negotiate an additional fee. Supporters of the campaign argue that the argument for exclusive rights works best in a perfect free market, where all the parties have equal bargaining power.<sup>24</sup> But this is a winner-take-all market, where only a small minority has any bargaining power, whilst the vast majority of performers are forced to accept the terms offered by powerful contractors in order to make a living.<sup>25</sup>

## C. Fairness in the European Union

- 17 The complex process through which law is made in the European Union is called the ‘ordinary legislative procedure’.<sup>26</sup> In its simplest description, the European Commission proposes legislation, which is amended by the European Parliament and passed on for approval by the Council of Ministers. In practice however, each of the bodies is involved in all stages; so for instance, while the EC gauges the need for reform, by opening consultations and commissioning reports, it also receives recommendations from the Parliament and Member States. At the later stage, the approval by the Council of Ministers is really a drawn-out negotiation between the Council and the Parliament, both of whom submit proposals to each other. Meanwhile, the Commission can change its proposal at any time. As Kretschmer has put it, ‘proposed legislation is a constantly moving target’.<sup>27</sup> This flexibility is especially relevant for the different stakeholders affected by a particular piece of legislation and whose work is to influence the process to their advantage.
- 18 In this section I analyse policy statements by looking out for the use of the word ‘fairness’. I begin with the presidential guidelines for the European Commission cycle 2014-2019 entitled ‘A New Start for Europe: My

24 In particular, respondents [04MI-160617] and [10MI-161213].

25 Peter DiCola, ‘Money from Music: Survey Evidence on Musicians’ Revenue and Lessons About Copyright Incentives’ 55 *Arizona Law Review* 301; Martin Kretschmer, ‘Artists’ Earnings and Copyright: A Review of British and German Music Industry Data in the Context of Digital Technologies’ (2005) 10 *First Monday* <<http://journals.uic.edu/ojs/index.php/fm/article/view/1200/1120>>.

26 Treaty on the Functioning of the European Union 2007, Articles 289 and 294; see also General Secretariat of the Council, ‘The Ordinary Legislative Procedure - Consilium’ (20 November 2017) <<http://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/>> accessed 25 January 2018.

27 Martin Kretschmer, ‘EU Copyright Reform: Quo Vadis?’ (*The IPKat*, 11 May 2017) <<http://ipkitten.blogspot.com/2017/05/eu-copyright-reform-quo-vadis.html>> accessed 25 January 2018.

Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission.’ Considering the use of ‘fairness’ in its title, I do not wish to promote a top-down approach to the use of the word, but rather to use these guidelines as a contextual starting point. I take the view that ‘fairness’ is continuously produced and reproduced by all of the actors involved in this chain of action that forms the copyright reform process. To quote Foucault on the circulation of power:

*power is not to be taken to be a phenomenon of one individual’s power over others, [but] must be analysed as something which circulates [...]. Power is employed and exercised through a net-like organisation. And not only do individuals circulate its thread; they are always in the position of simultaneously undergoing and exercising this power.*<sup>28</sup>

- 19 As the concept of fairness progresses through the Vice-Presidency and Directorate General to the Commission and Parliament and is meanwhile adopted by copyright stakeholders, the concept gains a life of its own. As I will demonstrate, however, this process is not a random one, but one neatly framed by ideology.

## I. Juncker’s political guidelines

- 20 In September 2014, following the launch of his presidency programme, Juncker consolidated the structure of the new European Commission designed to facilitate the implementation of the guidelines.<sup>29</sup> The structure consists of seven vice-presidents in addition to the High Representative of the Union for Foreign Policy & Security Policy, each leading one project. Former Estonian Prime Minister Andrus Ansip was given the task of leading the project team ‘A Digital Single Market’, overseeing the work of twelve Commissioners and their Directorate Generals (DGs). Within this project, Günther Oettinger, the Commissioner for DG Digital Economy and Society, was nominated to lead a copyright reform. On Oettinger’s promotion, this role was taken over temporarily by Andrus Ansip,<sup>30</sup> and finally by Mariya Gabriel in July 2017.<sup>31</sup>

28 Foucault (n 19) 98.

29 Juncker, ‘A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission.’ (n 6).

30 Jean-Claude Juncker, ‘Transfer of Commissioner Günther Oettinger’s Digital Economy and Society Portfolio to Vice-President Andrus Ansip’ (21 December 2016) <[https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner\\_mission\\_letters/letter\\_to\\_vice\\_president\\_ansip.pdf](https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_mission_letters/letter_to_vice_president_ansip.pdf)> accessed 31 January 2018.

31 EC Digital Single Market, ‘Mariya Gabriel Is the New Commissioner for the Digital Economy and Society’ 11/07/17 (7 November 2017) <<https://ec.europa.eu/digital-single>>

- 21 In the political guidelines, the words 'fair' or 'fairness' appeared 13 times, six times when referring to its title. Otherwise, Juncker's fairness is one directed towards a general category of (tax-paying and law-abiding) citizens and the private sector. Specific sections of society, such as that of labourers, which will become the focus of the FIPC debates, were excluded at this stage.
- 22 On his appointment letter to Ansip, Juncker mentioned fairness just once regarding the need for a 'fair level-playing field for all companies offering their goods and services on-line and in digital form'.<sup>32</sup> Juncker's letter emphasises a vision to 'make Europe a world leader in information and communication technology' through greater harmonisation.<sup>33</sup> Job creation and the development of creative industries would be an effect of this, and to this end the economic language focuses on infrastructure investment and user growth.

## II. Andrus Ansip's blog

- 23 This language is also reflected in Andrus Ansip's blog, which until September 2017 hosted 79 posts.<sup>34</sup> The posts cover topics including the progress of the Digital Single Market team activities, issues around internet safety and trust, infrastructure, start-ups and internet skills, international relations and in less measure gender equality, cultural diversity, research, education and health. To Juncker's distant, generalising, category of citizen, Ansip has added some consideration of the vulnerable, such as children, the elderly and ill, as well as unemployed youth. Women in the context of gender balance are also addressed. Amongst the private sector, the broadcasting, telecoms and media sectors are the ones singled out. Between these citizens and the private sector lies the much talked about start-up environment, which is expected to bring innovation. Entrepreneurship is thus supported, whilst employment is not deemed worthy of mentioning.
- 24 'Fairness' does not appear in the posts' headings, but it is mentioned occasionally within posts. A trawl of 30 posts shows the concept of fairness used in nine blog posts. However, the strong ideal of fairness promoted by Juncker in a remote and unspecified manner, becomes diluted in Ansip's

market/en/news/mariya-gabriel-new-commissioner-digital-economy-and-society> accessed 31 January 2018.

- 32 Jean-Claude Juncker, 'President Juncker's Mission Letter for Andrus Ansip: Vice-President for the Digital Single Market' (11 January 2014) 4 <[https://ec.europa.eu/commission/commissioners/2014-2019/ansip\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/ansip_en)> accessed 31 July 2018.
- 33 *ibid.*
- 34 Andrus Ansip's Blog, <[https://ec.europa.eu/commission/commissioners/blog/25\\_en](https://ec.europa.eu/commission/commissioners/blog/25_en)> accessed 3 May 2018.

informal voicings and continues to be very much focussed on the general citizen and competition rules between corporations. 'Fair remuneration for artists' as the FIPC would have it, starts to gain traction by the end of 2015 in two of Ansip's blogposts. One of them carries the phrase in the title of this article ('We want artists to be fully and fairly paid for their work') and makes an additional case for 'an internet with fair and equal access'.<sup>35</sup> With a similar but more compelling tone is a guest blog by Tibor Navracscs, the Commissioner responsible for Education, Culture, Youth and Sport, in which he makes a nuanced case for the 'fair remuneration for creators and for everyone who is part of the value chain', talking about the need to remunerate fairly the seven million people employed by the cultural and creative industries.<sup>36</sup> But these are the exceptions to the rule in a series of posts focussed on entrepreneurship and corporations, whilst disengaged from the realities of the majority of digital service creators and users.

## III. The Reda Copyright Report

- 25 Responding to Juncker's intention to modernise copyright rules, and without much certainty of how this intention would be exercised,<sup>37</sup> the Parliament appointed Julia Reda to report on the implementation of the last major copyright overhaul, the InfoSoc Directive. A German Pirate Party representative with the Green-EFA, Reda is the only Pirate Party MEP in the current 2014-19 parliament. Strongly in favour of open knowledge, on her election day she vowed to work towards a European Copyright Reform.<sup>38</sup>
- 26 In her draft report published in January 2015, Reda recommended the EU-wide harmonisation of copyright exceptions through four main principles:

35 Andrus Ansip, 'Getting the Digital Single Market off the Ground: The next Steps Forward' (*Blog by Andrus Ansip*, 18 November 2015) <[https://ec.europa.eu/commission/commissioners/2014-2019/ansip/blog/getting-digital-single-market-ground-next-steps-forward\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/ansip/blog/getting-digital-single-market-ground-next-steps-forward_en)> accessed 19 January 2018.

36 Tibor Navracscs, 'Guest Blog: Tibor Navracscs, Commissioner Responsible for Education, Culture, Youth and Sport' (*Blog by Andrus Ansip*, 9 February 2016) <[https://ec.europa.eu/commission/commissioners/2014-2019/ansip/blog/guest-blog-tibor-navracscs-commissioner-responsible-education-culture-youth-and-sport\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/ansip/blog/guest-blog-tibor-navracscs-commissioner-responsible-education-culture-youth-and-sport_en)> accessed 31 January 2018.

37 *i.e.* via a directive or soft law instruments; Eleonora Rosati, 'BREAKING NEWS: Pirate Party MEP Julia Reda Proposes Major Overhaul of EU Copyright' (19 January 2015) <<http://ipkitten.blogspot.com/2015/01/breaking-news-pirate-party-mep-julia.html>> accessed 31 January 2018.

38 Julia Reda, 'I Will Continue the Cooperation with Greens/EFA' (*Julia Reda*, 6 March 2014) <<https://juliareda.eu/2014/06/i-will-continue-the-cooperation-with-greensefa/>> accessed 31 January 2018.

use of a more open norm based on the Berne Convention's three-step-test; a reduction in term length; broad exceptions for educational purposes, and a simplification of the over-complex current rules.<sup>39</sup> Of relevance to the present case study is her recommendation to strengthen the bargaining power of authors and performers in contracts with other rightsholders and intermediaries.<sup>40</sup> Notably, her two uses of fairness relate to rules benefitting the general public.<sup>41</sup> This changes in the report adopted by the Parliament in June of the same year, where the simplicity and elegance of Reda's draft report is replaced by a more complex and lengthy report that reflects the hard work of corporations in influencing Parliament over the preceding period.

- 27 Note that the FIPC was launched officially in May 2015.<sup>42</sup> Although performers had voiced similar intentions for about a decade, the current form of the campaign was launched ahead of the parliamentary vote on this report. It is significant that it is at this point that the concept of 'fair remuneration' enters the mainstream of the copyright debate.
- 28 The word 'fair' appears in the final report a total of 12 times, of which ten refer explicitly to fair remuneration or compensation.<sup>43</sup> The repeated use of the 'fair remuneration' phrase should be good news for the FIPC, especially the points addressing, first, the creation of contractual mechanisms for the regulation of what are considered to be unbalanced contractual relations<sup>44</sup> and, second, the intention to

create parity in remuneration between the digital and analogue worlds.<sup>45</sup> The remaining points are likely to be more beneficial to rightsholders, which are more often than not the assignees of authors and performers. All in all, the careful language of the report, providing for all the parties, suggests that the balance could still tip in favour of any of the parties. But with the precedent set by the Commission's language focussed on corporations and entrepreneurs, the group behind the FIPC still has a lot of work to do at this point.

#### IV. The EC Copyright Proposal

- 29 The European Commission's Proposal for a Directive on Copyright in the Digital Single Market (henceforth the EC Proposal) was published on 14<sup>th</sup> September 2016.<sup>46</sup> Although much change is expected at this stage and some flexibility is built into it, the EC Proposal provides the structural framework for the Parliament and Council to work with. That is, the proposed amendments are drafted strictly in response to the EC Proposal and conforming to its structure.
- 30 The 33-page Proposal is pre-empted by an Explanatory Memorandum (11 pages), and the main body consists of Recitals (setting out the context for the articles taking into account their interpretation), and five Titles. The core of the Proposal is in the three middle Titles: Measures to adapt exceptions and limitations to the digital and cross-border environment (Title II); Measures to improve licensing practices and ensure wider access to content (Title III); and Measures to achieve a well-functioning marketplace for copyright (Title IV). This last one is composed of six articles in three chapters. Two titles carry the word 'fair': Article 12 'Claims to fair compensation' refers to the sharing of compensation from copying between authors and publishers. Chapter 3 is entitled 'Fair remuneration in contracts of authors and performers'. It is the core package granted to authors and performers and hence the focus of the attention of the FIPC.
- 31 The transparency obligation under article 14 provides that authors and performers are duly informed of the specificities of the exploitation of their works and performances by their contractual counterparts. This article formalises voluntary transparency statements already in place world-wide, such as

39 Julia Reda, 'Draft Report on the Implementation of 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 (2014/2256(INI))' (2015) European Parliament Draft Report 2014/2256(INI) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-546.580%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>> accessed 31 January 2018.

40 *ibid* at 3.

41 *ibid* at 8 and p.11.

42 Fair Internet Coalition, 'Fair Internet Press Conference | Brussels, 5 May 2015' (*Fair Internet for performers!*, 7 May 2015) <<https://www.fair-internet.eu/fair-internet-press-conference-brussels-5-may-2015-2/>> accessed 31 January 2018.

43 Julia Reda, 'REPORT on the Implementation of 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 - A8-0209/2015' (24 June 2015) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bREPORT%2bA8-2015-0209%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>> accessed 31 January 2018; for the process leading to the final report see also Julia Reda, 'EU Copyright Evaluation Report' (*Julia Reda*, 2015) <<https://juliareda.eu/copyright-evaluation-report/>> accessed 31 January 2018.

44 Reda, 'REPORT on the Implementation of 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 - A8-0209/2015' (n 45) at 25.

45 *ibid* at 27.

46 European Commission Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 13).

the Fair Digital Deals Declaration proposed and subscribed to by the World Independent Network (WIN)<sup>47</sup> and the subsequent Code of Conduct for the French Music Industry.<sup>48</sup> Article 14 has thus been welcomed by authors and performers as well as by the few independent record companies that have subscribed to such statements. However, considering that current technological developments offer inexpensive tools to warrant transparency for all the relevant parties, the article is unnecessarily limited by paragraphs (2) and (3). These make the obligation subject to, first, a proportionality assessment between the value of the revenue and the administrative burden resulting from the obligation and, second, the 'significance of the contribution' to the overall work or performance. By limiting the obligation in this way, Article 14 of the EC proposal would benefit only a minority of high profile authors and performers.<sup>49</sup>

- 32 The contract adjustment mechanism under article 15 of the EC Proposal offers authors and performers the possibility of adjusting a contract they entered into when their bargaining power was low, so that the new terms offer them appropriate remuneration commensurate with subsequent success. The article thus acknowledges that authors' and performers' low revenue level may be linked to unfair contractual terms and, in this sense, it has been welcomed by these stakeholders.
- 33 However, the article has been subject to considerable controversy. From the perspective of authors and performers, it does not acknowledge the complexities of bringing such a claim to contractual counterparts with greater bargaining power (such as publishers, record companies and other commercial intermediaries). These include the high cost of engaging in such a dispute and the risk of compromising future engagements. From the perspective of record companies, the breadth of the wording represents contractual uncertainty. They argue that this is because investment in new artists involves large advances and promotion costs, which depend on a rise in 'revenues and benefits derived

from the exploitation of the works or performances' in order to be recouped.<sup>50</sup> Also, record companies make the point that the profits from successful artists largely get reinvested in new ones that may not be as successful. This means that, if every successful artist gets paid the maximum possible share from the revenues from their recordings, investment in new acts will be reduced.

- 34 Article 16 of the EC proposal provides for the creation of a voluntary, alternative dispute resolution procedure for disputes related to obligations arising from articles 14 and 15. Such a procedure is generally preferred over litigation, but there are questions about who would preside over such a procedure.
- 35 In Chapter 3, the concept of 'fairness' in relation to authors and performers is put to the test. Instead of responding to the FIPC, Chapter 3 focusses on balancing the bargaining power between the parties to a contract, that is, authors and performers on the one hand, and corporations on the other. This outcome acknowledges a fundamental imbalance in contractual power relations. However, in seeking to also balance all of the stakeholders' interests in the copyright reform process, the EC proposal falls short of addressing the contractual imbalance. As I describe below, it is here that competing notions of 'fairness' begin to stand out.

## V. The EC Impact Assessment

- 36 Section 5.4 of the Impact Assessment (IA) produced by the European Commission to accompany the EC Proposal gives details about the reasoning behind the implementation of Articles 14-16.<sup>51</sup> According to the Public Consultation and other documents produced by campaigners, authors and performers face a lack of transparency in their contractual relationships in relation to the type of exploitation of their works and performances and amounts owed.<sup>52</sup> The IA responded to this by stating that 'the main underlying cause of this problem is related to a market failure: there is a natural imbalance in bargaining power in the contractual relationships

47 Worldwide Independent Network, 'Fair Digital Deals Declaration | Worldwide Independent Network' (16 July 2014) <<http://winformusic.org/declarationhomepage/fair-digital-deals-pledge/>> accessed 31 January 2018.

48 Coral Williamson, 'French Music Industry Agrees to WIN-Based Code of Conduct | Labels | Music Week' (*Music Week*, 10 May 2015) <<https://www.musicweek.com/labels/read/french-music-industry-agrees-to-win-based-code-of-conduct/063039>> accessed 31 January 2018.

49 For a more substantial critique see Ananay Aguilar, "'Significance of Contribution" in Article 14 of the EC Copyright Draft Proposal' (*Performers' Rights*, 18 September 2017) <<https://www.performerslegalrights.org/blog/2017/9/18/significance-of-contribution-in-article-14-of-the-ec-copyright-draft-proposal-or-why-the-imco-opinion-is-spot-on>> accessed 31 January 2018.

50 European Commission Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 13) Art. 15.

51 European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules' (*Digital Single Market*, 14 September 2016) <<https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>> accessed 31 January 2018.

52 EC Directorate General Internal Market and Services, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (2014) <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf)> accessed 31 January 2018.

favouring the counterparty of the creator, partly due to the existing information asymmetry'.<sup>53</sup> To address this problem, the IA considers three options, of which the EC chose the third and most comprehensive, that is, articles 14-16.

- 37 The debate that ensues reveals details about the lively lobbying process surrounding the European Commission's work. This is recorded in the footnotes and reference literature which itself bears titles containing the word fairness. So, for example, footnote 529 references the Creators' Rights Alliance, an umbrella organisation for authors and performers throughout the media sector.<sup>54</sup> Similarly, footnotes 542, 558 and 562 make reference to the Public Consultation results, which mention 'a lack of "adequate or fair remuneration"',<sup>55</sup> call for a 'healthy competition to ensure fair remuneration for creators'<sup>56</sup> and state that 'a buy-out contract prevents [creators'] adequate or fair remuneration'.<sup>57</sup>
- 38 The only mention of the FIPC requests appears in this discussion under Option 2 (Imposing transparency obligations on the contractual counterparties of creators), where creators are described as strongly supporting 'transparency obligations leading to appropriate solutions per sector'.<sup>58</sup> The IA adds: 'Some would however claim that transparency obligations on their own are not sufficient and would call for further intervention on unfair contracts or the introduction of an unwaivable remuneration right'.<sup>59</sup> Footnote 557 expands on this, explaining that some stakeholders claim that 'an unwaivable right for remuneration is necessary to ensure a minimum appropriate remuneration to creators', and referencing the Society of Audiovisual Authors' White Paper and the FIPC.<sup>60</sup>

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- 39 Much has happened since Juncker's initial use of the word 'fairness', where it was mentioned in a manner disengaged from the specificities of his large constituency but promoting a 'fair playing field' for the companies involved in the production of digital services. In the context of the copyright reform within the project of the Digital Single Market, 'fairness' has received more attention as spelled out by the different actors. Fairness is now related to the remuneration of authors and performers, specifically meaning 'a more balanced playing

53 European Commission (n 51) 175.  
 54 *ibid* 174.  
 55 *ibid* 176.  
 56 *ibid* 179.  
 57 *ibid* 180.  
 58 *ibid* 179.  
 59 *ibid*, italics are mine.  
 60 *ibid*.

field in contractual relations between authors and performers and their contractual counterparts'. Meanwhile, the meaning given by the FIPC—for which fairness translates as 'the introduction of an unwaivable equitable remuneration right'—has not yet garnered support. Most significantly, reading through the effect of Articles 14-16 on authors and performers, Juncker's intention of ensuring fairness amongst corporations remains intact. I now turn to a more nuanced examination of specific stakeholder perspectives.

