Editorial

by **Séverine Dusollier**

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1 There is no doubt that 2020 will be a pivotal year in European regulation of the digital economy.

Succeeding to the first wave of regulation of the internet, around the beginning of the second millennium with the e-commerce and copyright in the information society directives, a second wave of legal intervention has been launched by the EU Commission in 2015 with the Digital Single Market Initiative. 2019 was certainly a crucial year in the EU agenda, having seen the adoption of the directive on copyright in the digital single market, of the directive on contracts for the supply of digital content and digital services, of the directive on contracts for the sale of goods, as well as the revision of the public sector information directive, inserting for the first time the "open data" in its title and contents.

2020 will see the implementation of this new EU acquis and the first discussion on what promises to be as tense as what happened in copyright, the revision of the rules of the platforms liability. The Digital Services Act, announced by the new Von der Leyen Commission, might reopen the Pandora box of the regime applicable to intermediaries and reshuffle the rules applicable to platforms and other digital operators.

2 This new issue of JIPITEC aligns with this legislative agenda. It opens with its Statements section featuring two manifests from EU scholars. The first one, endorsed by more than 50 copyright professors and researchers, provides some recommendations to Member States for the implementation of the infamous article 17 of the DSM copyright directive, by insisting on the need for video sharing platforms to guarantee user freedoms when answering to requests from copyright owners. Therefore, the two key components of the regime so enacted, the licensing and preventive measures by default of a licence, should be interpreted in the light of the exceptions and limitations provided to the benefit of the users. To that end, the Declaration recommends to ensure a full harmonization and effectiveness of the exceptions of quotation, criticism, review, caricature, parody and pastiche, as those exceptions are particularly considered as user freedoms in the article 17. In order to minimize the risks of broad filtering and over-blocking, Member States should limit the application of preventive measures imposed by the directive by default of a proper licence, to prima facie copyright infringements, i.e. to uploads of materials identical or equivalent to the work for which rightholders have provided information. In other cases, as the Declaration further recommends, the uploaded content should not be presumed to be infringing and more legal evidence should be provided by copyright owners to allow for its removal from the platform.

3 Such recommendations cleverly operate within the manoeuvre that is left to Member States by the directive and offers pragmatic and balanced solutions that could be endorsed by the stakeholders' dialogue set up by the directive to come up with solution to implement the new regime. So far, this dialogue, started last