## D. Fairness amongst stakeholders: the interviews

### I. Methodology

- 40 The study is based on 15 one-hour interviews, which were conducted between 2016 and 2017 in London and Brussels. Interviewees represented nine stakeholder groups, two political parties, and the position of one European civil servant. I note that the limited number of interviewees does not reflect the potential views of the entirety of the affected population. Rather, I have taken great care in talking to high-level representatives of UK trade associations, including CEOs or Policy Affairs officials holding the views that are most likely to find their way to EU policy-makers. In order to give further resonance to the interviews, I have combined these with extensive fieldwork at record industry and government events as both an observer and a participant, and with primary literature including online resources from stakeholder websites, the European Commission and Parliament websites, news websites, and social media.



Figure 1: Choice of stakeholders

- 41 The choice of stakeholder groups is summarised in Figure 1 and was sought to represent a wide range of stakeholders both favourable and not-so-favourable to the FIPC. I have organised stakeholders starting from those participating in the FIPC (performers, featured artists, CMOs), moving on to those favourable but not officially involved in the campaign (managers and authors), then introducing those opposed to it (record companies and DSPs), and finalising with those who are traditionally left out of the debate but who also have important stakes in it (Pirate Party and consumers, who closing the circle, again are likely to support the campaign).
- 42 With the skilful support of research assistant Adrian Aronsson-Storrier, I designed an interview schedule for each individual respondent touching on the following themes: overview of the campaign; relevance of articles 14-16 of the EC's Proposal; and lobbying practices in the UK and Europe. I structured each schedule around these themes bearing in mind individual interests and priorities, and also gave respondents the flexibility to respond in their own time and lead me in unexpected directions. I have anonymised the interviews to allow respondents to talk freely without potentially harming their careers. I took notes during the interviews and prepared field notes describing my overall impression of the respondents and interview conditions. Through immersion in these combined sources, the concept of fairness began to emerge as a leading theme in copyright debates.

## II. Views from different stakeholders

### 1. Performers

- 43 The legal term 'performers' is a broad one, encompassing what the industry would call orchestral musicians (whether freelance or employed), session musicians (whether for live, recording, film or TV session work), featured artists (signed to major or indie labels) and self-releasing artists. While each group has distinctive features, most of them overlap with each other, with performers taking different roles throughout their careers. These distinctions amongst performers are not reflected in the UK or EU copyright systems but are important within the industry. As I discuss below, the different groups of performers often represent conflicting interests which come to the fore in situations like the one described here, where legislative reform is at stake.
- 44 For lack of a better term, I will use 'performers' to describe the first two groups: orchestral and session musicians. This may be confusing at times but acknowledges the fact that these musicians represent the great majority of performers. In the UK, performers are typically represented by the Musicians' Union (MU), founded in 1893. The MU has a membership of 30,000 musicians, who were described by an interviewee as representing 'the musical labour force'.<sup>61</sup> While some of them may be well known within the industry, they may be less well-known by the general public.
- 45 According to the campaign documents<sup>62</sup> and interviews,<sup>63</sup> performers' associations believe that all performers deserve royalties. They argue that due to contracting practices that buy performers out of their rights, performers need an unwaivable ER right. In other words, by implementing the new ER right, the campaign ultimately seeks to address the performers' lack of bargaining power. For performers, therefore, a 'fair internet' is one that remunerates performers collectively for making available their music online for on-demand use of their recorded performances, regardless of contractual agreement. Their incentive is economic based on lack of bargaining power.

### 2. Featured artists

- 46 Under this term I group together featured artists and self-releasing artists. Featured artists are those who are featured on album sleeves and promotional material and are often signed by indie or major labels. As noted above, under UK and EU copyright law, featured artists and self-releasing artists are still performers, but in industry practice they fulfil different roles and might represent different interests.
- 47 Most featured artists sign contracts that may be more advantageous than those signed by the majority of performers, but that may still not be in their favour. These may include a small percentage of royalties tied to conditions such as the infamous packaging and breakage deductions even on digital income.<sup>64</sup> A small minority of featured artists—the most famous ones—have enough bargaining power to negotiate with their powerful counterparts a contract that will benefit them in the long term. Self-releasing artists take care of the entire process themselves and so do not need to enter into contracts, unless by choice and when it is in their favour. This group encompasses very famous artists who were launched to fame by

61 [10MI-161213].

62 e.g. Fair Internet Coalition (n 12).

63 [01MI-160310] and [02MI-160310].

64 Donald Passman, *All You Need to Know About the Music Business: Eighth Edition* by Passman, Donald S. 8th (8th edn, Free Press 2012) 78–82 and [15MI-170508].

a major label and then became independent, like Radiohead, or well- and not-so-well-known DIY artists who manage the entire process with the help of sub-contractors, like Imogen Heap<sup>65</sup> and Amanda Palmer.<sup>66</sup>

- 48 Regarding the FIPC, there are differences in opinion between, on the one hand, the large majority of featured artists in less favourable contracts and, on the other, the small, but influential, minority of featured artists in favourable contracts and successful self-releasing artists. The first group supports the FIPC under the same argument offered by performers.
- 49 The second group understandably has its reservations: firstly, collectively managed rights, such as this right would become, have administration costs that they may not be willing to pay. Secondly, featured artists would see themselves in a situation where they would have to share their revenue with session musicians, which they do not do at the moment. Thirdly, if the unwaivable ER right is introduced *instead* of the exclusive right (and not alongside this right), then they would lose the opportunity to negotiate the value of that right, that is, they would lose bargaining power vis-à-vis powerful record companies. This case illustrates Kretschmer and Kawohl's observation that the most successful artists tend to align their interests with investor interests—in this case with record companies.<sup>67</sup> This explains why these artists are happy to campaign alongside and represent the interests of power record companies. In a winner-take-all market, 'they benefit disproportionately from the current copyright system'.<sup>68</sup> Because the incentive of highly successful artists is economic, relative bargaining power has to be assessed carefully.
- 50 In the UK, the body representing this conflicting group is the Featured Artist Coalition (FAC), a small association if compared with the MU, founded in 2009. As a key member of the International Organisation for Artists, the FAC publicly supports the FIPC. This was not without some internal tension, though.

*Exclusive rights are only stronger and better in an efficient market. Music is not an efficient marketplace and, therefore, the security of compensation through remuneration rights at a lower level is more attractive to most artists than the*

65 Jeremy Wade Morris, 'Artists as Entrepreneurs, Fans as Workers' (2014) 37 *Popular Music and Society* 273.

66 Devon Powers, 'Intermediaries and Intermediation' [2015] *The Sage Handbook of Popular Music*. Thousand Oaks, California: Sage Publications Ltd 120.

67 Martin Kretschmer and Friedemann Kawohl, 'The History and Philosophy of Copyright' in Simon Frith and Lee Marshall (eds), *Music and Copyright* (2<sup>nd</sup> Revised edition edition, Edinburgh University Press 2004).

68 *ibid* 44.

*ability to exploit and negotiate individually on their exclusive rights. So, for me, even if the Fair Internet Campaign had been successful, you would hope, in an ever-improving market, if digital lives up to its vision of transparency and the ability to actually see what's going on, you would expect those arrangements to be transitional in some sense, because, ultimately, the cost-effectiveness direct... [sic] and, you know, to do better, more commercial deals at lower costs, with exclusive rights, that we have more control over, should be better. So, it depends again, on the timescale you're looking at.*<sup>69</sup>

- 51 The hesitation above refers to the cost-effectiveness of the management of rights as this interviewee explained later:

*If you do business through a CMO, you're accepting that you're going to pay a lot of costs, yeah, and in the UK, we're very lucky that our CMO is quite transparent. [...] Now, I'm going to say something quite contradictory really, in a sense, because, on the one hand, okay, so because of the lack of transparency, I'd rather have secure revenue than no revenue, so I'd rather have revenue with significant costs deducted that I know I can count on, than allow myself to be ripped off all the time.*<sup>70</sup>

- 52 This view is a complex one which combines digital technology with transparency, transparency with the relative cost-effectiveness of exclusive and ER rights, and this in turn with different timescales. This bringing together of multiple perspectives and possibilities ultimately reflects the unique position of featured artists. However, as a representative body, the FAC takes the same view as the MU: a 'fair internet for creators' is one that remunerates artists for making their music available online.

### 3. Collective management organisations

- 53 In the UK, license fees for performers are paid by record companies and are collected by the CMO in charge of collecting license fees on behalf of record companies. This is PPL, a CMO set up by record companies. Although over the years performers have increased their say over how PPL is run,<sup>71</sup> idiosyncrasies related to this history remain. For example, PPL is not part of AEPO-Artis, the European association of performers' collective management organisations and is therefore not part of the FIPC. The CMOs that are part of AEPO-Artis have different histories that involve representation of performers, in the same way that musicians' unions across the world represent the interests of performers. In this role, AEPO-Artis is acutely aware of performers' lack

69 [10MI-161213].

70 [10MI-161213].

71 [16MI-170615].

of bargaining power.<sup>72</sup>

54 However, it could be argued that CMOs have an additional interest in collecting license fees, as they get to keep a percentage fee to cover running costs which will grow with the management of additional rights. Or as one interviewee put it: 'if you have a bunch of collecting societies sitting round a table and you ask what the answer should be, the answer is collective management, irrespective of the question'.<sup>73</sup> For these reasons, it makes sense that performer CMOs are behind the FIPC. For performer CMOs a 'fair internet for creators' is therefore one that provides a collectively managed solution for remunerating artists for making their music available online. Their incentive is the economic well-being of performers and is based on their members' lack of bargaining power.

#### 4. Managers

55 Managers represent performers and artists and, in doing so, receive a cut of their income. Managers are therefore generally sympathetic to performers' and featured artists' causes. However, considering that there are split views between these two groups regarding the FIPC's proposals - their representative body in the UK - the Music Managers Forum (MMF), is ambivalent. Although not officially part of the FIPC, the MMF endorses the campaign's ideals but does so from the sidelines: 'we've supported the FAC's supporting it'.<sup>74</sup>

56 The Digital Dollar Reports I and II commissioned by the MMF clearly make the case for the two groups, but ultimately they remain inconclusive.<sup>75</sup> However, these reports make it absolutely clear that contracts offered by major and some indie labels are exploitative. Their idea of fairness is a situation whereby this power imbalance is addressed, whether through greater transparency, contract adjustment mechanisms by which inexperienced artists turned famous become legally entitled to change the terms of their contracts, or ER rights. Their incentive is therefore economic, considering relative bargaining power.

72 [12MI-171212].

73 [10MI-161213].

74 [15MI-170508].

75 Chris Cooke, 'Dissecting the Digital Dollar, Part One: How Streaming Services Are Licensed and the Challenges Artists Now Face' (CMU Insights for Music Managers Forum 2015); Chris Cooke, 'Dissecting the Digital Dollar, Part Two' (CMU Insights for Music Managers Forum 2016).

#### 5. Authors

57 Music authors and performers have historically diverged over copyright matters. Authors see income deriving from performers' rights as diminishing their own. Yet under the EU proposal, authors and performers of all stripes have been bundled together under Chapter 3 of Title II.<sup>76</sup> Some cross-sectoral campaigns do exist, such as the UK Creators' Rights Alliance, under which authors and performers have jointly campaigned for a more level playing field vis-à-vis powerful contractors, including publishers, record companies and DSPs. This is the Fair Terms for Creators Campaign currently lobbying the EU government, of which the MU is a signatory, but the British Academy of Songwriters, Composers and Authors (BASCA) is not.

58 During this particular reform process, authors have sided with record companies to campaign against the value gap and for payment from DSPs protected under safe harbour rules, such as YouTube. This is because if successful, authors would be remunerated for making their works available online through their CMO, the Performing Rights Society (PRS), as they are by other commercial DSPs like Spotify. Since performers do not receive royalties from any DSP (the reason for the FIPC, in the first place), performers have decided to make sure they are first remunerated for on-demand services, before fighting a behemoth like YouTube, especially considering that YouTube offers alternative payment methods for artists.

59 In 2016, music authors and performers in the UK decided to overcome their differences and make some steps towards mutually supporting each other's campaigns. Under the rationale that they should be working together against much greater powers, they have formed the Council of Music Makers. It may be through efforts such as this that some parliamentary committees have been more favourable towards the collectively managed solution proposed by the FIPC. As explained to me by a respondent from within the EC, legislators do like to see cross-sectoral agreement.<sup>77</sup> The surprise is that the equitable remuneration right applies now to both authors and performers. And both authors and performers have expressed some concern about this for the reasons outlined above, namely that it could weaken authors' exclusive rights. For authors a 'fair internet for creators' is one in which authors can retain the highest possible income, even if that means siding with the weaker side for political support. Their immediate incentive is strategic,

76 European Commission Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 13).

77 [09MI-161111] and see also Vetulani-Cegiel (n 14) para 40.



whilst their long-term incentive is economic, so their relative bargaining power has to be assessed carefully.

## 6. Record companies or producers

- 60 In terms of attitude towards performers, I have not found any significant divergences between indie and major labels. The general view here is that *some* performers deserve royalties, that is, featured artists. For session musicians, a buy-out is sufficient. One industry representative naturalised this position: ‘The nature of the performance of session musicians is that it is a buy-out of the exclusive rights. Obviously what they’re paid allows for that, that’s simply the nature of the work they do’.<sup>78</sup> Another put this in terms of justice:

*Session musicians, and let’s be clear, we have an agreement with session musicians that pays them for playing of tracks, and you know, we pay them for a job, in the same way you pay anyone else. [Laughter]. Now, on broadcast, they happen to get a repeat fee, but there’s no, kind of, theoretical, there’s no kind of justice reason why someone who you pay to do something should then get paid again and again, and again and again. [...] They’re paid per session, that’s how it works, in the same way that if you go to an orchestra and you play for an evening, you’re paid.’<sup>79</sup>*

- 61 The comparison of a recording with a live performance is remarkable, considering that it is thanks to license fees for secondary use that record companies have become so powerful. In short, record companies are happy to negotiate with successful featured artists but do not want to entertain the possibility of royalty payments for performers, as that would diminish their wealth. For record companies a ‘fair internet for creators’ is therefore one that retains the status quo: record companies are incentivised by economic gains and by ensuring current levels of bargaining power.

## 7. Digital service providers

- 62 2016 marked the year when digital streaming started to be profitable.<sup>80</sup> This stood in contrast to years of investment in a technology that has been charged with saving the record industry from its post-Napster crisis. In subscription models, the aim

of DSPs is to retain a percentage, typically of 30 per cent, of their total income and redistribute the remaining income to music rightsholders. However, DSPs have persuaded investors that this model works best after a certain number of subscribers has been achieved. Anything below that number initiates losses, which is precisely what has happened in the last few years since DSPs started to populate the market. Understandably then, DSPs are not keen on additional outgoings. Considering also that DSPs have received funding from powerful investors over this period, many of which are music rightsholders themselves, a restructuring of their outgoings would not be welcome either. Their argument turns the FIPC on its head: if DSPs have further outgoings, they will have to close down, in which case all musicians would lose, regardless of relative bargaining power.<sup>81</sup> This argument resonates with the EC, to the point that my Commission respondent repeated it almost verbatim.<sup>82</sup> For DSPs, like for record companies, a ‘fair internet for creators’ is therefore one that retains the status quo.

## 8. Pirate Party

- 63 The first Pirate Party was established in Sweden in 2006 and the label has spread across several countries since. They are known for supporting civil rights, direct democracy, open access to knowledge, and privacy. Strong supporters of copyright reform, pirate parties have end-users as their primary beneficiaries. During a brief informal conversation with the only Pirate Party MEP, Julia Reda, on 24<sup>th</sup> June 2016, she disagreed in principle with *unwaivable* collectively managed rights. Her view was that authors and performers should be able to decide whether they want any money at all.
- 64 Here the incentive is not economic, but ideological: creators supporting open access should be able to do so without ifs and buts. In other words, by removing decision-making, ERs (whether MA or communication to the public rights) effectively remove creators’ bargaining power vis-à-vis open access. Thus, a ‘fair internet for creators’ is one that preserves creators’ freedom to either monetise or share their creations for free. Albeit an argument with little resonance in the industry and consumers (see below), Julia Reda, as member of the committee of legal affairs (JURI), was the copyright reform rapporteur and thus has had some influence over the process.

78 [06MI-161005].

79 [07MI-161010].

80 BPI, ‘BPI Official UK Recorded Music Market Report for 2016’ (BPI, 1 March 2017) <<https://www.bpi.co.uk/news-analysis/bpi-official-uk-recorded-music-market-report-for-2016/>> accessed 31 January 2018.

81 [08MI-161014].

82 [09MI-161111].

## 9. Consumers

- 65 The 2014 Report on the Responses to the Public Consultation portrays consumers as favourable towards authors and performers.<sup>83</sup> Consumers are aware that 'many contracts for the exploitation of works were concluded before the emergence of digital content distribution, hence they do not explicitly provide for royalties for online exploitation'.<sup>84</sup> They further point out that 'the way in which new online streaming services are licensed may circumvent the payment of digital royalties to artists and hence contravene the aim of ensuring appropriate remuneration for creators and right holders in the digital world'.<sup>85</sup> Consumers therefore support EU intervention in this area, mainly in the form of contractual mechanisms that would allow authors and performers to retain some control over their works.
- 66 In May 2017, I attended a workshop conducted by AEPO-Artis in Brussels in which Isabelle Buschke, Head of Office of the Federation of German Consumer Organisations, came to the support of the FIPC. Her main agenda was the creation of a levy system, whereby consumers would pay a fee to access all creative products online, which would then be redistributed to the different industries. By overcoming the complexity inherent in individual DSP payment systems, she argued, a levy system would introduce the simplicity needed to bring down piracy and close the value gap - two of the greatest problems faced by record companies. However, in order to close the value gap, Buschke called for reassurance that the money was passed on to the creators. This would involve payments by DSPs collectively managed by CMOs. Her view was that consumers would be happier to pay for artistic products if they knew that artists were well remunerated. Therefore, for consumer associations, a 'fairer internet for creators' is one that remunerates creators for their investment in musical works and performances and the proposal put forward by the FIPC is one that they feel they can support. The incentive is economic in the sense that they seek the long-term well-being of the creative ecosystem. They support the FIPC because it would inch closer to re-establishing a balance in bargaining power.

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- 67 The different positions can be summarised in three groups. For the groups most favourable to the FIPC, fairness is synonymous with 'the introduction of an unwaivable equitable remuneration right' based on the perception that performers are in a very low bargaining position (performers, less successful featured artists and their managers, performer CMOs and consumers). On the other side of the fence are those groups that consider fairness to be synonymous with retaining the status quo relative to the FIPC. These include those with the highest bargaining power (record companies and highly successful featured artists) and those who worry about the quantity and source of payment allocated to performers (as well as record companies and highly successful featured artists, authors and DSPs). The exception to these two groups is the argument put forward by the Pirate Party, for whom fairness translates into the creators' freedom to monetise or freely share their creations. The incentive is ideological: to retain individual freedom to decide over the collective benefit of copyright.
- 68 I now examine how these views have been received and reproduced by the Parliament.

## III. The EC copyright proposal in Parliament

- 69 After its release in August 2016, the EC Proposal moved on to be scrutinised in Parliament. In the legislative process, the Parliament is responsible for proposing amendments to the initial proposal and negotiating these with the Council. During this time, trade associations and lobbying groups are busy making their views about the EC Proposal heard in Parliament and the amendments reflect this. The first set of amendments proposed in April 2017, finally brought good news to the FIPC, with some of the amendments sympathetic to its cause.
- 70 In the context of the EU copyright reform, the Legal Affairs Committee (JURI) has taken a leading role in amending the EC Proposal. This involves drafting a report that serves as a first critical reflection on the EC draft proposal<sup>86</sup> and by requesting opinions from other committees. The committees that have been asked for opinions are: Internal Market and

83 European Commission, 'Public Consultation on the Review of the EU Copyright Rules' <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)> accessed 28 November 2016.

84 *ibid.* 78.

85 *ibid.*

86 By former MEP Maltese EPP rapporteur Therese Comodini Cachia, '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))' (European Parliament Committee on Legal Affairs 2017) Draft report <[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNO\\_NSXML%2BCOMPARL%2BPE-601.094%2B01%2BDOC%2BPDF%2BV0%2F%2FEN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNO_NSXML%2BCOMPARL%2BPE-601.094%2B01%2BDOC%2BPDF%2BV0%2F%2FEN)> accessed 31 January 2018.

Consumer Protection (IMCO)<sup>87</sup>; Industry, Research and Energy (ITRE);<sup>88</sup> Culture and Education (CULT),<sup>89</sup> and most recently, Civil Liberties, Justice and Home Affairs (LIBE).<sup>90</sup> The adopted opinions of IMCO, ITRE and CULT contain nearly 1000 amendments. Among these amendments there are only a few devoted to Articles 14-16.

- 71 IMCO focuses its efforts on limiting the controversial proportionality assessment designed to eliminate the obligation of offering transparency to those earning the least. For the majority of authors and performers in a weak bargaining position, this is good news. For this group, IMCO has re-established some sense of fairness by offering greater transparency and thus balancing the bargaining power of the different contractual parties.
- 72 The best news for the FIPC comes in the form of the new Art.14a by ITRE<sup>91</sup> and CULT;<sup>92</sup> both committees offer an equitable remuneration right for authors and performers *in addition* to the exclusive making available right. While both articles 14a bear the same title (Unwaivable right to fair remuneration for authors and performers), only ITRE's proposal

is fully unwaivable. In contrast, CULT's allows EU member states to proscribe the waiving of the right<sup>93</sup> and creates two scenarios under which the right can be waived.<sup>94</sup> The second simply provides a mechanism for contractors to turn it into a waivable right. However, the first scenario interestingly responds to Reda's concern regarding the clashing of unwaivable rights with open access provisions. It does this by allowing an author or performer to 'grant a free non-exclusive right for the benefit of all users for the use of his or her work'.<sup>95</sup> Finally note that, unlike the wording of the FIPC's suggested amendments, the addition of Art.14a, includes authors as well as performers, leaving authors with a question mark over the effect of this right on their bargaining power.

- 73 ITRE's new Art.15a<sup>96</sup> regarding a reversion right under extreme negligence represents a thoughtful start, but it still imposes many conditions on authors and performers to extract themselves from their contracts. Regarding Art.16, both ITRE and CULT<sup>97</sup> offer provisions to level the playing field when using the alternative dispute mechanism, such as third-party representation (CULT and ITRE) and anonymity (ITRE). CULT also provides that 'the costs directly linked to the procedure should be affordable'.<sup>98</sup>

- 74 A combination of the three sets of amendments would give authors and performers the greatest assurances in terms of strengthening their bargaining power. With these combined changes the intention of providing fairness, understood as 'a more balanced playing field in contractual relations between authors and performers and their contractual counterparts', is the closest to a real action. However, it is doubtful that the three sets of amendments will merge in this idealised way. Amongst the three, ITRE represents the interests of authors and performers more strongly, while counter-intuitively, CULT appears more cautious of stepping on the major players' footsteps.<sup>99</sup>

- 75 All in all, the FIPC has taken some hold, despite the main obstacles remaining the same: the record companies' resistance; the uncertainty of DSPs but

87 Catherine Stihler, '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 (COM(2016)0593 –C8-0383/2016 –2016/0280(COD))' (14 June 2017) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARGML%2bPE-599.682%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>> accessed 31 January 2018.

88 Zdzisław Krasnodębski, 'OPINION of the Committee on Industry, Research and Energy 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 (COM(2016)0593–C8-0383/2016–2016/0280(COD))' (8 January 2017) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARGML%2bPE-592.363%2b03%2bDOC%2bPDF%2bV0%2f%2fEN>> accessed 31 January 2018.

89 Marc Joulaud, 'OPINION of the Committee on Culture and Education 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 (COM(2016)0593–C8-0383/2016 –2016/0280(COD))' (9 April 2017) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARGML%2bPE-595.591%2b03%2bDOC%2bPDF%2bV0%2f%2fEN>> accessed 31 January 2018.

90 Michał Boni, 'OPINION of the Committee on Civil Liberties, Justice and Home Affairs 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 (COM(2016)0593–C8-0383/2016 –2016/0280(COD))' (22 November 2017) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARGML%2bPE-604.830%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>> accessed 31 January 2018 which did not offer amendments to Articles 14-16.

91 Amd. 55.

92 Amd. 92.

93 Art.14a(2).

94 Art.14a(2) and Art.14a(4).

95 Joulaud (n 89) Art.14a(2), Amd.92; note also the gender-neutral wording so rare in legal documents.

96 Amd. 57.

97 Through Amd. 58 and Amds 95-6, respectively.

98 Joulaud (n 89) Art. 16(1a), Amd. 96.

99 For a more detailed analysis see Ananay Aguilar, 'How Is the Fair Internet for Performers Campaign Faring in the European Debate?' (*Performers' Rights*, 20 September 2017) <<https://www.performerslegalrights.org/blog/2017/9/20/how-is-the-fair-internet-for-performers-campaign-fairing-in-the-european-debate>> accessed 31 January 2018.

also record companies and authors over quantity and source of payment, and from the European Commission's perspective, the long-term balance of interests. Yet considering that some opinions included the FIPC's proposal, the campaigners have some reason for hope.

76 By April 2018, the Legal Affairs Committee had provisionally scheduled the vote on their report for June 2018, a date that has been moving for almost a year. This vote then needs to be confirmed by the entire Parliament, which means that some form of consensus should ideally be reached with the Council by then. Discussion on the Council's proposals have been underway; but given the delays, the regular six-monthly change of Council Presidency brings new challenges. In order to retain the relevant amendments, FIPC will need to work a lot harder with MEPs and each of the countries' Council Ministers.

## E. Copyright reform in the neo-liberal state

77 With David Harvey's *A Brief History of Neoliberalism* in mind, the process described here, as well as the choice of words employed by the parties, reads like a case sample of neoliberal forces at work.<sup>100</sup> Neoliberalism, according to the author, is a political economic theory that holds that 'human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade'.<sup>101</sup> In line with this theory, the role of the state is not only to preserve an institutional framework appropriate to such practices, but also to create it, 'by state action if necessary'.<sup>102</sup>

78 Taking hold since the 1970s, neoliberal thought has become the hegemonic mode of discourse, permeating what we perceive to be common sense. In its hijack of the concept of individual freedom, neoliberal thought is appealing. Yet the assumption that individual freedoms are guaranteed by freedom of the market is misleading. As Harvey points out, values of individual freedom and social justice are not necessarily compatible: 'Pursuit of social justice presupposes social solidarities and a willingness to submerge individual wants, needs, and desires in the cause of some more general struggle for, say, social equality or environmental justice'.<sup>103</sup> While these differences can be bridged, Harvey continues, in neoliberal rhetoric 'all forms of social solidarity

were to be dissolved in favour of individualism, private property, personal responsibility, and family values', ultimately benefitting a small capitalist or entrepreneurial class at the expense of a much larger labouring class.<sup>104</sup>

79 By emphasizing the significance of contractual relations in the marketplace, neoliberalism:

*holds that the social good will be maximized by maximizing reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market. This requires technologies of information creation and capacities to accumulate, store, transfer, analyse, and use massive databases to guide decisions in the global marketplace. [...] These technologies have compressed the rising density of market transactions in both space and time. They have produced a particularly intensive burst of [...] 'time-space compression'. The greater the geographical range and the shorter the term of market contracts the better.*<sup>105</sup>

80 This is the political economic environment sought by Juncker and the European Commission via Ansip and his 'Digital Single Market' project. Entrepreneurs are at the centre of this strategy, that mostly ignores any other characterisation of Europe's citizens. Seen in this light, Articles 14-16 of the EC Proposal make perfect sense in addressing a problem of bargaining power: the need to establish better information (transparency) and an environment that optimises market transactions. By regulating contracts, the state interferes at the point where individuals meet to transact and avoids drawing in any sense of collectivity (and with it social justice), as is suggested by the FIPC. As one of my interviewees pointed out:

*The idea of a right to transparency, a right to renegotiate and an independent alternative dispute resolution mechanism caused a direct response by the Commission to try and help find something for performance that was market-driven, would not conflict with the right to give the freedom to contract and that would show their political and emotional commitment to artists in Europe, despite the inability to support the Fair Internet Campaign.*<sup>106</sup>

81 It is understandable that record companies are against any proposition that may compromise their ability to increase their wealth. They oppose adding administrative burdens as proposed by the FIPC and mechanisms that remove contractual certainty as currently suggested by Articles 14-16. As members of Harvey's capitalist class and the driving force behind neoliberal ideology, record companies have invested considerable capital in shaping copyright the way it is and so will defend the status quo. Their aim in this reform process is to extract wealth from

100 *A Brief History of Neoliberalism* (Oxford University Press 2007).

101 *ibid.* 2.

102 *ibid.*

103 *ibid.* 41.

104 *ibid.* 23.

105 *ibid.* 3-4.

106 10MI-171213, emphasis added.

those digital service providers operating outside the realms of their long-established licensing mechanisms, notably YouTube (as suggested by Recital 38 and Article 13 of the EC Proposal, not the focus of this paper). But the idea that they might well share potential proceeds with the labour force behind their products—the creators and content producers—is not one that they want to entertain. As Thomas Edsall has explained:

*During the 1970s, business refined its ability to act as a class, submerging competitive instincts in favour of joint, cooperative action in the legislative arena. Rather than individual companies seeking only special favours [...] the dominant theme in the political strategy of business became a shared interest in bills such as consumer protection and labour law reform, and in the enactment of favourable tax, regulatory and antitrust regulation.<sup>107</sup>*

- 82** The position of the most successful artists towards the FIPC is consistent with this. As Kretschmer and Kawohl have shown, when artists arrive at a point where they have level bargaining power, they coincide with the ideal neoliberal market conditions: a situation where a zero-cost transaction is determined solely by market signals.<sup>108</sup> Collective agreements would get in the way of this by adding complexity to the transaction and the intrinsic costs of managing and distributing payments to a collectivity they have only just surpassed. The cost of these transactions, insignificant in light of the wealth they extract from their exclusive rights, is too high a price to pay for others' potential benefit. The neoliberal definition of individual freedom supports this view and makes it perfectly acceptable in public opinion. In contrast with record companies, however, I can see no reason why successful artists would oppose Articles 14-16.
- 83** Reda's argument on the other hand, draws attention to the fact that copyright is an opt-out system: every original creation is automatically protected by copyright—and thus drawn into the market system—without the need for registration. However, authors and performers are free to assert their wish to opt-out of their rights and make their creations freely available to the public. An unwaivable right such as that proposed by the FIPC, would stop creators from opting out, and would demand that every use was licensed by collective management organisations. The resistance to the unwaivable right, in the name of a small minority who might opt out, upholds the individual freedom to oppose imposed market transactions and thus to benefit the wider public by granting it open access to knowledge. It is a view with a long-term commitment to the ideological imperative of open knowledge that does not, however, overturn the copyright regime. Articles 14-16 address creators' challenges with bargaining power without having to diminish this ideological commitment (even though, as CULT's amendment 92 proposing Art.14a(2) shows, Reda's view could also be made compatible with the FIPC's proposal).
- 84** Where creators are concerned, as Harvey puts it drawing on Marx, 'an empty stomach is not conducive to freedom'.<sup>109</sup> So where copyright is the principal, albeit imperfect, mechanism ensuring remuneration from creativity, collective action aiming to restore some of its inherent imbalance might be worth embracing. This is also the understanding reached by consumers, who are willing to pay to overcome this imbalance. The current language of Articles 14-16 is weak (even with the amendments proposed by various parliamentary committees) and is unlikely to address the immediate needs of the majority of performers.
- 85** The performers' and consumers' views overlap with the views of those managers and featured artists, that are aware that not all of their constituents fit into the bracket of the highest earners. This overlap of the perspectives of the less powerful stakeholders with consumers suggests that there is a serious power imbalance in the record industry. The oversupply of musicians in a winner-take-all market creates the perfect situation for the exploitation of the less powerful by those in power: the imperative of Harvey's neoliberal regime.
- 86** It is this imbalance that the FIPC seeks to address. Yet there is a question mark over whether the FIPC's proposal alone can reduce an imbalance that has external causes. A slightly better solution is that presented by the ITRE and CULT committees, in which the FIPC's proposal is offered *in addition* to Articles 14-16 proposed by the commission. Yet this would add more complexity to an already complex copyright system. In the digital era, whether accepting or rejecting a neoliberal regime, this mounting complexity of the copyright system betrays the system's inherent deficiencies made explicit by the Pirate Party. Under this rationale, Articles 14-16 with or without the FIPC's proposal are short-sighted solutions that further sustain the neoliberal regime.

## F. Conclusion

- 87** The objective of this article was not to determine whether the FIPC is indeed fair in a normative sense. Rather, I have shown how the concept of fairness develops its own self-reinforcing cycles of

<sup>107</sup> *The New Politics of Inequality* (WW Norton 1985) 128.

<sup>108</sup> (n 67) 43-4.

<sup>109</sup> Harvey (n 100) 184.

signification in the process of European copyright reform, drawing attention to how emerging discourses are consistent with hegemonic neo-liberal thought.

- 88 I started by explaining what the FIPC is, describing the associations behind it and their motivations for engaging in this campaign. I have provided some background for the legal tool demanded by this group and have outlined the advantages of exclusive rights over equitable remuneration rights under perfect market conditions. Considering that the labour market of the record industry can best be described as a winner-take-all market, where bargaining power of the majority of musicians is very low, I have assessed the need for equitable remuneration rights. I then described the general tone of the European Union members regarding fairness in the record industry, by explaining how reform is made and how the copyright reform sits within the wider plan of the current EC presidential cycle. I focussed on EC President Juncker's vision for his presidency, the Team Leader for Digital Single Market Andrus Ansip's language employed in his regular blogposts, Julia Reda's copyright report and, finally, the EC Proposal for a Directive on Copyright in the Digital Single Market. Analysis of stakeholder views provided further detail on the multiple ways in which the concept of fairness is produced and reproduced in the current process of copyright reform.
- 89 As I have sought to demonstrate, the concept of fairness is fragmented and very much dependent on the relative bargaining power of stakeholders. However, in considering the vision for a digital single market and, within it, fairness within the record industry, I have identified an overarching conception of fairness held by the European Commission and dominating the discussion that is deeply entrenched in neo-liberal thought. Under this regime, the facilitation of market transactions over ever-increasing geographical areas is expected to benefit entrepreneurs and the already powerful contractual counterparts, but little thought is given to the workers that are hit with increasing casualization and diminishing bargaining power. While the vision held by the European Parliament appears at this stage to be more heterogenous and negotiation with the Council will no doubt add more nuances to it, the framework offered by the European Commission can be taken for granted. In this setting, Rawls's ideal theory mentioned above serves as a powerful reminder of how far the concept of fairness has been stretched.

### Post-scriptum

- 90 On 25th May 2018, the Council's Committee of Permanent Representatives (COREPER) published its common position on the EC proposal. On 20th June 2018, the JURI committee found a common position too. This was at first rejected by the Parliament on 5th July, but after renewed debate, finally approved on 12th September. The process is currently under Trilogue, the closed-door compromise negotiations between the Commission, Parliament and Council. The result of Trilogue needs then to be approved by Parliament for it to become a Directive. This is expected to take place early in 2019. Since the Parliament's report incorporated the Council's mandate, no big surprises are expected at this stage.
- 91 In the Parliament's version (and not in COREPER's), Article 14 includes a 'principle of fair and proportionate remuneration'. Yet the wording is so broad that it adds little to the status quo. Nevertheless, considering that the reform process is still ongoing, FIPC representatives welcomed it with optimism: 'the vote finally asserted the principle that all performers should be paid a fair and proportional remuneration for all modes of exploitation, including for on-demand uses, and sends a clear signal against persistent and unacceptable buy-out practices'.<sup>110</sup>
- 92 Paragraph 2 of this new article responds to Reda's concern regarding the clashing of unwaivable rights with open access provisions, in the event that a Member State might be persuaded to make an equitable remuneration right unwaivable.
- 93 The transparency obligation of Article 14 has been specified slightly upwards. However, the proportionality assessment proposed by the EC remains (par. 2-3). The amended Article 15 makes it possible for representative organisations to act on the individuals' behalf, which slightly addresses some of the complexities involved in individuals bringing a case against their powerful counterparts.
- 94 The bigger news relate to a new Article 16a, the 'right of revocation'. This gives authors and performers the right to revoke their licensed or transferred rights when their work or performance is not being exploited or reported upon. Like Article 15, this article mainly addresses already powerful featured artists.
- 95 COREPER's Article 16a is not in the Parliament's version. This article strengthens articles 14 and 15 by making unenforceable any contract that does not

110 Fair Internet Coalition, 'The European Parliament Adopts the Copyright Directive' (*Fair Internet for performers!*, 17 September 2018) <<https://www.fair-internet.eu/eu-parliament-adopts-copyright-directive/>> accessed 19 September 2018.

comply with them.

- 96 Taken as a package, the so-called ‘transparency triangle’ importantly acknowledges the imbalance of bargaining power between authors and performers and their powerful contractual counterparts. Depending on the balance achieved between its different elements, especially by excluding the proportionality assessment, this set of right has the potential to go some way towards addressing the imbalance between authors and performers and their powerful contractual counterparts. As things stand, not much will be gained.
- 97 In short, after the parliamentary vote, the conclusions reached in this article still hold: the definition of fairness aligns best with that of entrepreneurs and the already powerful contractual counterparts, and less so with that of the content-creators with the least bargaining power.

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# The Portability Regulation (Regulation (EU) 2017/1128)

## A Commentary on the Scope and Application

by **Sebastian Engels and Jan Bernd Nordemann\***

**Abstract:** Since 1 April 2018, the Portability Regulation prohibits geo-blocking of online content within the European Union. The regulation regulates the unrestricted access to (paid) subscribed online content of all European citizens, regardless of where they are present in EU territory. The presence must be “temporary”. Providers of fee-based online content are then obliged to guarantee their subscribers

cross-border portability. A limitation of the access or the demand of additional fees is prohibited. The Portability Regulation does not apply directly to offers that are not or not directly liable to payment, such as media libraries. It is rather voluntary for these providers. Furthermore, the Portability Regulation also includes rules to minimize the user’s personal data collected in order to identify the Member State.

**Keywords:** Portability Regulation; portability; geo-blocking; online content; digital borders

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## A. Introduction

### I. Meaning and purpose

1 The Portability Regulation is part of the Initiative of the European Commission towards a Digital Single Market, which has its origin in the Commission’s communication on the Digital Single Market Strategy for Europe (COM(2015) 192 final), which was published in May 2015. The objective stated in the communication was the achievement of a Union-wide connected Digital Single Market based on three pillars: (1) better access to online goods and services, (2) optimum conditions for digital networks and services and (3) the digital economy as a growth engine. As a Digital Single Market, the Commission envisions a digital European single market, in which private citizens and businesses are able seamlessly to access and pursue online activities and use web applications, under conditions of fair competition and with a high level of consumer

and personal data protection, irrespective of their nationality, residence or place of business. The Portability Regulation therefore only governs a small part of the first pillar. It only legislates for the portability of online content outside the Member State of residence for subscribers to a service who are temporarily present in another Member State (Art. 1 (1) Portability Regulation). As such, the Portability Regulation uses a legal fiction that such a temporary presence is deemed to be a presence in the Member State of residence, see Art. 4 Portability Regulation. Therefore, it is not about consumers’ general cross-border access across the EU to online content services in Member States other than their Member State of residence. The Regulation, which implemented the Portability Regulation as one of the first projects of the “digital agenda”, thus separates the question of the portability of content services in cases of temporary presence in another Member State from the far more complex and economically more serious question of cross-border access to online content services (c.f. section B.I.1.).



2 Prior to the Portability Regulation, there were various barriers to the provision of access to content to consumers temporarily present in a Member State, in particular due to the fact that licences to use content protected by copyright or related rights are often granted on a territorial basis (as in the case, for example, of films) and that providers of online content services can decide only to service certain markets (see Recital 4 Portability Regulation). The possibility under copyright law to grant rights for individual States separately is also not excluded by antitrust law (Art. 101 TFEU). There is no general country of origin principle under EU anti-trust law governing online uses in EU copyright law. The exceptions also confirm this, namely the restricted country of origin principle in Art. 4 Portability Regulation and the country of origin principle for satellite broadcasting as per Art. 1 (2) (b) Satellite and Cable Directive (for more detail c.f. below section B.VII.2.(c)). The Portability Regulation is aimed at bringing about a balancing of the different interests<sup>1</sup>: on the one hand, the **user** of digital and copyright protected content is increasingly mobile and expects online access to the works throughout the European Union. It would reach the limits of user acceptance if a consumer, who is temporarily present in another country, were not able to access something they have acquired and paid for.<sup>2</sup> The privilege is only afforded to users domiciled within the European Union, however; people who have their permanent residence in a country outside the European Union do not come under the Portability Regulation (c.f. below section A.II. and section B.II.2.(a)). On the other hand, the interests of the rightholders in maintaining their exclusive rights position must be preserved. The provisions of the Regulation are not intended to reduce the high level of protection enjoyed by authors (Recital 12 Portability Regulation). One of the interests of authors and other rightholders is in particular the ability to define their own optimum exploitation strategy themselves, through a territorial splitting of rights. For example, a differentiation in price and conditions by territory enables film rightholders to secure a sufficient return on investment in the high risk business of film production, thereby

ensuring diversity in European film is protected.<sup>3</sup> Furthermore, the interests of the providers of online services must be taken into account.

## II. History of the Regulation

- 3 On 9 December 2015 the Commission published a proposal for a Regulation to ensure cross-border portability of online content services in the internal market (COM(2015) 627 final), that is to say the first draft of the Portability Regulation. This draft version was based on the results of a consultation carried out in 2013 and 2014 on the review of the EU copyright rules.<sup>4</sup> The proposed Regulation was adopted by the European Parliament on 18 May 2017 with a series of amendments and published on 30 June 2017. The Regulation has therefore been in force since 20 July 2017 (Art. 11 (1) Portability Regulation). However, the Portability Regulation only applies in the Member States from 1 April 2018 (Art. 11 (2) Portability Regulation).
- 4 The Portability Regulation is the first EU regulation in the area of copyright law. Elsewhere, the EU had pursued the harmonisation of copyright law through directives, which then had to be transposed into the national copyright laws. EU regulations differ from directives in that regulations are directly applicable in every Member State (Art. 288 (2) TFEU). The Portability Regulation has thus become the first part of a European copyright system directly applicable in all Member States. It remains to be seen whether this trend will continue. The reasoning behind the decision to employ the legislative instrument of a regulation, as stated in Recital 35, namely that it was “necessary in order to guarantee a uniform application of the cross-border portability rules across Member States and their entry into force at the same time with regard to all online content services can also be applied to other copyright questions which have to date only been harmonised by way of directives.

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1 *Eginger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 698, 712; *Ranke/Göckler*, Multimedia und Recht (MMR) 2017, 378, 382; *Synodinou* in Synodinou et al, EU Internet Law (2017), p. 217.

2 *Grünberger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 697, 698; *Synodinou* in Synodinou et al, see Fn. 1, p. 237.

3 *Schwarz*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2015, 950; *Ranke/Göckler*, Multimedia und Recht (MMR) 2017, 378, 382 regard this interest as being protected; *Synodinou* in Synodinou et al, see Fn. 1, p. 233; see on this point, in detail *Engels*, Die Vereinbarkeit der territorialen Aufspaltung von Verwertungsrechten mit den europäischen Binnenmarktregeln, p. 44 et seqq.

4 <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf)>.

### III. Charter of Fundamental Rights of the European Union

- 5 According to Recital 30 Portability Regulation, the Portability Regulation is in line with the fundamental rights and principles which are recognised in the EU Charter of Fundamental Rights. The Portability Regulation must therefore be interpreted and applied in accordance with that Charter. Of particular relevance are the right to respect for privacy and family life, the right to the protection of personal data, the right to freedom of expression, the right to freedom to conduct a business and the protection of property, including intellectual property rights. The processing of personal data is subject to detailed regulation in Art. 8 Portability Regulation (c.f. below section B.VIII.1.). National constitutional law of EU member states should not apply. For example, the German Grundgesetz (GG, German Constitution) does not apply because the Portability Regulation is EU law directly applicable in Germany<sup>5</sup>, neither does the ECHR, to the extent the scope of application of the EU Charter of Fundamental Rights applies<sup>6</sup>.

### IV. International legal framework

#### 1. International scope of application of the Portability Regulation

- 6 The Portability Regulation only applies in favour of users who have their permanent residence in a Member State of the European Union (see Recital 26 Portability Regulation). People who have their permanent residence in a country outside the European Union do not fall under the Portability Regulation (c.f. below section B.II.2.(a)). However, online services which are not located within the EU or which supply their service from a country outside the EU do fall under the Portability Regulation (c.f. below section B.II.2.(e)).

#### 2. International conflict of laws

- 7 Under Art. 7 (2) Portability Regulation, the provisions of the Portability Regulation apply irrespective of which national contract law is applicable to the contracts of the provider of the online content

5 See BVerfG (Bundesverfassungsgericht, German Federal Constitutional Court) decision of 31 May 2016 in case 1 BvR 1585/13, para. 115 - *Metall auf Metall*, remarking on completely harmonised directives.

6 BGH (Bundesgerichtshof, German Federal Court of Justice) decision of 1 June 2017 in case I ZR 139/15, para. 35 - *Afghanistan Papiere*.

service with the rightholders on one side or with the subscribers on the other. This serves to clarify that the rules set out in Art. 7 (1) Portability Regulation are mandatory under international conflict of law rules and thus constitute overriding mandatory provisions as per Art. 9 (1) Rome I Regulation (c.f. below section B.VII.1.).

#### 3. International copyright treaties

- 8 International treaties on the regulation of copyrights and ancillary copyrights (related intellectual property rights) are binding upon EU Member States, but also for the European Union, however individual persons cannot cite such treaties.<sup>7</sup> Recital 7 Portability Regulation stipulates that the provisions of the Portability Regulation must be consistent “insofar as is possible”, in particular with the international obligations under TRIPS (and thus also of the RBC), WCT and WPPT.<sup>8</sup> Above all, the Portability Regulation raises the question of whether the restricted country of origin principle as per Art. 4 Portability Regulation is in line with the provisions of Art. 8 WCT for the affording of a right - also interactive - of communication to the public.

### V. Brief summary of the provisions of the Portability Regulation

- 9 Art. 1 Portability Regulation determines the subject matter and scope of application of the Portability Regulation. This wording of the subject matter of the provision has no independent regulatory content as far as the definition of terms in Art. 2 Portability Regulation and the substantive provisions in Art. 3 to 9 Portability Regulation are concerned (c.f. below section B.I.1.). The material core of the Portability Regulation is contained in Art. 3 and Art. 4 Portability Regulation. Firstly, Art. 3 Portability Regulation provides for an obligation to enable cross-border portability of online content services. Art. 4 Portability Regulation defines the place of residence as the place of provision of online content services as well the access to and

7 CJEU decision of 15 March 2012 in case C-135/10, para. 43 et seqq. - *SCF*; see also CJEU decision of 14 December 2000 in joined cases C-300/98 and C-392/98, para. 41 et seqq. - *Dior/Tuk Consultancy*; CJEU decision of 13 September 2001 in case C-89/99, para. 51 et seqq. - *Schieving-Nijstad*; For more detail on this, see *Nordemann-Schiffel* in Fromm/Nordemann, *Urheberrecht* (Commentary on the German Copyright Act), 12<sup>th</sup> edition 2018, Preliminary note to § 120 UrhG et seqq., marg. nos. 9 et seqq.

8 For more detail on this, see *Nordemann-Schiffel* in Fromm/Nordemann, *Urheberrecht* (Commentary on the German Copyright Act), 12<sup>th</sup> edition 2018, Preliminary note to § 120 UrhG et seqq., marg. nos. 12 et seqq.

use of these services, if the user is only temporarily present in another Member State. Under Art. 5 Portability Regulation, the provider of the online service is entitled to verify this Member State of residence. Art. 6 Portability Regulation contains a special rule for the cross-border portability of online content services provided free of charge, while Art. 7 Portability Regulation then regulates the contractual provisions between providers of online content services and rightholders on the one hand and between providers of online services and their users on the other; the article also contains provisions regarding international private law. The protection of personal data is the subject of Art. 8 Portability Regulation. Transitional provisions governing existing contracts and acquired rights are set out in Art. 9 Portability Regulation. Art. 10 Portability Regulation provides for a review of the Portability Regulation by the Commission by 21 March 2021. The final provisions, in particular regarding the entering into force of the Regulation, are found in Art. 11 Portability Regulation.

## VI. Relationship to other provisions

10 The Portability Regulation is subordinate to the extent EU primary law provisions apply. This is true in particular in respect of Art. 101 and Art. 102 TFEU (c.f. below section B.VII.2.(c); see Recital 33 Portability Regulation). The Portability Regulation does not affect the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84 of 20 March 2014, p. 82), as expressly stated in Recital 34 Portability Regulation. No priority is given to national rules, however, because the Portability Regulation takes precedence over them; as such, for example, the provisions national competition law are subordinate, for example the German competition law provisions in Sec. 1, Sec. 19, Sec. 20 GWB (Gesetz gegen Wettbewerbsbeschränkungen, German Act Against Restraints of Competition). However, the national law governing terms and conditions of business has a special role to play in regulating the affected contracts between providers and subscribers on the one hand and the licensing agreements between rightholders and providers on the other; that law of the EU member states continues to apply alongside the Portability Regulation (c.f. below section B.VII.2.(a)).

## B. Commentary

### I. Article 1 Purpose and scope

#### 1. Subject matter of the Portability Regulation (Par. 1)

11 Art. 1 Portability Regulation sets out the subject matter and scope of application of the Portability Regulation. According to par. 1, the purpose of the Regulation is to introduce a common approach to the cross-border portability of online content services, by enabling subscribers to portable online content services to access these services under certain circumstances while temporarily present in a Member State other than their Member State of residence. Therefore, the starting point for par. 1 is the possibility under copyright law of granting rights for individual states separately, such that rightholders technically have the ability to prohibit or separately license use of their works even in cases where users are only temporary present abroad. There is no general country of origin principle for online uses under EU copyright law (on antitrust law, c.f. below section VII.2.(c)). The wording of the subject matter of the provision in Art. 1 (1) Portability Regulation is a general intention and thus has, as a basic principle, no independent regulatory content as compared to the definitions in Art. 2 Portability Regulation and the substantive provisions in Art. 3 to Art. 9 Portability Regulation. However, it can be of relevance in the interpretation of the Portability Regulation. It is interesting that in the wording of Art. 1 (1) Portability Regulation, the Regulation has clearly focussed on the interests of subscribers as users of online services. This is clear from Recitals 1 and 12 Portability Regulation, which primarily emphasise the interests of consumers in the cross-border use of online services to which they are subscribed in their home Member State. At the same time, the Regulation insists, in Recital 12 Portability Regulation, that the provisions of the Regulation are not intended to reduce the high level of protection afforded to authors. Correspondingly, the definition of cross-border portability is explicitly separated from the definition of cross-border access by consumers to online content services in a Member State other than their Member State of residence, the latter of which is not covered by the scope of this Regulation. This clarification was generally not necessary, since the limited scope of application of the Regulation already follows from the clearly delineated stipulations in Art. 3 Portability Regulation. The clarification is welcome, however, since the notions of portability and cross-border access are frequently confused with one another in political and social debate. The Regulation, which

implemented the Portability Regulation as one of the first projects of the “digital agenda”, is obviously wanting to separate the question of the portability of content services from the far more complex and economically more serious question of cross-border access to online services and for it to be understood in this way. Art. 1 (1) Portability Regulation only contains an independent provision, however, to the extent that it clarifies that only online services which are lawfully provided in the country of residence are covered by the Portability Regulation. This clarification is not otherwise found in Art. 3 to Art. 9 Portability Regulation. That said, the Portability Regulation would have to be interpreted in that way in any case because Recitals 1, 3, 12, 23 and 34 Portability Regulation contain corresponding statements that only lawfully provided online services are covered.

## 2. Scope of application of the Portability Regulation (Par. 2)

- 12 Par. 2 has its own regulatory content which explicitly excludes the field of taxation from the scope of application of the Regulation. The treatment for tax purposes of the use of online content services in countries outside the subscriber’s home Member State must therefore be determined without considering the provisions of the Portability Regulation. This does not appear to be an entirely unproblematic matter. For example, in cases where access to content is subject to a separate payment obligation (transactional video on demand) the question could be raised as to whether taxes or duties are payable in the country the content was accessed in, although the law of the country of origin of the service otherwise applies as per Art. 4 Portability Regulation, and thus the law of the Member State of residence.

## II. Article 2 Definitions

### 1. General

- 13 Art. 2 Portability Regulation contains a catalogue of definitions which apply to the whole Regulation and thus contribute to determining the scope of application of the Regulation. Additional indicia for the interpretation of the terms defined in Art. 2 Portability Regulation can be found in the Recitals, in which the Regulation communicates its understanding of the scope of application of the Regulation and the terms used therein (see Recitals 14 et seqq. Portability Regulation). All the terms legally defined in Art. 2 Portability Regulation must

be interpreted in a uniform manner throughout the EU, considering the objectives of the Portability Regulation (see Recital 14 Portability Regulation, in respect of “Member State of residence”).

## 2. Key aspects

### a.) Subscriber

- 14 Subscriber within the meaning of the Regulation is any consumer who, based on a contract for the provision of an online content service with a provider whether against payment of money or without such payment, is entitled to access and use the service in the Member State of residence.
- 15 The definition of a subscriber, which at the same time determines the personal scope of application of the Regulation more closely, could thus hardly be broader and requires, unlike the general understanding of the term in everyday language, no recurring provisions of service. The key factor is solely the existence of a contract between the provider and consumer in the Member State of residence, entitling the consumer to the use of the online content service.
- 16 The Regulation would also like to have the term ‘contract’ correspondingly broadly understood such that any type of agreement is covered, for example even the express or implicit acceptance of terms and conditions (see Recital 15 Portability Regulation). The existence of a payment obligation is not a requirement for the assumption that an arrangement constitutes a contract. A simple registration to receive content alerts or a mere acceptance of HTML cookies does not constitute a contract in this sense (see Recital 15 Portability Regulation). The simple use of a website does not therefore qualify the user as a subscriber within the meaning of the Regulation. “Terms of use” or “disclaimer” notices on a website cannot change this in any way, as the mere use of a website does not even involve any effective contractual relationship between website operator and user into which corresponding terms and conditions could be incorporated.
- 17 Persons whose stable residence is in a non-EU country are also not considered subscribers within the meaning of the Regulation. This is because the Portability Regulation only applies to subscribers who reside in the EU (see Recital 26 Portability Regulation).

## b.) Consumers

- 18 A consumer within the meaning of the Regulation is any natural person who, in contracts covered by this Regulation, is acting for purposes which are outside that person's trade, business, craft or profession. The Regulation thus follows the definition of consumer which is generally applicable in harmonised law, which is based on the purpose of the act concerned. The key factor in whether a person is considered a consumer within the meaning of the Portability Regulation is the non-commercial purpose of the contract which entitles the user to access the online content service. The purpose of the individual acts of use is therefore not relevant. Occasional private access via a commercial usage contract is also not covered by the provisions of the Regulation.

## c.) Member State of residence

- 19 Member State of residence means the Member State, determined based on Art. 5 Portability Regulation, where the subscriber has his or her actual and stable residence. There can be only one single Member State of residence (see Recital 14 Portability Regulation: "only Member State of residence of the subscriber"). By including the objective determination criteria from Art. 5 Portability Regulation in the definition of the Member State of residence, the Regulation largely relieves the service provider of the risk of an incorrect determination of the Member State of residence. To the extent the service provider relies on at least two means of verification as stated in the provisions in Art. 5 Portability Regulation (see the remarks there), the Member State thus determined shall be deemed to be the Member State of residence within the meaning of the Regulation. This applies irrespective of whether the consumer actually has their stable residence in the identified country. Based on the unfortunate wording in the definition of the Member State of residence, one could potentially assume cumulative elements. However, in Recital 14 Portability Regulation, the Regulation makes it clear that the service provider should be able to rely on a determination of the Member State of residence in accordance with Art. 5 Portability Regulation. Accordingly, one could, in cases of doubt, see the reference to the provisions in Art. 5 Portability Regulation as a legal fiction in favour of the provider.

## d.) Temporarily present in a Member State

- 20 Temporarily present in a Member State means being present in a Member State other than the Member State of residence for a limited period of time. The purpose of the presence is immaterial.

For example, it could be for holiday, business, work or study purposes.<sup>9</sup> While the Regulation on the determination of the Member State of residence in Art. 5 Portability Regulation contains comprehensive instructions, the definition leaves it completely open as to what should be understood by a "limited period of time". The term "residence for a limited period of time" could thus present a liability risk for providers, because whilst they are given a legally certain solution for determining the Member State of residence in Art. 5 Portability Regulation in conjunction with the presumption rule in Art. 2 No. 3 Portability Regulation, the question of when a residence is temporary and how that should be determined remains unclear. This in mind, a broad interpretation of "temporary presence" would be desirable from the provider's perspective, to avoid the risk of offering services outside its own licensing territory without falling under the special rule in Art. 4 Portability Regulation. However, a broad interpretation of "temporary presence" increases the risk of subscriber abuse.

- 21 Taking into account the clear intention of the Regulation to give providers, through the verification criteria to determine the Member State of residence as per Art. 5 Portability Regulation, a possibility to determine, with legal certainty, the applicability of the Regulation to a particular usage relationship, one can assume that the additional criterion of "temporary residence" was not intended to create a criterion which had to be verified independently by the provider. In the absence of any further restriction, the term "limited period of time" must be understood according to its wording, such that any form of limitation to the period of residence which does not lead to a change in the assessment of the Member State of residence, must be deemed a "temporary presence".<sup>10</sup> There is therefore no maximum time limit for the period of temporary presence, provided it does not lead to a change in the Member State of residence. Should the provider have reasonable doubts, in the course of the duration of the contract, as to whether the subscriber's originally determined Member State of residence is still the subscriber's Member State of residence, the provider has the possibility, under Art. 5 (2) Portability Regulation, but not the obligation, to repeat the verification (c.f. below section V.2.(b)).

9 *Einger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 698, 703; *Roos*, Multimedia und Recht (MMR) 2017, 147, 149; *Riis/Schovsbo*, The borderless online user – Carving up the market for online and streaming services (available at <<https://ssrn.com/abstract=2867353>>), p 13.

10 Of the same opinion, in effect, *Einger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 698, 704; *Ranke/Glückler*, Multimedia und Recht (MMR) 2017, 378, 380; *Heyde*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 718; *Peifer* Archiv fuer Presserecht (AfP) 2017, 8, 11; *Synodinou* in *Synodinou et al*, see Fn. 1, p. 251 et seqq.

The rightholder can, however, contractually oblige the service provider to perform the respective verifications (c.f. below section V.2.(d), also regarding the content of such obligations).

## e.) Online content service

22 “Online content service” within the meaning of the Regulation is any service as defined in Art. 56 and Art. 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is either an audio-visual media service as defined in Art. 1 (a) of Directive 2010/13/EU<sup>11</sup>, or a service, the main feature of which is the provision of access to, and the use of, works, other protected subject-matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner. The definition of the online content services could thus hardly be broader and covers, on a general level, any service offered over the internet, the main purpose of which is the linear or non-linear provision of audio-visual, visual or audio content. The use must take place via the internet (not a closed system, even if it is based on the internet protocol; c.f. below section B.II.(f)), because otherwise it is not an “online” use.<sup>12</sup> This therefore covers, in particular, online services for the linear and non-linear provision of films, videos, music, e-books, photographs but also live-picture and audio reporting e.g. of sporting events (see Recitals 1, 5, 8 Portability Regulation).<sup>13</sup> All video-on-demand (VOD) services are also covered but also live-streaming services. The Commission’s press release mentioned video-on-demand platforms (Netflix, HBO Go, Amazon Prime, Mubi, Chili TV), internet TV services (Viasat Viaplay, Sky Now TV, Voyo), music streaming services (Spotify, Deezer, Google Music) or online games marketplaces (Steam, Origin) as examples.<sup>14</sup> The broadcaster’s multi-media libraries are also certainly covered.<sup>15</sup> Whether the services are provided free of charge or against payment of money is irrelevant to their classification as online content services (see Recital 15 Portability Regulation).

23 However, the Regulation only covers portable services (c.f. below section II.2.(f)), which a provider delivers to a subscriber (c.f. above section II.2.(a)) in their Member State of residence (c.f. above section II.2.(c)). Audiovisual media services are excluded, where the provision of audiovisual content merely represents an ancillary purpose. Thus, in particular websites on which audiovisual content is provided merely in an incidental manner or by way of illustration are not covered (see Recital 16 Portability Regulation). Websites that use works or other protected subject-matter, such as graphical elements or background music, only in an ancillary manner, where the main purpose of such websites is, for example, the sale of goods, are excluded (see Recital 16 Portability Regulation). The boundaries may certainly be blurred in this respect. In practice, however, any classification will be, in particular in the case of non-commercial websites, on the basis of the additional feature that the content is being provided under agreed conditions, since as a rule such an agreement between user and website operator generally does not exist where the provision of content is not a main objective (on the criteria for the existence of a contractual agreement c.f. above section II.2.(a)).

24 The online content service does not have to be based within the EU or provide the corresponding online content services from within the EU. The purpose of the Portability Regulation, to ensure access for users with cross-border presence in another Member State, also extends to services based in countries outside the EU. If these services are prepared to contract with users who reside in the EU, they therefore also submit themselves to the provisions of the Portability Regulation.

## f.) Portable

25 Portable within the meaning of the Regulation means a feature of an online content service whereby subscribers can effectively access and use the online content service in their Member State of residence without being limited to a specific location. Any service can therefore be deemed portable which is accessible either online or in another manner using several different end devices (e.g. laptops, tablets, smartphones; see Recital 2 Portability Regulation), but also services which are only accessible on one specific mobile end device. The definition is technology neutral. Services which are exclusively limited to a specific location are excluded. The Regulation did not intend to oblige providers to make services portable (see Recital 17 Portability Regulation). This would mean, for example, IP-TV and other wired services, but also internet based services which are designed solely for access from

11 DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

12 *Kraft*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 722.

13 See also *Kraft*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 721.

14 <[http://europa.eu/rapid/press-release\\_IP-17-225\\_en.htm](http://europa.eu/rapid/press-release_IP-17-225_en.htm)>.

15 *Kraft*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 721.

a specific location, e.g. via a set top box. Even in the latter case, the online content service is generally limited to a stationary use, hence it would be unreasonable to expect the provider to design the service to be mobile solely based on the provisions of the Portability Regulation. If a stationary content service (e.g. a pay-tv service) also offers a portable service with limited content, only this additional service would have to be regarded as portable within the meaning of the Regulation. This does not lead to any conflict with the equivalence rule in Art. 3 (1) Portability Regulation (c.f. below section III.2.(b)), because the additional service is also only available to the subscriber in the limited form in their Member State of residence.

temporary presence in a Member State are concerned (see above section II.2.(a) et seqq.). Therefore, the obligation to ensure portability across the Union only exists if a user who has their stable residence as per Art. 5 Portability Regulation in the European Union has concluded a contract with a provider for use of an online content service against payment of money and is then in another Member State for a limited period of time. Where the provider is based and from where the corresponding online content service is provided are irrelevant to the applicability of the rule (c.f. above section II.2.(e)). The only key factors for the question of the applicability of Art. 3 Portability Regulation are the stable residence of the user and the design of the specific usage relationship which exists between provider and user (subscriber).

### III. Article 3 Obligation to enable cross-border portability of online content services

#### 1. General

26 Art. 3 Portability Regulation, together with Art. 4 Portability Regulation, forms the core part of the Regulation. While Art. 3 Portability Regulation imposes a mandatory obligation to ensure Union-wide portability on providers of paid subscription services, Art. 4 Portability Regulation establishes a country of origin principle restricted to the provision of this portability, to the benefit of the provider such that the provider is thus exempt from obtaining the necessary exploitation rights for all Member States. Art. 3 Portability Regulation also applies, through Art. 6 Portability Regulation, *mutatis mutandis* to providers of free-of-charge online content services with the caveat that such providers are free to decide whether they would like to guarantee portability throughout the Union to their users or not (for details c.f. below section VI.1.).

#### 2. Key aspects

##### a.) The provider of an online content service provided against payment of money (par. 1)

27 All providers of online content services are subject to the obligation under Art. 3 (1) Portability Regulation, who provide their service to subscribers against payment of money within the meaning of the Regulation, to the extent the subscriber is temporarily present in another Member State. As far as the terms online content service, subscriber and

28 The obligation to ensure portability throughout the Union only applies, at a general level, to providers of an online content service provided against payment of money (on free-of-charge online content services c.f. below section VI.1. et seqq.). According to Recital 18 Portability Regulation, this requirement of a payment obligation is intended to be broadly interpreted, such that a payment obligation is assumed regardless of whether the payment is rendered directly to the provider of the online content service or to another party. The decisive element in determining the nature of an online content service in this respect is that users pay money for access to the online content service, regardless of to whom the payment is made. There must, however, at least be an indirect contractual tie between the provider and the user. How the payment obligation is specifically designed is also irrelevant. Regularly recurring payments are considered a payment obligation just as much as single payments related to specific transactions are, or a mixture of the two (c.f. above section II.2.(a)). Services financed by advertising, for which the users themselves do not make any payments of money are not covered by Art. 3 Portability Regulation. According to Recital 18 Portability Regulation, services from public radio broadcasters, which are provided based on a general, public licence fee, are explicitly excluded from Art. 3 Portability Regulation. Also not covered are payments which users do not make as contractual payment for the use of the service but for other services e.g. internet access. Payment through the provision of personal data also does not fall under Art. 3 (1) Portability Regulation, as shown by the clear wording (“payment of money”).

29 In the case of flat rate payments which cover several services, it suffices if the payment at least in part relates to the use of the online content service. There could be cause for debate as to the scope of application of Art. 3 Portability Regulation as far as online content services which are tied into an overall package, such as *Amazon Prime*, which are

only accessible to users with a paid membership, but where membership is partly or primarily for other purposes, so it could be argued that the online content service itself is merely a free perk. Although a clear separation of the various services provided within such packages cannot be made, hence at least a part of the monetary payment must be regarded as being for the online content service, such packages are, according to the regulatory intention behind the Regulation, subject as a whole to the obligation under Art. 3 Portability Regulation. As the Regulation clarifies in Recital 20 Portability Regulation, the differentiation between online content services which require payment and those that do not is primarily based on the consideration that free-of-charge content services can often be accessed without registration. The obligation to verify the Member State of residence in accordance with Art. 5 Portability Regulation would thus represent an unreasonable interference in the freedom of free-of-charge content services to arrange their own business. This problem does not exist in the case of the above-mentioned paid service packages, so there is no reason to exclude them from the scope of application of Art. 3 Portability Regulation.

quality requirements applicable to the delivery of an online content service that the provider is subject to when providing that service in the Member State of residence, unless otherwise expressly agreed between the provider and the subscriber. Recital 22 Portability Regulation clarifies what is meant by this rather cryptic limitation. The quality of an online content service strongly depends on the location and connection to the relevant server and can, accordingly, vary significantly depending on the place of access. The provision in par. 3 is intended to clarify that the provider is not obliged to technically configure its service to ensure a consistent quality of access irrespective of the place of access. This also applies to the extent a specific access quality is contractually agreed for the Member State of residence, which in practice will never be the case anyway, due to a variety of unknowns. Only where the provider makes specific commitments on the quality of access outside the Member State of residence must these be adhered to. In order to prevent abuse to circumvent the obligation under par. 1, par. 3 makes it additionally clear that the provider is prohibited from taking specific action to limit the access quality outside the Member State of residence.

#### **b.) Content and scope of the obligation: Equivalence rule (par. 1 and par. 3)**

- 30 If a contractual relationship falls within the scope of application of Art. 3 (1) Portability Regulation, the provider is subject to an equivalence rule. The provider is obliged to enable a subscriber to access the online content service, while temporarily present in another Member State, in the same manner as in their Member State of residence. In the form of a non-exhaustive list (“including”), par. 1 stipulates an equivalence for, among other things, access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities. This equivalence rule governing the extent of access to online content services from another Member State is intended to prevent providers circumventing the obligation to enable portability by restricting the functionality of the service abroad (Recital 21 Portability Regulation). Accordingly, any restriction to the functionalities of the service or to the quality of its delivery should be considered to be a circumvention of the obligation to provide cross-border portability of online content services and therefore contrary to the Regulation (Recital 21 Portability Regulation).
- 31 This equivalence rule is given a certain degree of limitation by par. 3, in relation to the quality of access to the online content service outside the Member State of residence. The obligation to guarantee equivalent access does not extend to any

#### **c.) Information obligations (par. 4)**

- 32 The provision in par. 3 is flanked by the provider’s obligation in par. 4 to inform subscribers, based on information available to it, as to the quality of delivery of the online content service outside the Member State of residence. This information must be provided to the subscriber prior to providing the online content service in accordance with par. 1, i.e. outside the Member State of residence, by means which are adequate and proportionate. This information obligation is firstly very vaguely worded and thus has the potential to lead to a significant workload and expense on the part of service providers. However, the crucial factor in ascertaining the scope of the information obligation is the restriction, that the information only must be provided on the basis of information already available to the provider. Recital 22 Portability Regulation clarifies in this respect that the Regulation’s intention was that no obligation should be imposed on providers requiring them actively to seek information regarding the quality of the delivery of a service in another Member State. As a result, the information obligation under par. 4 should thus usually be limited to the advice that due to factors outside the service provider’s control, the quality of the delivery may not correspond to that which applies in their Member State of residence. Even if par. 4 does not contain any specific provisions regarding the type and manner of such a notice,



in par. 4 the Regulation suggests the provider's website as a suitable medium. Accordingly, notices provided in other media, e.g. within an app or other usage software, will be sufficient. A particularly eye-catching notice is not necessary. Very broadly speaking, the service provider can limit itself to references in its terms and conditions.

#### d.) Prohibition on additional charges (par. 2)

- 33 Under par. 2, the provider is not allowed to impose any additional charges on the subscriber for access to the online content service from another Member State. However, this does not prevent the provider, in respect of ensuring portability and the associated additional costs, e.g. for verifying Member State of residence, from taking account of these from the outset in its own pricing system. Par. 2 merely prohibits the charging of additional amounts specifically for the subscriber's access from other Member States. Additional costs incurred from communications providers for the use of communications services abroad (e.g. internet access charges), which are used to access the online content service, are also not prohibited under par. 2 (see Recital 19 Portability Regulation).

### 3. Enforcement

- 34 Art. 3 Portability Regulation contains an obligation to ensure portability throughout the Union, however does not contain any legal consequences. Art. 7 (1) Portability Regulation stipulates this lack of enforceability. This means that only the individual contractual clause which violates Art. 3 Portability Regulation will be unenforceable, (c.f. below section VII.2.(a)).
- 35 In EU member states like Germany providing for a provision in Unfair Competition Law sanctioning the breach of law in favour of the competition of a competitor (Sec. 3a Gesetz gegen den unlauteren Wettbewerb - German Act Against Unfair Competition) the enforcement of an online content service's obligations under Art. 3 Portability Regulation could be achieved through such provision.
- 36 Whether subscribers themselves also have an enforceable claim, against the provider, for provision of portability across the Union is not clearly determined by the Regulation. Art. 3 Portability Regulation initially only states that the provider shall enable portability for subscribers, without explicitly affording subscribers a claim for the provision of portability. If one considers the Regulations stated intention for the Regulation, to enable subscribers

to enjoy online content services to which they have subscribed in their Member State of residence when they are temporarily present in another Member State, that would suggest that the Regulation did imply an own claim on part of subscribers against providers. Accordingly, the Regulation clarifies in Recital 26 Portability Regulation that subscribers should be eligible for cross-border portability of online content services only if they reside in a Member State of the Union. However, the provision in Art. 7 (1) Portability Regulation suggests such a claim on the part of subscribers would not exist. This is because Art. 7 (1) Portability Regulation only stipulates the lack of contractual enforceability as a legal consequence (c.f. below section VII.2.(a)). If one still wanted to conclude that subscribers do have a claim, such a claim could only be a contractual claim, enforceable based on national member state law. The claim (from a German perspective) does not arise based on tort law, because Art. 3 (1), (2) and (3) Portability Regulation only govern the contractual relationship between service and subscriber. The secondary claims of subscribers, in particular with regards to failure to perform and poor performance are also governed by national law.

## IV. Article 4 Localisation of the provision of, access to and use of online content services

### 1. General

- 37 In addition to Art. 3 Portability Regulation, Art. 4 Portability Regulation contains the second core element of the Portability Regulation. It is the legal counterpoint to the obligation to ensure portability throughout the Union. Art. 4 Portability Regulation uses a legal fiction that the use of rights in respect of online content service takes place exclusively in the subscriber's Member State of residence. In this way it places providers in the legal position of ensuring portability of online content without running the risk of violating contractual or legal provisions, e.g. because it does not hold the necessary exploitation rights for access from another Member State. The Regulation achieves this trick by introducing a country of origin principle limited to ensuring portability under Art. 3 Portability Regulation, as can also already be found in other European legal instruments (see for example Art. 1 (2) (b) Satellite and Cable Directive). There is some debate, in connection with Art. 101 TFEU, as to whether the granting of a right of communication to the public limited to one or a few Member States is in violation of competition law and thus exploitation rights can only be granted throughout the Union (for more

detail on this point, c.f. below section VII.2.(c)). If Art. 101 TFEU were to produce such an outcome, Art. 4 Portability Regulation merely would have a clarifying character.

## 2. Key aspects

- 38 According to Art. 4 Portability Regulation, the provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence. This country of origin principle restricted to the ensuring of portability under Art. 3 Portability Regulation means that the provider, both in relation to licensing rights and in relation to other legal provisions only needs to secure the lawfulness of the online content service in the subscriber's Member State of residence. To avoid this principle being circumvented by contractual limitations (e.g. in the scope of licensing agreements), Art. 4 Portability Regulation is flanked by Art. 7 Portability Regulation (c.f. below section VII.2.(a)). For the determination of the Member State of residence as the country of origin, the provider can refer to the results of the verification as per Art. 5 Portability Regulation, which it is entitled to rely on, according to the definition in Art. 2 No. 3 Portability Regulation (c.f. above section II.2.(c) and below section V.2.(b)). Art. 4 Portability Regulation does not prevent a provider from enabling a subscriber to access additional content which the provider lawfully offers in the temporary country of residence (see Recital 23 Portability Regulation).
- 39 The restricted country of origin principle in Art. 4 Portability Regulation thus firstly has a copyright law dimension. Through the legal fiction of the place of provision, the provider is released from the requirement to obtain the necessary rights for making the online content service available in a Member State other than the Member State of residence of the respective subscriber. That applies both in respect of exploitation rights based on copyright and for exploitation rights based on ancillary copyrights (related rights). If the provider supplies the service to subscribers with different Member States of residence, it (only) needs to have the necessary rights for the respective usage relationship in the respective Member State of residence. The rights concerned are, in particular, the right of making available to the public (Sec. 19a UrhG), the broadcasting right (Sec. 20 UrhG) and the right of reproduction for users in regard to downloading or streaming (Sec. 16 UrhG). The restricted country of origin principle under Art. 4 Portability Regulation only applies to the enabling

of portability of a service. It does not release the provider from obtaining the necessary rights for all Member State in which it offers its service to users residing there. The provisions of Art. 7 Portability Regulation must be considered, which stipulate a mandatory application of the Portability Regulation to contracts. That does not mean, however, that the rightholder is not allowed to set a higher price for the increased scope of use (c.f. section VII.2.(a)). Art. 4 Portability Regulation also has an impact on rightholders' licensing contracts with third parties. The legal fiction protects the rightholder from violations of such contracts. For example, if the rightholder has granted exclusive rights to a third party for a certain territory, Art. 4 Portability Regulation ensures that the exclusivity granted is not violated through compliance with the requirements in Art. 4 Portability Regulation.<sup>16</sup>

- 40 Secondly, the restricted country of origin principle in Art. 4 Portability Regulation also has a regulatory dimension, which applies in respect of civil law, criminal law as well as public law. In order to provide portability into another EU Member State, the provider of an online content service only has to observe the regulatory framework of the Member State of residence if the subscriber is only temporarily present. In this respect, the provider thus does not have to allow for sometimes differing legal requirements of each individual Member State. In particular, Art. 4 Portability Regulation contains in this context a civil law connection to the Member State of residence. This applies in particular to tort law: e.g. German tort law only applies if Germany is the Member State of residence. An example from public law is the law governing the protection of minors in the media. In respect of the access of content as per Art. 4 Portability Regulation, the provider only must comply with the relevant rules for the subscriber's Member State of residence. National competition (antitrust) law in the country of access should not apply, because the European law provision in Art. 4 Portability Regulation takes precedence over national antitrust law and its associated rule in the form of the effects doctrine. However, European antitrust law takes precedence over the Portability Regulation (c.f. below section VII.2.(c)). The area of taxation is, however, not covered by the restricted country of origin principle in Art. 4 Portability Regulation (Art. 1 (2) Portability Regulation; see also Recital 13 Portability Regulation). In this respect, national provisions may apply in the country of residence.

<sup>16</sup> Kraft, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 723.

## V. Article 5 Verification of the Member State of residence

### 1. General

- 41 Art. 5 Portability Regulation gives providers a regulated procedure for the verification of a subscriber's Member State of residence. This is intended to ensure, in the interests of consumers, that interference in subscribers' privacy is reduced to the degree actually required. Moreover, the verification process regulated in Art. 5 Portability Regulation takes into account the providers' interest in legal certainty, in that the definition of the "Member State of residence" in Art. 2 Portability Regulation (c.f. above section II.2.(c)) stipulates that a Member State of residence determined in accordance with Art. 5 Portability Regulation shall in all events be considered the Member State of residence within the meaning of the Regulation (see also Recital 26 Portability Regulation).
- 42 In addition to the provisions in Art. 5 Portability Regulation, when verifying a Member State of residence, data protection rules must also be observed, some of which are further specified in Art. 8 Portability Regulation (c.f. below section VIII.).

### 2. Key aspects

#### a.) Timing of verification (par. 1)

- 43 The verification of the Member State of residence must be carried out for paid online content services at the point of conclusion and renewal of the contract. For contracts which are not open-ended but which contain a clause stipulating automatic renewal at the end of the contract period, this means, according to the clear wording of Art. 5 (1) Portability Regulation, that a new verification of Member State of residence must be performed at the end of each contract period. For contracts already existing on 21 May 2018, the verification of the Member State of residence must, under Art. 9 (2) Portability Regulation, be completed by that date at the latest.
- 44 Providers of online content services provided without payment of money, who decide, in accordance with Art. 6 Portability Regulation, to enable portability of their services as per the Regulation, are obligated under Art. 9 (2) Portability Regulation from the date on which they first offer the service in accordance with Art. 6 to complete a verification of the Member State of residence, when concluding or renewing

contracts in future. For customers already in place before that date, a verification must be carried out within two months.

#### b.) Process for verification of Member State of residence (par. 1 to par. 3)

- 45 Art. 5 (1) Portability Regulation stipulates a specific process for verifying Member State of residence, according to which the provider must use no more than two of the listed means of verification in (1) (a) to (k) in order to verify the subscriber's Member State of residence. The list is, according to the wording of Art. 5 (1) Portability Regulation, intended to be exhaustive.<sup>17</sup> According to lit. (a), a ID card should count as an identity document confirming the Member State of residence. The provider has a somewhat limited right to choose. Whilst it is permitted to use just one or any combination of the means of verification under lit. (a) to (h), the more easily manipulated means under (i) to (k) may only be used in combination with one of the means of verification under lit. (a) to (h). An exception to this exists solely for the invoice and postal address under lit. (i), which is permitted as a sole means of verification if the postal address is listed in a publicly available register. Therefore, checking a user's IP address is generally excluded as a sole means of verification, in any case the means listed under lit. (a) to (h) must have been exhausted beforehand<sup>18</sup>, particularly because they can also serve as sole means, c.f. marg. no. 6. In addition, of primary relevance to the selection of the means of verification is the obligation on the part of the provider to ensure that the selected means of verification are reasonable, proportionate and effective. In the scope of its right to choose it seems to be permitted for the provider initially to determine one specific means of verification; that applies in particular if it is a means under lit. (a) to (h) and is the most 'data avoiding' means. That can also be effected through general terms and conditions. However, in the event that this means does not produce a confirmation and the user provides another reasonable, proportionate and effective means as per Art. 5 (1) Portability Regulation, the verification can also, as an exception, be completed using that means. In this respect, it is recommended, in the case of general terms and conditions which stipulate the most data economic means under lit. (a) to (h), that a respective opening clause be included.

17 Heyde, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 717; Synodinou in Synodinou et al, see Fn. 1, p. 248.

18 Heyde, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 717; Synodinou in Synodinou et al, see Fn. 1, p. 249.

- 46 The provider's right to choose is limited by the principle of 'data minimization' in Art. 8 Portability Regulation expressly for the verification of the Member State of residence. Firstly, the provider is, in this respect, primarily obliged to use those means of verification that are collected by the provider in the scope of concluding the contract anyway, or that are already available to the provider. Secondly, the provider is normally encouraged to limit itself to one of the means of verification, to the extent that one means comes from lit. (a) to (h) and that it seems suitable of being an effective verification of Member State of residence.<sup>19</sup> This will normally result in services provided for payment completing a verification based on the criterion in par. (1) lit. (b) (payment details such as the bank account or credit or debit card number of the subscriber), because this information is available anyway.
- 47 The Regulation does not clarify the question as to what the provider should do if it utilises two of the means of verification stated in par. 1 with contradictory results, such that it is not possible to verify Member State of residence with certainty in this manner. Whilst Art. 5 (1) does set an upper limit for the stated means of verification of two, this restriction is a result of the general data protection principle of data minimisation/data economy, according to which data collection and processing must always be limited to the extent necessary in order to fulfil the respective purpose. If the provider arrives at two different results from two means of verification, such that the collection of further data is necessary to verify the Member State of residence, one must therefore conclude that the provider may, where applicable after rechecking already utilised means of verification, if necessary use a third means of verification.<sup>20</sup>
- 48 If, during the term of the contract, the provider has reasonable doubts about the previously established Member State of residence, he is, under par. 2, entitled to repeat the verification of the Member State of residence. As par. 2 is a justification for data processing which interferes in the subscriber's protected interests, fairly strict criteria will have to be applied in relation to the requirement of reasonable doubts. Since the verification has already taken place, indications that the chosen means of verification has since changed will, in particular, constitute a reason to repeat the verification process. However, the simple fact that access has occurred from a different Member State will not suffice, since enabling access from other Member States is at the very core of the Portability Regulation. Even

if a temporary presence can still be assumed in the case of a longer stay abroad, access from a specific foreign country for several months can indeed form the grounds for legitimate doubts and a right of verification.<sup>21</sup> On contractual options for specifying the right to verify in cases of reasonable doubts (c.f. below section V.2.(d)).

- 49 In order to enable the verification of Member State of residence, par. 3 affords the provider the right to request the information required for verification and listed in par. 1. If the subscriber does not fulfil such a request and if the provider is thus prevented from carrying out an effective verification of the Member State of residence, the provider shall not grant the subscriber access to the online content service while the subscriber is temporarily present in another Member State. In such a case, the provider is exempt from the obligation under Art. 3 Portability Regulation accordingly. This raises the question of whether the provider is possibly obliged, in the case of refusal to provide the requested information, to utilise other effective means of verification, to the extent they are available. This should be answered in the affirmative within the meaning of an effective implementation of the purpose of the Regulation, to the extent that resorting to such means of verification seems proportionate and reasonable. Moreover, it does not follow from the limitation to no more than two of the means of verification that there is no obligation to switch to alternative means of verification, since the provider has specifically not received the information and has thus not utilised the corresponding means of verification.

### c.) Simplified process with consent of the rightholder (par. 4 and par. 5)

- 50 Par. 4 provides for a simplified process if a rightholder authorises the provision of access to its content in the case of temporary presence in another Member State, without verification of the Member State of residence. In this case the contract between provider and subscriber is sufficient to determine the Member State of residence. The authorisation must be obtained, however, for the protected subject matter concerned (work and/or ancillary right/neighbouring right) from the respective rightholder. It can be granted for individual or for all protected subject matter licensed to the service. Authorisation will make sense above all if the rightholder licences their content to the service across borders in any case and the rightholder thus has no interest in the provider of the online content

19 Heyde, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 716.

20 Of this opinion, also Eginger, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 698, 703.

21 See Ranke/Glückler, *Multimedia und Recht (MMR)* 2017, 378, 380, who have doubts after three months as to whether the Member State of Residence might have changed.

service only allowing portability of the content after verification. Furthermore, the rightholder has the inalienable right which, as stated in par. 5, explicitly cannot be waived by contract, to revoke consent from the provider. That can occur at any time, however only after prior notice. The notice must be given with a reasonable time period, so that the provider can make the necessary changes to its service. The notice and the revocation require no specific format. However, the contract with the provider can stipulate a specific form for the notice and revocation, without this constituting a violation of par. 5. On contractual provisions which deviate from par. 4 and par. 5 (c.f. below section V.2.(d)).

#### d.) Possibilities for deviating arrangements in the contract between provider and rightholder

- 51 The Regulation provides for the explicit possibility in Recital 26 Portability Regulation, that providers and rightholders can come to an agreement about which means of verification to use, within the limits of the Regulation. The option expressly provided for in par. 4, whereby the rightholder grants authorisation and completely forgoes the need for verification in respect of the work or ancillary copyright licensed by them is readily permitted. A reduction of the requirements under Art. 5 Portability Regulation, such as an acceptance of the means of verification in accordance with points i) to k) as sole means of verification, should also not raise any concerns. In this respect also, however, the respective rightholder can only dispose of the rights to which he is entitled, such that for every protected subject matter (work and/or ancillary right/neighbouring right) corresponding agreements must be made with all rightholders. Par. 5 stipulates, however, that the rightholders right to revoke a consent granted to the rightholder - whatever its content - cannot be contracted away. Rightholders and service providers can agree that, in cases where the provider has reasonable doubts as to the subscriber's Member State of residence, contrary to Art. 5 (2) Portability Regulation (c.f. above section V.2.(b)), the provider is obligated to complete a verification.
- 52 Since, however, the Regulation contains a number of provisions in particular in relation to the number and selection of means of verification, which serve to protect the user's privacy and thus deprive the provider and rightholder of freedom of action, raises the question as to what extent such agreements are permitted. Against the background of the principle of data minimisation/data minimization/economy, any agreement which represents, in comparison to the provisions of the Regulation, a (potential) intensification of checks and thus of the

interference in the subscriber's privacy, will likely be deemed unacceptable. This applies firstly in respect of agreements under which more than two of the means of verification under par. 1 must be used in every instance. Due to Art. 8 (1) Portability Regulation and the principle of data economy set out therein, even a standard obligation to use two means of verification would likely be unacceptable (c.f. above section V.2.(b)).<sup>22</sup> Secondly, stipulating specific means of verification will likely normally be deemed unacceptable where this goes against the principle that primarily those means of verification should be used which the provider collects or which are available to the provider anyway. Such a stipulation would prevent the provider from selecting the means which represent the least possible intrusion into the subscriber's privacy in each case. An arrangement regarding the selection of the means of verification will thus only be possible provided if it considers the specific circumstances of the respective online content service, in particular the information collected by the provider anyway in the respective case.<sup>23</sup> In conclusion, any arrangement will thus normally only be able to reproduce the selection of means of verification required under data protection law, with the exception of cases where several effective means of verification are collected by the provider anyway, or to provide for a verification process which is less strict than Art. 5 Portability Regulation. An arrangement whereby additional verifications must be carried out (e.g. at regular intervals) without reason would be unacceptable. In the interests of the subscriber's privacy, Art. 5 (2) Portability Regulation provides for an additional verification only where reasonable doubts exist, hence any agreement to perform checks without good reason constitutes an unacceptable increase in the level of strictness not foreseen in the Regulation to the detriment of subscribers.<sup>24</sup> An arrangement regarding additional verification in the case of legitimate doubts can, however, be provided for, because the Regulation does not mandate the protection of the freedom of choice. This does not unreasonably restrict users' rights because the service has a right to a further verification under par. 2. Making the existence of reasonable doubt and thus the right for renewed verification dependent on specific contractually defined circumstances is problematic, but not always unacceptable. Agreeing criteria which, in the individual case, cannot objectively lead to any legitimate doubts is unacceptable because that would involve a deeper intrusion into the subscriber's privacy.

22 Heyde, *Zeitschrift für Urheber- und Medienrecht* (ZUM) 2017, 712, 716 et seq.

23 Also of this opinion, Heyde, *Zeitschrift für Urheber- und Medienrecht* (ZUM) 2017, 712, 717.

24 Also of this opinion, Heyde, *Zeitschrift für Urheber- und Medienrecht* (ZUM) 2017, 712, 717.

## VI. Article 6 Cross-border portability of online content services provided without payment of money

### 1. General

53 According to Art. 6 (3) Portability Regulation, the provisions of the Regulation also apply to providers of free-of-charge online content services with the proviso that, in accordance with par. 1, they are free to decide whether they would like to enable Union-wide portability for their users. The reason for affording this decision making ability to providers of online content services provided without payment of money (“opt-in”) is that such services regularly require no, only optional, or a very limited form of registration. The Regulation thus regarded it as unreasonable to impose the obligation to verify Member State of residence as per Art. 5 Portability Regulation on such providers (see Recital 20 Portability Regulation). At the same time, however, the intention is for such providers to maintain the possibility of benefitting from the provisions of the Regulation and in particular the limited country of origin principle based on Art. 4 Portability Regulation, if they voluntarily decide to carry out a verification of their users’ Member State of residence.

### 2. Key aspects

#### a.) Choice of providing portability for online content services provided without payment of money (par. 1)

54 Art. 6 (1) Portability Regulation affords the provider of an online content service provided without payment of money the choice (“opt-in”) of committing to the provisions of the Portability Regulation. On the definition of online content services c.f. above section II.2.(e). Free-of-charge online content services are those which are not provided against payment of money as per Art. 3 (1) Portability Regulation. This includes, in particular, services financed through advertising or by public service broadcaster licence fees (c.f. above section III.). The requirement for providers of free-of-charge online content services to exercise their freedom of choice is that they in accordance with Art. 5 Portability Regulation (c.f. above section V.2.(b)).

55 Since Art. 6 (3) Portability Regulation refers in general to the provisions of the Regulation and not to individual articles within it and determines that they apply, it can thus be assumed that in the event that the provider voluntarily decides, as per Art. 6 (1) to enable the portability of the online content service for subscribers temporarily present in another Member State, all rights and obligations which the Portability Regulation sets out for online content services will apply to that provider. Under par. 1, the provider of a free-of-charge online content service is free to decide whether it would like to enable portability in other Member States or not. If the provider decides to enable portability, it cannot limit the portability to individual Member States (see Recital 20 Portability Regulation). The provision in Art. 3 Portability Regulation thus applies. The portability must therefore be ensured for all Member States. In return, the provider benefits from the limited country of origin principle as per Art. 4 Portability Regulation. As far as the verification of the Member State of residence is concerned, Art. 5 Portability Regulation applies.

56 Irrespective of that, the question arises of whether it is possible for the provider of a free-of-charge online content service to obtain the rights for several Member States and restrict access to its service accordingly. That question must be answered in the affirmative, since the Regulation itself explicitly differentiates, in Recital 12 Portability Regulation, between cross-border portability of online content services, which fall under the scope of application of the Regulation, and the cross-border access to online content services not governed by the Regulation (see Art. 1 (1) Portability Regulation). According to Recital 20 Portability Regulation, the freedom to decide afforded to providers of free-of-charge online content services under Art. 6 Portability Regulation is intended primarily to enable them to be included in the scope of this Regulation and thus to benefit from the advantages of the restricted country of origin principle set out in Art. 4 Portability Regulation. Providers of free-of-charge online content services should, according to Art. 6 Portability Regulation, be free to decide whether they will be subject themselves to the scope of application of the Regulation and thus be able to take advantage of the privilege in Art. 4 Portability Regulation or not. From that it follows that the respective providers must have the option of offering cross-border access to their services without falling under the scope of application of the Regulation, if this is possible for them without recourse to the limited country of origin principle in Art. 4 Portability Regulation, e.g. if they have rights throughout the EU anyway. This option is not available to providers of online content services provided with payment of money. If they obtain similarly comprehensive exploitation rights, they would only be able to release themselves

from the obligation to verify the Member State of residence (see Recital 29 Portability Regulation). Equally, providers of free-of-charge online content services are free to decide to commit only a certain part of the content of its free-of-charge service to the scope of application of the Regulation. For example, the provider can decide to design its service so that only its premium content is portable from the Member State of residence, while not providing this possibility for other content. Even just the higher cost of completing the verification according to Art. 5 Portability Regulation justifies the option of such a differentiation.

## b.) Information obligations (par. 2)

- 57 If the provider decides, in accordance with par. 1, to participate in the provisions of the Regulation, it must inform its subscribers, the relevant holders of copyright and related rights and the relevant holders of any other rights in the content of the online content service of its decision to provide the online content service in accordance with par. 1, prior to providing that service, as expressly stipulated in par. 2.
- 58 This information must be provided to the respective recipient by means which are adequate and proportionate. In Recital 20 Portability Regulation, the Regulation suggests the provider's website as an example of a suitable medium. This form of information should be a suitable information medium in relation to the own subscribers, since it is assumed that they regularly visit this website to access the online content service. In relation to rightholders, with whom a direct licensing relationship exists, however, it would appear reasonable and proportionate to require direct communication. Otherwise, at the least the contracting party must be notified, for forwarding on to the rightholder.

## VII. Article 7 Contractual provisions

### 1. General

- 59 The provision in Art. 7 (1) Portability Regulation declares contractual agreements which run counter to the provisions of the Regulation to be unenforceable. That is intended to prohibit the provisions of the Portability Regulation from being circumvented by contractual arrangements, and also to exclude providers from being subject to claims for breach of contract due to their mandatory obligations under the Regulation. As such, the provisions of the Portability Regulation

are declared to be binding internationally under international conflict of laws for contracts that fall under the Portability Regulation. These are overriding mandatory provisions as per Art. 9 (1) Rome I Regulation. Art. 7 (2) Portability Regulation clarifies this once more (c.f. below section VII.2.(b)). On conflicts, in particular with Art. 101 and Art. 102 TFEU (c.f. below section VII.2.(cc)).

## 2. Key aspects

- 60 Under Art. 7 (1) Portability Regulation contractual provisions which violate the provisions of the Regulation are deemed to be unenforceable. In this respect, Art. 7 (1) Portability Regulation explicitly mentions agreements between providers and rightholders as well as agreements between providers and subscribers. The wording of the provision ("including those") makes it clear, however, that Art. 7 (1) Portability Regulation applies, irrespective of the respective contracting parties, to any contractual agreements covered by the Portability Regulation.

### a.) Agreements contrary to the Regulation (par. 1)

- 61 Par. 1 second subclause explicitly mentions contractual provisions which prohibit cross-border portability of online content services or limit such portability to a specific time period as being contrary to the Regulation. That applies both to agreements between providers and subscribers and licensing agreements between rightholders and providers. The wording used ("including those") makes it clear that these are non-exhaustive examples of possible unacceptable agreements. These examples make it clear that under Art. 7 (1) Portability Regulation in particular any agreement which prohibits the provider of a paid online content service from enabling cross-border portability or makes it impossible or more difficult for the provider to do so, completely or partially, directly or indirectly, are deemed contrary to the Regulation. Considering this, in particular unconditional obligations for geo-blocking outside the Licensed Territory, which do not take into account the cross-border uses permitted in the Portability Regulation, are considered unacceptable (c.f. above section IV.2.). The Portability Regulation is thus specifically aimed at abolishing such general unrestricted obligations on geo-blocking (see Recital 10 Portability Regulation).
- 62 Agreements with providers of free-of-charge online content services which directly or indirectly restrict the Regulation are also deemed unacceptable,

however only to the extent such providers have taken advantage of their right to choose under the Portability Regulation. Rightholders can therefore continue to contractually prohibit cross-border access, e.g. through means of general unrestricted geo-blocking, for providers who have not exercised the right to choose, provided this is in accordance with antitrust law (c.f. below section VII.2.(c)).<sup>25</sup> However, where a provider decides voluntarily to conduct verification and thus to subject itself to the Portability Regulation, Art. 7 Portability Regulation applies. The prohibition under Art. 7 Portability Regulation is also intended to cover direct or indirect arrangements which prevent the provider of a free-of-charge service from exercising its right to choose or from waiving it.<sup>26</sup> Taking into account the regulatory objective of the Regulation, to create as comprehensive a Digital Single Market as possible, one has to assume that agreements which limit the provider of a free-of-charge online content service in its ability to exercise its freedom of choice will constitute a violation of the Regulation and will thus not be enforceable.

63 Agreements which attempt to limit the scope of application of the Regulation by using a more specific definition of the term “temporary presence”, e.g. by stipulating a specific time limit, will likely also be deemed unacceptable. The Regulation specifically forewent such a specific time limit and worded the definition in Art. 2 No. 2 Portability Regulation openly (c.f. above section II.2.(d)). A further-reaching restriction of this definition must thus generally be regarded as an unacceptable restriction of the rights and obligations of the provider under the Regulation.<sup>27</sup> That also applies specifically to agreements between providers and rightholders. If the provider had to comply with different contractual definitions, it would once more not be able to ensure uniform portability.<sup>28</sup> Everything else would also lead to fragmentation. On the permissibility of contractual arrangements regarding the verification of Member State of residence under Art. 5 Portability Regulation (c.f. above section V.2.(d)).

64 Any agreements with which the scope of services or the quality of the online content services are negatively affected, directly or indirectly, when accessing from another Member State compared to when accessing from the Member State of residence are certainly deemed unacceptable.

25 *Ranke/Glückler*, *Multimedia und Recht (MMR)* 2017, 378, 381; *Synodinou* in *Synodinou et al*, see Fn. 1, p. 258 et seqq.

26 *Heyde*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 719.

27 Also of this opinion, *Heyde*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 718; *Kraft*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 720, 725.

28 *Kraft*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 720, 725.

65 The provisions in Art. 7 (1) Portability Regulation do, however, permit the rightholder to demand a higher price for the enlarged territorial area of exploitation resulting from the restricted country of origin principle. It also does not seem unreasonable to demand a higher usage fee for a territorial area of use which has been increased through Art. 4 Portability Regulation, which also increases the attractiveness of the service.<sup>29</sup> Art. 7 (1) Portability Regulation therefore does not contain any independent limitation on the price setting freedom of rightholders. Rather, the usual antitrust law restrictions apply: the purpose of copyright and ancillary copyrights is not to secure the highest possible remuneration, only an equitable remuneration.<sup>30</sup> This can only be a matter for EU competition law, however, in the case of a dominant market position of the rightholder (Art. 102 TFEU).

66 As the legal consequence of a violation of the Regulation, Art. 7 (1) Portability Regulation, unlike for example Art. 101 (2) TFEU, does not stipulate the invalidity of the violating clause, but merely its unenforceability. How this can be transferred into national law seems problematic. For Germany, it seems to be compelling to assume no legal prohibition exists under Sec. 134 BGB (*Bürgerliches Gesetzbuch*, German Civil Code), hence Sec. 139 BGB also does not apply. Thus, contractual agreements will otherwise remain unaffected, provided, upon application of German contract law, an adjustment under Sec. 313 BGB could not be considered in exceptional cases, which can certainly be excluded in the case of agreements which are concluded after publication of the Portability Regulation. To the extent a reduction to the valid elements is by national law permitted, this should be considered. For example, obligations on geo-blocking which go too far could be reduced to the degree permitted.

## b.) Applicability of the Regulation independent of the law applicable to the contract (par. 2)

67 According to Art. 7 (2) Portability Regulation, the provisions of the Portability Regulation cannot be excluded by agreeing a different choice of law. The provisions of the Portability Regulation apply irrespective of which national contract law is applicable to the contracts of the provider of the online content service with the rightholders on one side or with the subscribers on the other. This helps clarify the fact that the provisions in Art. 7 (1)

29 *Heyde*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 715.

30 CJEU decision of 3 July 2012 in case C-128/11, para. 63 – *UsedSoft/Oracle*; CJEU decision of 4 October 2011 in case C-403/08, para. 108 – *Premier League/Murphy*.



Portability Regulation are mandatory provisions in internal private law and thus overriding mandatory provisions as per Art. 9 (1) Rome I Regulation. Which contracts fall under Art. 7 (1) Portability Regulation is determined by the scope of application of the Portability Regulation and thus Art. 1 Portability Regulation. Thus, the mandatory provisions apply to situations involving a portable online content service which is lawfully provided in a subscriber's EU Member State of residence and for which it must be ensured that the subscriber can access and use this service during a temporary presence in an EU Member State other than the EU Member State of Residence. Furthermore, the Portability Regulation applies for the underlying agreements concerning the acquisition of rights by the online content service from holders of copyrights or ancillary right/neighbouring right, however only to the extent they regulate the acquisition of rights related to the aforementioned portability situation in another EU Member State.

### c.) Relationship to other provisions, in particular Art. 101 and Art. 102 TFEU

68 The provisions of Art. 101 and Art. 102 TFEU with the corresponding invalidity remain applicable alongside Art. 7 Portability Regulation (see Recital 33 Portability Regulation). This can be relevant especially if the contractual provisions between the rightholder and the online content service constitutes an anti-competitive agreement which restricts the internal market as per Art. 101 TFEU.<sup>31</sup> It appears to be correct that Art. 101 TFEU does not generally exclude a territorial limitation of rights under Art. 3 par. 2 Directive 2001/29<sup>32,33</sup> There is therefore no general country of origin principle required by antitrust law for online uses in EU copyright law.<sup>34</sup>

31 See on this point CJEU decision of 4 October 2011 in case C-403/08, para. 134 et seqq. – *Premier League/Murphy*.

32 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.

33 Making available to the public; *Stieper*, Multimedia und Recht (MMR) 2011, 825; *Albrecht/Mutschler-Siebert/Bosch*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2012, 93, 96; *Ranke/Roßnagel*, Multimedia und Recht (MMR) 2012, 152, 156; *Baumann/Hofman*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2011, 890; *Ratjen/Langer*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2012, 299, 306; stricter: *Hoeren/Bilek* CR 2011, 735, 740; *Kreile*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2012, 186.

34 Partially of a different opinion, with an assessment looking at an individual market analysis: *Engels*, Die Vereinbarkeit der territorialen Aufspaltung von Verwertungsrechten mit den europäischen Binnenmarktregeln.

69 Art. 102 TFEU also remains applicable (see Recital 33 Portability Regulation) and its legal consequences from Art. 101 par. 2 TFEU in the event of infringement of its prohibition. However, Art. 7 Portability Regulation has priority over national law.

## VIII. Article 8 Protection of personal data

### 1. General

70 Art. 5 Portability Regulation stipulates a mandatory verification of Member State of residence through the collection of a series of subscriber personal data. In order to emphasise the protection of this personal data and to keep any interference in subscribers' privacy as minimal as possible, Art. 8 Portability Regulation contains a provision on handling personal data in the scope of the verification of the Member State of residence. Art. 8 Portability Regulation contains some provisions which are stricter than general data protection law, in particular in relation to the purpose of the data processing as well as the time limits for deletion. In addition to these more specific provisions, however, general data protection law rules apply to the data processing actions, which follow from the General Data Protection Regulation (GDPR).

### 2. Key aspects (par. 1 to 3)

71 Art. 8 (1) Portability Regulation clarifies that the processing of personal data to verify the Member State of residence under Art. 5 Portability Regulation must be carried out in line with European data protection law and in particular the principle of data minimisation must be taken into account. This provision also follows directly from the provisions under data protection law and thus only has clarifying effect. Directive 95/46/EC<sup>35</sup>, mentioned in par. 1, has been replaced by the General Data Protection Regulation, which despite not being explicit mentioned in par. 1, is now applicable to all data processing actions in the scope of the verification under Art. 5 Portability Regulation, provided no more specific provisions follow from Directive 2002/58/EC<sup>36</sup> (so-called ePrivacy Directive)

35 DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

36 DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy

or the corresponding national implementation provisions which pursue the same objective (see Art. 95 GDPR).

- 72 The principle of data minimization/economy explicitly emphasized in par. 1 (see also Art. 5 (1) (c) GDPR) requires that the scope and extent of the collection and processing of personal data are always limited to what is necessary. This principle has particular significance for the selection of verification criteria listed in Art. 5 Portability Regulation. For example, to avoid unnecessary data processing actions, the provider will be required primarily to rely on that data (e.g. payment data), which is already available to it for the purposes of performing the contract or which is necessary in the scope of the setting up or renewal of the contractual relationship (see Recital 27 Portability Regulation). As far as the checking of the IP address under Art. 5 (1) lit. (k) Portability Regulation, only the abbreviated address in binary format is required in order to determine the country from which the subscriber accesses the content service, while the collection of the complete IP address cannot be justified on the basis of Art. 5 Portability Regulation (see Recital 28 Portability Regulation).
- 73 Under Art. 8 (2) Portability Regulation, data collected as per Art. 5 Portability Regulation may be used solely to verify the Member State of residence of the subscriber and may not be disclosed to third parties, in particular rightholders. This provision represents an increase in stringency compared to the provisions of general data protection law, which allow for a rededication of the purpose of personal data processing in certain circumstances (see. Art. 6 (4) GDPR). According to the clear wording of the provision, a rededication of the data collected under Art. 5 Portability Regulation is not possible. However, this restriction does not apply to data which the provider already has in its possession and thus was collected on another basis.
- 74 The same applies to the unconditional obligation, stipulated in Art. 8 (3) Portability Regulation, immediately and irreversibly to destroy all data collected under Art. 5 Portability Regulation after every verification. In this respect also, the general provisions of data protection law provide for exceptions within narrow limits (see Art. 17 (3) GDPR), which, according to the precise wording of Art. 8 (3) Portability Regulation, do not apply to data collected as per Art. 5 Portability Regulation. However, in this respect also, the absolute obligation to delete the data under par. 3 does not apply to data which the provider already has and thus was collected on another basis.

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and electronic communications).

### 3. Data collection to protection against abuse?

- 75 Art. 5 (2) Portability Regulation provides for the possibility for providers with legitimate doubts as to the subscriber's initially determined Member State of residence to repeat the verification as per Art. 5 Portability Regulation. Art. 5 Portability Regulation also justifies the collection and processing of the subscriber's personal data, in accordance with Art. 8 Portability Regulation and the provisions of general data protection law, for the purposes of this repeat verification. However, it remains unclear to what extent the provider is supposed to be entitled to collect and process personal data such as a user's IP address, in order to prevent abuse by subscribers and thus even to establish doubts as to the accuracy of the initially determined Member State of residence in the first place. Since that type of data collection does not constitute data collection under Art. 5 Portability Regulation, rather prior data processing, Art. 8 Portability Regulation is not applicable to such data processing actions. The permissibility of such processing is determined solely according to the general provisions under data protection law. One possible justifying provision in this respect would be Art. 6 (1) lit. (c) GDPR (compliance with a legal obligation) or alternatively Art. 6 (1) lit. (f) (safeguarding the legitimate interests pursued by the controller or by a third party). Ultimately, it must be possible for the provider to verify that the requirements of Art. 3 and Art. 4 Portability Regulation have been met, i.e. in particular the subscriber's Member State of residence, in a proportionate manner. However, in order to make any interference in subscribers' privacy as minimal as possible, the data collection must be limited to the extent absolutely necessary and adequate measures must be taken to prevent any other use of the data collected.

## IX. Article 9 Application to existing contracts and rights acquired

### 1. General

- 76 Art. 9 Portability Regulation contains provisions on the handling of contracts and exploitation rights which were concluded or acquired prior to the application of the provisions of the Regulation on 1 April 2018. With a view to the objective of the Regulation, of ensuring as effective an implementation of the Digital Single Market as possible, these provisions are intended to ensure that the provisions of the Regulation also apply to ongoing contractual relationships.

## 2. Regulatory content

### a.) Applicability of the Regulation also to already existing agreements (par. 1)

77 Par. 1 firstly establishes that the Regulation shall apply also to contracts concluded and rights acquired before 1 April 2018, to the extent they are relevant for the provision of, access to and use of an online content service, in accordance with Art. 3 and 6 Portability Regulation, after 1 April 2018. The provisions of the Regulation thus apply to all usage relationships (existing agreements) in existence on 1 April 2018 for online content services provided for payment of money. At the same time, it must be assumed that the Regulation also applies to existing agreements which run counter to the provisions of the Portability Regulation. The contract clauses which are contrary to the Portability Regulation are thus not enforceable. Thus, the Portability Regulation leads to a contractual amendment. To the extent that it then becomes unreasonable to expect adherence to other contract clauses - not directly affected by the Portability Regulation - an amendment of the contract or even a termination of the contract by the service provider must be possible, in accordance with the principles applicable when the basis of the underlying transaction ceases to exist. However, a contract amendment in the form of a price increase is excluded. This is because Art. 3 (2) Portability Regulation and Recital 19 Portability Regulation exclude additional fees and this also applies to existing agreements. It is, however, conceivable that an existing agreement could be terminated in the event of unreasonableness. The subscriber may also terminate the contract under these conditions, in particular if they have concluded a contract in a country other than their Member State of residence and now want to conclude a contract - which is portable according to the Regulation - in their own Member State of residence. If the subscriber has concluded a package consisting of an online content service on the one side and electronic communications services (e.g. internet access) on the other, they may, however, only terminate the part of the contract which concerns the online content service (Recital 32 Portability Regulation).

78 Furthermore, the Portability Regulation also applies to contracts regarding the provision of online content services with rightholders pre-dating 1 April 2018. Even if the wording of Art. 9 (1) Portability Regulation is not completely unambiguous in this respect, it does follow clearly from Recitals 31 and 32 Portability Regulation, which even afford a grace period between the Portability Regulation coming into force (20 July 2017, as per Art. 11 (1) Portability Regulation) and the first day of application (1 April 2018, as per Art. 11 (2) Portability Regulation),

in order to allow time for existing licensing agreements to be renegotiated. Therefore, it is certainly conceivable for a new price to be set for licensing agreements, which reflects the increased territorial exploitation possibilities and the resulting increase in attractiveness of the service. The Portability Regulation does not in principle prohibit rightholders from demanding higher prices for the larger scope of use (c.f. above section VII.2.(a)). If the parties cannot agree, a claim on the part of the rightholders to an amendment or termination of the contract is conceivable. This is, however, a question of the applicable national contract law.

79 For example, where German contract law applies, the primary possibility is a claim for contractual amendment (or subsidiarily also withdrawal or termination) due to disruption of the basis of the transaction as per Sec. 313 BGB (Bürgerliches Gesetzbuch, German Civil Code). This possibility cannot be excluded on the grounds that risk would then lie with one party.<sup>37</sup> The risk of territorial expansion of the exploitation authorisation through the Portability Regulation does not lie solely in the rightholders area of risk, because the service gains attractiveness. However, the principle of the disruption of the basis of the transaction may not be applied recklessly rather only if it seems essential to prevent consequences which are plainly incompatible with law and justice and thus unreasonable for the contracting parties concerned.<sup>38</sup> A case-by-case assessment is therefore required. One factor which suggests the situation is unreasonable for the rightholder and which would therefore give rise to an adjustment in remuneration is that the rightholder is forced to accept a larger scope of use without additional remuneration whilst the provider's service becomes more attractive to subscribers, even if this cannot be reflected in a higher total payment from the subscriber. In any case, service providers who invoice on a transaction basis may be able to create a higher usage intensity as a result of the larger territorial coverage.<sup>39</sup> Another conceivable consequence is a modification of certain obligations of the service to the degree allowed by the Regulation, e.g. with respect to geo-blocking obligations, which remain permitted without verification of the Member State of residence or for countries outside the EU. In this respect, the contractual amendment should be made in the manner of a reduction to the valid elements.<sup>40</sup>

37 BGH (Bundesgerichtshof, German Federal Court of Justice) decision of 25 November 2004 in case I ZR 49/02 – *Kehraus*.

38 BGH decision of 25 November 2004 in case I ZR 49/02 – *Kehraus*; BGH decision of 4 July 1996 in case I ZR 101/94; – *Klimbim*.

39 *Heyde*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 715.

40 *Ranke/Glückler*, Multimedia und Recht (MMR) 2017, 378, 382.

Withdrawal or termination are subsidiary to remuneration adjustment<sup>41</sup> and should as a rule be considered by the rightholder if the provider of the service does not agree to a remuneration adjustment.

- 80 The legal consequence of the application of the Portability Regulation to existing agreements is that contractual clauses in user contracts (with subscribers) or licensing agreements (with rightholders) are not enforceable from 1 April 2018 onwards, as per Art. 7 Portability Regulation (c.f. above section VII.2.(a)). Furthermore, invalidity could be considered, in particular for violations against Art. 101 or Art. 102 TFEU (c.f. above section VII.2.(c)). In order to avoid negative legal consequences, therefore, a review of and, where applicable, amendment to corresponding licensing agreements appears to be appropriate.

### b.) Verification of Member State of residence in the case of old contracts (par. 2)

- 81 Par. 2 contains specific time limits in relation to the obligation to verify the Member State of residence under Art. 5 Portability Regulation, within which the review of existing contracts which deviate from Art. 5 Portability Regulation must have been completed. For usage contracts concluded prior to 1 April 2018 for online content services provided against payment of money, the corresponding verification of the Member State of residence must be completed by 2 June 2018. Providers of an online content service provided without payment of money, who voluntarily decide to participate in the provisions of the Regulation as per Art. 6 Portability Regulation, must complete the corresponding verification of pre-existing subscribers within two months from the date the service was first offered under Art. 6 Portability Regulation. For contracts concluded or renewed after this date, a verification must be undertaken as per Art. 5 Portability Regulation. In the original text of the Regulation, the date given was still 21 May 2018; however, this date was corrected to 2 June 2018 in a corrigendum to the Regulation in OJ L 198/42 of 28 July 2017.

## X. Article 10 Review

- 82 By 21 March 2021, and as required thereafter, the Commission shall assess the application of this Regulation in the light of legal, technological and economic developments, and submit to the European Parliament and to the Council a report thereon.

<sup>41</sup> BGH decision of 4 July 1996 in case I ZR 101/94;– *Klimbim*.

The report referred to in the first paragraph shall include, inter alia, an assessment of the application of the verification means of the Member State of residence referred to in Art. 5, taking into account newly developed technologies, industry standards and practices, and, if necessary, consider the need for a review. The report shall pay special attention to the impact of this Regulation on SMEs and the protection of personal data. The Commission's report shall be accompanied, if appropriate, by a legislative proposal.

## XI. Article 11 Final provisions

- 83 The provisions and stipulations of the Regulation are binding in all Member States from 1 April 2018, see Recital 35 Portability Regulation. In the original text of the Regulation, the date given was still 20 March 2018; however, this date was corrected to 1 April 2018 in a corrigendum to the Regulation in OJ L 198/42 of 28 July 2017. It does not require transposition into national law of the EU member states.

- 84 The grace period between the entry into force (par. 1) and the date of application (par. 2) is explained by the fact that the Regulation applies to contracts and rights concluded or acquired prior to the date of its application. The intention is to enable rightholders and providers of online content services who fall under the scope of application of this Regulation to make the necessary adjustments to the new situation and enable providers to amend their terms for the use of their services (Recital 32 Portability Regulation).

## C. Conclusion

- 85 The Portability Regulation is another step towards reducing digital borders within the European Union. The new regulations are intended to reflect the behaviour of EU citizens, to conclude contracts for the use of online content. However, the Portability is not free from any conceptual difficulties. It is unclear, above all, what time limit is to be seen in a “temporary presence”.

### Annotation

This Article is based on the commentary of the REGULATION (EU) 2017/1128 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on cross-border portability of online content services (“Portability Regulation”) in the internal market by both authors in the renowned German copyright commentary Fromm/Nordemann, published in German language in

its 12th edition 2018. It has been amended to meet the requirements of this journal and the expectations of an international readership. It does, however, still contain some references to the German perspective on the Portability Regulation, which may serve as an exemplary application of its provisions within a member State.

# Notice-and-Takedown Procedure under Greek Intellectual Property Law 4481/2017

by Charis Tsigou\*

**Abstract:** After two years of negotiations and several drafts, the provisions of the Directive 2014/26/EU on collective management of copyright and related rights were introduced into Greek legislation by the Law 4481/2017, which establishes a strict legal framework for the collective management organisations and places great emphasis on state control mechanisms. Additionally, Law 4481/2017 introduces a notice-and-takedown procedure as a sanction to the intermediaries (access providers or hosting service providers) and website owners for online violation of intellectual property and related

rights. Although it is an attempt to swiftly resolve cases of violation through the internet, the unclear relation of this sanction system to the system laid down by the Law 2121/1993 on copyright and related rights creates several inconsistencies and legal issues. At the same time, the Committee on Internet Violations of Intellectual Property (CIVIP) established to implement the notice-and-takedown procedure lacks institutional integration in the public administration structure, a situation that undermines the effectiveness of its decisions and may annul the expected benefits of the new procedure in practice.

**Keywords:** Directive 2014/26/EU; eCommerce Directive; copyright management; online copyright infringements; intermediaries; website owners; notice-and-takedown procedure; Greek Law 4481/2017

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## A. Introduction

1 The recent Greek Law 4481/2017 transposed the provisions of the Directive 2014/26/EU on collective management of copyright and related rights in a rigorous way, creating a rather strict legal framework providing various sanctions.<sup>1</sup> Additionally, article 52§1 of this Law introduces, for the first time in the Greek jurisdiction, a sanction-imposing mechanism for online copyright infringements, implementing the provisions of the Directive 2000/31/EC on electronic commerce (art. 12-14) and the corresponding Presidential Decree PD 131/2003 (art. 11-13).

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1 See D. Kallinikou / P. Koriatopoulou, *Chronique de Grèce*, RIDA 254 oct. 2017, pp. 119-120.

2 The sanctions are imposed to specific categories of internet intermediaries<sup>2</sup> (internet access providers<sup>3</sup>

2 For the different types of internet intermediaries and the evolution of their concept see P. Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*, Santa Clara High Technology Law Journal, vol. 19, 1/2003 available at <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1315&context=chtlj>, P. A. De Miguel Asensio, *Internet Intermediaries and the Law Applicable to Intellectual Property Infringements* 3 (2012) JIPITEC 3, 350 available at <https://www.jipitec.eu/issues/jipitec-3-3-2012/3522/asensio.pdf>, B. van der Sloot, *Welcome to the Jungle: the Liability of Internet Intermediaries for Privacy Violations in Europe*, (2015) JIPITEC 211, available at <https://www.jipitec.eu/issues/jipitec-6-3-2015/4318>.

3 For the definition of the internet access providers, on the one hand Greek legal doctrine follows the framework set by the articles 12-14 of the Directive 2000/31/EC on electronic commerce, and, on the other hand, the ECJ jurisprudence. According to the Order of 19 February 2009 in the case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH (TELE2), “access providers which merely provide

or hosting service providers<sup>4</sup>) and website owners (art. 52§1.5(b) of L. 4481/2017). For the imposition of such sanctions, a three-member administrative Committee on Internet Violations of Intellectual Property (CIVIP), formed by Decree of the Minister of Culture, is foreseen.

## B. Brief overview of notice-and-takedown mechanisms in the USA and EU

- 3 The existing mechanisms for combating online copyright infringements are usually hinged on two different axes, either as self-regulation systems ensuring an out-of-court resolution of the dispute or as systems based on judicial or administrative sanctions.
- 4 Following the self-regulation approach, in 1998 the USA released internet service providers of any liability due to the transmission of illicit content under the condition that they warned users in advance that their connection would be suspended in the case of unauthorised exchange of protected works.<sup>5</sup> After a standard-format written complaint, the provider commences the notice-and-takedown procedure, removing the illicit content or prohibiting access to it, without any prior judicial or administrative act.<sup>6</sup> In Europe, analogous

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users with Internet access, without offering other services such as email, FTP or filesharing services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Article 8(3) of Directive 2001/29” (para. 46).

- 4 For the integration of the concept of “hosting service providers” to the broad notion of internet intermediaries see the definition proposed by OECD according to which “internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties”. See OECD, *Report on the Economic and Social Role of Internet Intermediaries (2010)*, available at <<https://www.oecd.org/internet/ieconomy/44949023.pdf>>. See also Prof. Dr G. Sartor, *EU In-Depth Analysis. Providers Liability: From the eCommerce Directive to the Future (2017)*, available at <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL\\_IDA\(2017\)614179\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA(2017)614179_EN.pdf)>.
- 5 See Digital Millennium Copyright Act (DMCA), Sec. 512 (C) (3)-Limitations on liability relating to material online.
- 6 For the functioning and the impact of the US notice-and-takedown procedure see M. Peguera, *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*, Columbia Journal of Law Arts, vol. 32, 4/2009, L. Trapman, *American and European safe harbours*, Kluwer Copyright Blog December 14, 2016 available at <<http://copyrightblog.kluweriplaw.com/2016/12/14/american-european-safe-harbours/?print=pdf>>, E. M.

procedures were adopted in Ireland<sup>7</sup> and Hungary, while in Finland a notice-and-takedown procedure was established for intellectual property violations. Similarly, the British Digital Economy Act 2010/2017 contains a procedure of notice of the users by the provider, following a complaint by the rightholder.<sup>8</sup>

- 5 Contrary to the above, other jurisdictions consider it necessary to interject an administrative act or a court judgment affirming that an online copyright infringement has occurred, in order to ensure that the rule of law principle is observed. In its Law on digital economy<sup>9</sup> and as early as 2004, France introduced the three-strike mechanism, which is activated following the complaint of the rightholder by the competent independent authority (HADOPI) itself established in 2009.<sup>10</sup> The authority warns the user about the complaint and simultaneously notifies the provider; if there is a second violation, it sends a registered letter and, in case of non-compliance by the user, it obliges the provider (by means of a resolution of a special judicial board) to terminate the internet connection. The provision about a judicial resolution was included in the law following the reaction of the French Constitutional Court to the police powers of the independent authority HADOPI. It was found that the power to terminate a particular internet connection limits the right to information to an excessive degree and, as such, may not be yielded by an administrative authority, but must be subject to the safeguards of the judicial process.<sup>11</sup>

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Asp, *Section 512 of the Digital Millennium Copyright Act: User Experience and User Frustration*, 103 IOWA L. REV. 751 (2018).

- 7 Art. 40(4) of the Copyright and Related Rights Act 2000 provides for a notification and take down procedure to the ISP, which informs the user requesting retraction of the content.
- 8 A. Giannopoulou, *Copyright enforcement measures: the role of the ISPs and the respect of the principle of proportionality*, European Journal of Law and Technology (EJLT), Vol. 3, 1/2012, available at <<http://ejlt.org/article/view/122/204>>.
- 9 Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique available at <[www.wipo.int/wipolex/en/details.jsp?id=12761](http://www.wipo.int/wipolex/en/details.jsp?id=12761)>.
- 10 HADOPI was established by the French Law 2009-669 on Dissemination and Protection of Intellectual Property on the Internet (Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet), which was later amended by the Law HADOPI II on the Criminal Protection of Intellectual Property on the Internet (Loi n°2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet). Both texts available at <[www.wipo.int/wipolex/fr/details.jsp?id=5615](http://www.wipo.int/wipolex/fr/details.jsp?id=5615)>.
- 11 Décision n° 2009-580 DC du 10 juin 2009, considérant 16: “les pouvoirs de sanction institués par les dispositions critiquées habilite la commission de protection des droits, qui n'est pas une juridiction, à restreindre ou à empêcher l'accès à internet de titulaires d'abonnement ainsi que des personnes qu'ils en font bénéficier; que la compétence reconnue à cette autorité administrative n'est pas limitée à une catégorie particulière

- 6 Similarly, on 12 December 2013 the independent authority for communication industries (AGCOM) in Italy issued a Regulation containing a detailed notice-and-takedown procedure for the sanctioning of online copyright infringements. Such procedure targets only the internet service providers (ISPs), while excluding peer-to-peer networks and end users. The extended powers of AGCOM on the basis of this Regulation were strongly criticized; the Regulation's validity was challenged before the Italian Courts, but it was finally ratified by a TAR Lazio decision on 30 March 2017.<sup>12</sup>
- 7 In Spain, the competence for proceeding to a notice-and-takedown sanctioning mechanism for online copyright infringements was given to the Spanish Copyright Commission (SCC), which is formed as an administrative commission subject to the oversight of the Ministry of Culture.<sup>13</sup> The notice-and-takedown procedure was established by the Royal Decree 1889/2011, implementing the provisions of the Spanish Sustainable Economy Act 2/2011 of 4 March 2011 (the "Sinde Act", as amended by Law 2/2010 of 29 June 2012). According to the Royal Decree, the role of the Spanish Copyright Commission (SCC) was enhanced by the attribution of a notice-and-takedown competence.<sup>14</sup> In the

*de personnes mais s'étend à la totalité de la population ; que ses pouvoirs peuvent conduire à restreindre l'exercice, par toute personne, de son droit de s'exprimer et de communiquer librement, notamment depuis son domicile ; que, dans ces conditions, eu égard à la nature de la liberté garantie par l'article 11 de la Déclaration de 1789, le législateur ne pouvait, quelles que soient les garanties encadrant le prononcé des sanctions, confier de tels pouvoirs à une autorité administrative dans le but de protéger les droits des titulaires du droit d'auteur et de droits voisins"* available at <http://www.conseil-constitutionnel.fr/decision/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html>. See also E. Derieux, *France: la loi «création et internet» dite Hadopi 2*, La Revue Européenne des Médias et du Numérique, 12/2009, available at <http://la-rem.eu/2009/09/22/france-la-loi-creation-et-internet-dite-hadopi-2>; E. Derieux, *La loi française création et Internet*, La Revue Européenne des Médias et du Numérique, 10-11/2009, available at <http://la-rem.eu/2009/03/20/la-loi-franc%CC%A7aise-creation-et-internet>. For the criticism towards HADOPI see J-A Fines-Schlumberger, *La Hadopi: totem et tabou*, La Revue Européenne des Médias et du Numérique, 36/2015, available at <http://la-rem.eu/2015/11/12/la-hadopi-totem-et-tabou>; N. Lucchi, *Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI)*, Cardozo Journal of International and Comparative Law (JICL), Vol. 19 2011, at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1816287](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1816287).

- 12 G. Campus, *Italian public enforcement on online copyright infringements: AGCOM Regulation held valid by the Regional Administrative Court of Lazio*, Kluwer Copyright Blog, June 16 2017, available at <http://copyrightblog.kluweriplaw.com/2017/06/16>.
- 13 G. Gallego, *New procedure against Internet copyright infringement in Spain*, available at <http://ehoganlovells.com/cv/d225836c375411d30c0b90695b966cfda822f0d8>.
- 14 On notice-and-takedown procedure in Spain and the SCC competences see G. Gallego, *New procedure*

case that SCC issues a resolution confirming online copyright infringement, the information society service provider (ISSP) in question has to remove the illicit content, otherwise ISPs may be required by the SCC to suspend their service. It is worthy to note that the SCC's request for suspension of the service or blocking of access has to be previously authorized by a judge.

- 8 In Germany, where the three-strike French system is viewed with reservation, art. 101§9 of the Law on Intellectual Property (1965/2017)<sup>15</sup> requires a court order in the case where the information on the violation of an intellectual property right may be accessed only through the transfer data of a particular IP address.

### C. The notice-and-takedown procedure under Greek Law 4481/2017

- 9 Greek Law eschews the self-regulation approach and seems inspired by the abovementioned procedures already adopted in other EU member states, which require the intervention of a judicial or administrative body.
- 10 The recent Greek L. 4481/2017 chose to establish a voluntary out-of-court procedure for the resolution of disputes concerning online copyright infringements, initiated by a complaint of the right holder before a special administrative Committee on Internet Violations of Intellectual Property (CIVIP). The Committee has a three-year term of office and consists of the Chairman of the Hellenic Copyright Organisation (OPI), a representative of the Hellenic Telecommunications and Post Commission and a representative of the Hellenic Data Protection Authority (art. 52§1.2).
- 11 This arrangement aims to reduce court workload and to facilitate rightholders by inaugurating a notice-and-takedown procedure. According to

against Internet copyright infringement in Spain, available at <http://ehoganlovells.com/cv/d225836c375411d30c0b90695b966cfda822f0d8>; also Hogan Lovells Global Media and Communications Quarterly 2015, *Is 2015 the year of the website-blocking injunction?*, <http://www.hoganlovells.com/files/upload/Is%202015%20the%20year%20of%20the%20website-blocking%20injunction.%20pdf.pdf>. For ISPs liability in Spain under eCommerce Directive see M. Peguera, *Internet Service Providers' Liability in Spain: Recent Case Law and Future Perspectives*, 1 (2010) JIPITEC 151, available at <https://www.jipitec.eu/issues/jipitec-1-3-2010/2823/peguera-isp-liability-spain.pdf>.

- 15 Act on Copyright and Related Rights 1965/2017 (Urheberrechtsgesetz) available at [https://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html](https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html).



article 52§§1.1 and 1.5(b) of L. 4481/2017 this procedure includes only specific categories of internet intermediaries (internet access providers or hosting service providers) and website owners while excluding the end users (i.e. the persons who perform acts of reproduction, uploading, downloading, peer-to-peer, streaming or cloud computing). Moreover, it is provided that the initiation of this procedure or even the adoption of a decision by the Committee on Internet Violations of Intellectual Property (CIVIP); it does not preclude the rightholder from filing a lawsuit (art. 52§1.8). In addition to the rightholder, the collective management organisations and the collective protection organisations<sup>16</sup> are expressly allowed to bring a request before the Committee (art. 52§1.1). The lack of any reference to the independent management entities is not explained in the explanatory memorandum of the Law; consequently, this gap must be filled by means of a *mutatis mutandis* interpretation, so that all groups of secondary rightholders may enjoy equal protection.

## I. Legal nature of the Committee on Internet Violations of Intellectual Property

- 12 The explanatory memorandum of the Law clearly demonstrates the administrative nature of the Committee on Internet Violations of Intellectual Property (CIVIP). Nevertheless, article 52§1 of the L. 4481/2017 and its implementing Ministerial Decree 196/2018<sup>17</sup> form a fragile regime, which does not guarantee the institutional integrity of the Committee, as it does not achieve its organic and functional integration within the body of public administration, due to formal and substantive reasons.
- 13 According to Greek Administrative Law, the inclusion of a specific body in the public sector requires the fulfilment of either the formal or the functional criterion. The formal criterion<sup>18</sup> is met if the body is hierarchically subject to the control of another, higher administrative organ. The functional

criterion<sup>19</sup> is satisfied if the body is exercising public powers in pursuit of a direct public interest.

- 14 First of all, the formal requirement of Greek administrative law for the inclusion of the Committee in the public administration corpus is not met. The Committee may be formed as a body of administrative nature, but it is not organically integrated to the public administration structure since it is subject neither to a hierarchical higher authority, nor to the oversight of the Ministry of Culture. On the contrary, the apparatus of the Committee is blatantly absorbed by a private legal entity: the Committee meets at the offices of the Hellenic Copyright Organisation (OPI), it uses the website of the OPI to publish its resolutions, and the fee for the review of requests by the Committee is payable to the OPI (art. 11§2 of MD 196/2018).
- 15 It should be mentioned that, according to art. 69§4 of the Greek L. 2121/1993 on copyright and related rights, the Hellenic Copyright Organisation (OPI), is a state-controlled<sup>20</sup> legal entity which does not belong to the public sector but “works in the public interest under the rules of the private economy and is governed by private law”. Furthermore, both legal theory and jurisprudence accept that the OPI’s main duty consists “in assisting the Minister of Culture, in order for the latter to exercise administrative control”<sup>21</sup> on collective management societies and does not extend to administrative decision-making. Hence, the functioning of the CIVIP under the structure of a private legal entity, such as the OPI, clearly prevents its integration into the public administration hierarchy.
- 16 Such a setup, far from incorporating CIVIP in the administrative mechanism structure, places it instead under the purview of a private legal entity whose stated mission is to assist the Minister of Culture in his exercising administrative control over collective management societies.
- 17 Furthermore, the substantive test of the *de facto* exercise of public dominion similarly fails, as the Committee does not regulate administrative law issues, nor does it pursue a public objective in service of public interest. On the contrary, it addresses

16 L. 4481/2017 provides more categories of collective management organisations than Directive 2014/26/EE, as for instance the collective protection organisations. On this subject see P. Koriatopoulou / Ch. Tsigou, *The Law 4481/2017 on collective management organisations and the relevant amendments in Greek copyright law (in Greek)*, Synigoros, 122/2017, p. 28.

17 The Committee on Internet Violations of Intellectual Property (CIVIP) was established by the Ministerial Decision 196/2018.

18 See P. Dagtoglou, *Administrative Law (in Greek)*, 1992 (3<sup>rd</sup> ed.), p. 33.

19 See P. Dagtoglou, *Administrative Law (in Greek)*, 1992 (3<sup>rd</sup> ed.), pp. 34 and 230-231.

20 See T. Synodinou, *The adventures and misadventures of the implementation of the Directive on collective management of copyright in Greece and Cyprus (Part I)*, March 27 2018, available at <http://copyrightblog.kluweriplaw.com/2018/03/27/adventures-misadventures-implementation-directive-collective-management-copyright-greece-cyprus-part/>.

21 See the decisions Council of State 949/2000 (in Greek), NOMOS Database, Council of State 1058/2010 (in Greek), NOMOS Database. Also D. Kallinikou, *Copyright and Related Rights (in Greek)*, 2005 (2<sup>nd</sup> ed.), pp. 274-275.

disputes of a purely private nature between rightholders and intermediaries (internet access providers, hosting service providers) or website owners.

- 18 The legal paradox of establishing an administrative committee without formal or substantive relation to the administrative structure of the state may undermine the legal validity and enforceability of CIVIP's decisions, by making them vulnerable to annulment by the administrative courts. For that reason, it would have been preferable either to have CIVIP integrated into the public administration corpus and the subsequent oversight by the Ministry of Culture, or to have established it as an independent regulatory authority with larger staffing and institutional safeguards similar to the other regulatory authorities. Independent regulatory authorities are integrated in the public administration structure whilst retaining their functional independence vis-à-vis the executive branch, since they are subject neither to hierarchical control nor to oversight by a superior state organ.<sup>22</sup> They are only subject to the legislature, since their members are obliged to observe the law, and to the judiciary, since their decisions may be reviewed by the courts.<sup>23</sup> The parliamentary control exercised by the Institutions and Transparency Commission of the Parliament is not a form of administrative control, because it does not aim to control the legality of their activities, but to safeguard transparency and administrative unity within

the framework of the rule of law.<sup>24</sup> The ECJ in the case C-518/07 concerning state oversight on the authorities monitoring personal data processing, found that the principle of democracy, which imposes the subjugation of the public administration to the instructions of the government “does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government”.<sup>25</sup> It affirmed, therefore, the functional independence<sup>26</sup> of such authorities, noting, however, that “the absence of any parliamentary influence over those authorities is inconceivable” and that they may be subject to reporting obligations towards the parliament.<sup>27</sup>

- 19 In any case, it would be for the legislator to decide the appropriate mechanism for the inclusion of the Committee on Internet Violations of Intellectual Property (CIVIP) in the public administration corpus once it becomes clear that the current structure could undermine the validity of the Committee's decisions.

## II. Formal requirements of the application and resolution procedure

- 20 According to express provisions of the L. 4481/2017, before filing an application, a previous unsuccessful attempt at an out-of-court settlement through a procedure offered by the provider (art. 52§1.4, al. c) and the payment of a review charge to the OPI<sup>28</sup> (art. 52§1.3, al. d) must have taken place. Additional implicit formal requirements are the use by the claimant of the standard application form (art. 52§1.4, al. b), as well as the statement of non-existence of a pending court case or final court judgment over the same issue (art. 52§1.5, al. a). If a pending court case or final court judgment exist, the case file is mandatorily closed by the Committee.
- 21 A serious issue is the requirement of payment of the review fee to the OPI. First, the OPI does not participate as such in the Committee (its Chairman

22 On the status and role of independent regulatory authorities in Europe see OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, London, 10-11 January 2005, available at <<https://www.oecd.org/unitedkingdom/35028836.pdf>>; see also ERGA, *Report on the Independence of NRAs*, 15 December 2015, available at <<https://ec.europa.eu/digital-single-market/en/news/erga-report-independence-national-regulatory-authorities>>.

23 On the questions of legitimacy and accountability of independent regulatory authorities see G. Majone, *The Regulatory State and its Legitimacy Problems*, Archive of European Integration, Political Science Series, 56/1998, at <[http://aei.pitt.edu/32416/1/1208943461\\_pw\\_56.pdf](http://aei.pitt.edu/32416/1/1208943461_pw_56.pdf)>; M. Thatcher, *Regulation after delegation: independent regulatory agencies in Europe*, Journal of European Public Policy, December 2002, at <<https://eclass.uoa.gr/modules/document/file.php/PSPA113/THATCHER%201.pdf>>; F. Gilardi, *Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis*, Journal of European Public Policy (JEPP), December 2002, available at <<https://www.fabriziogilardi.org/resources/papers/Gilardi-JEPP-2002.pdf>>; M. Maggetti, *Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review*, Living Reviews in Democracy, November 2010 at <[https://www.ethz.ch/content/dam/ethz/special-interest/gess/cis/am/CIS\\_DAM\\_2015/WorkingPapers/Living\\_Reviews\\_Democracy/Maggetti.pdf](https://www.ethz.ch/content/dam/ethz/special-interest/gess/cis/am/CIS_DAM_2015/WorkingPapers/Living_Reviews_Democracy/Maggetti.pdf)>; M. Maggetti/K. Ingold/F. Varone, *Having Your Cake and Eating It, Too: Can Regulatory Agencies Be Both Independent and Accountable?*, Swiss Political Science Review, 19(1)/2013, available at <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/spsr.12015>>.

24 Article 2§1 of Greek L. 3051/2002 on Independent Regulatory Authorities.

25 CJEU Case C-518/07 of 9 March 2010, *European Commission v Federal Republic of Germany*, ECLI:EU:C:2010:125, paras. 40-42.

26 For the tendency to strengthen the role of independent authorities in the public sphere see article 30 of the Proposal for the Amendment of Directive 2010/13/EU [COM(2016) 287final], available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0287&from=EN>>.

27 CJEU Case C-518/07 of 9 March 2010, paras. 43-45.

28 See article 52§1, al. 3 of L. 4481/2017 and article 11§2 of MD 196/2018.

does, but in a personal capacity), and second, it is possible that objections of incompatibility may be raised because the private legal entity to which the fee is payable is concurrently receiving income from the activities of the claimant, in the case where the latter is a collective management organisation, according to article 69§2 of L. 2121/1993 on copyright and related rights.

- 22 The review procedure is flexible and swift, responding to the requirements of the online environment. The Committee, within ten working days from the receipt of the application, may decide either to close the case on the grounds of formal or substantive reasons enumerated in the Law (art. 52§1.5) or to continue the proceedings. The CIVIP informs intermediary (internet access provider or hosting service provider) and, if possible, other involved parties (website owner) about the filing of the application (summary of the facts, the contested rights and the Committee's findings). The Committee also notifies the abovementioned parties of their option either to comply with the rightholder's request (usually to withdraw the protected work from the internet) or obtain a license for the use of the work in question within a short deadline of ten working days. At this stage, the case closes with a Committee's decision in the event of voluntary removal of the illicit content or is terminated if a license is authorized by the beneficiary.
- 23 If the review continues, the Committee, by a reasoned and justified resolution, issued within forty working days from the submission of the application, either closes the case if no violation is found or invites the respondent to comply within three working days from the service of the resolution (art. 52§1.6, al. b). The provision in article 8, al. a, of the MD 196/2018, which reduces the aforementioned compliance deadline to two working days is contrary to the Law and subsequently voidable.<sup>29</sup> Considering that all the aforementioned deadlines may be doubled by means of a Committee decision, the maximum total duration of the review procedure is around four months.
- 24 With its resolution<sup>30</sup> the Committee orders either the hosting providers to proceed to the permanent removal (takedown) of the illicit content (art. 9 of MD 196/2018) or the access providers to suspend access to said content for a specific time (art. 10§3 of MD 196/2018). When the violation is committed through a server located outside the territory of Greece, the suspension of access is obligatory by

the Law (art. 52§1.6, al. g). Furthermore, if a large-scale violation is found, particularly violation of a large number of works or violation of a commercial scale,<sup>31</sup> the Committee has the discretionary power to immediately impose the suspension of access to specific content "in the most appropriate and technically efficient manner" (art. 10§1 of MD 196/2018).

- 25 The allowance of such a degree of discretion must be offset by the requirement of sufficient and adequate justification of such a decision in relation to the severity of the violation, in order to maintain the proportionality of the sanction, as dictated by article 36§3 of Directive 2014/26/EU.<sup>32</sup> In any case, the Committee's resolution needs to reflect an ad hoc balance between the protection of intellectual property, the protection of the personal data of the users, and the right to information, in accordance with EU law<sup>33</sup> and jurisprudence.<sup>34</sup>
- 26 After the service of the resolution to impose such administrative sanctions, a fine of 500 to 1,000 Euros per day of non-compliance may be imposed on the offender following a new decision of the Committee.<sup>35</sup> The Law indicatively provides several criteria for the determination of the fine, such as the severity of the violation and repeated offenses. Article 8, al. d of MD 196/2018 adds to these criteria the duration of the violation, but such addition lies beyond the legal mandate provided to the issuing Minister. The legal service of the Committee's resolution, which impose the sanctions of content removal or suspension of access, is provided by article 7 of MD 196/2018, whereas, according to art. 5§5, their publication lies at the discretion of the Committee.

31 See Explanatory Memorandum, 24; article 10§2 MD 196/2018.

32 "Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive".

33 According to article 2§4 of General Data Protection Regulation 679/2016 "This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive".

34 See namely Case C160/15, GS Media BV v. Sanoma Media, ECLI:EU:C:2016:644, para. 31; Case C314/12, UPC Telekabel, ECLI:EU:C:2014:192, paras. 55-56; Case C70/10, Scarlet Extended SA, ECLI:EU:C:2011:771, para. 46.

35 See Ministerial Decision 240/2018.

29 P. Dagoglou, *Administrative Law (in Greek)*, 1992 (3<sup>rd</sup> ed.), p. 98 and p. 296.

30 As mentioned, in Spain SCC's request towards an ISP for the suspension of the service or blocking of access imposed as a sanction to an ISSP because of online copyright infringement has to be previously authorized by a judge.

### III. Recourse against the sanctions by the Committee and relation to the sanctions system of Law 2121/1993

- 27 In view of the silence of the Law regarding recourses against the sanctions imposed by the CIVIP, it should be accepted that they can be appealed by means of a request for annulment before the Council of the State on the basis of article 95§1 of the Greek Constitution.<sup>36</sup> Alternatively, due to the private nature of the disputes falling under the purview of the Committee, it could be argued that the parties could resort to the civil courts, similarly to the procedure set out in article 18§11 of L. 2121/1993 on copyright and related rights governing disputes between collective management organisations and the Hellenic Copyright Organisation (OPI) concerning the method of payment of the portion of the reasonable fees which correspond to each organisation.<sup>37</sup> In any case, it is desirable that a legislative arrangement of this gap is made, allowing recourse against the Committee's decisions before the administrative courts, as provided in article 69§13 of an earlier draft of L. 4481/2017.
- 28 The procedure before the Committee and the issuance of a relevant decision does not preclude the parties from referring their dispute to the courts (art. 52§1.8, al. c). Additionally, based on article 64A of L. 2121/1993 on copyright and related rights, it is possible to seek injunctive relief against the intermediaries whose services are used by a third party to violate the author's rights and related rights.<sup>38</sup> In these cases, it is obvious that an opposite judgment by the court would prevail over the decision of the Committee, thereby annulling in practice the basic objective of this procedure, which is the alleviation of the courts' workload.

### D. Conclusion

- 29 The attempt to resolve cases of online copyright infringements and of the liability of the providers quickly by out-of-court procedures is surely a positive step, following the initiatives of various other countries on establishing notice-and-takedown procedures. It is also consistent with the tendency

of EU law to recognize the pivotal role of internet access providers and hosting service providers, which dictates the limitation of the immunity they have enjoyed to this date.<sup>39</sup> However, the lack of institutional integration of the Committee on Internet Violations of Intellectual Property (CIVIP) in the public administration structure undermines the effectiveness of its decisions and may reverse the expected benefits of the new procedure in practice. A single contrary court judgment which would adopt the aforementioned reservations and observations about the legality and enforceability of the CIVIP resolutions in general, would bring this new procedure down, causing significant insecurity and further delay in the adoption of a truly effective and solid system.

36 See P. Koriatopoulou / Ch. Tsigou, *The Law 4481/2017 on collective management organisations and the relevant amendments in Greek copyright law (in Greek)*, Synigoros, 122/2017, p. 30.

37 D. Kallinikou, *Copyright and Related Rights (in Greek)*, 2005 (2<sup>nd</sup> ed.), pp. 220-221.

38 The scope of article 64A of L. 2121/1993, that only covers internet intermediaries, is narrower than that of article 52§1 of L. 4481/2017 that covers also website owners.

39 According to article 10 of the Proposal for a Directive on Copyright in the Digital Single Market [COM (2016) 593 final] the providers of internet access to copyright-protected content are required to conclude agreements with the rightholders in order to facilitate the licensing of rights process. Similarly, in the new article 28a of the Proposal for amending Directive 2010/13/EU [COM(2016) 287 final] Member States are encouraged to take co-regulation measures with the video-sharing platforms providers in order to ensure the protection of minors and avoid hate speech incitement.

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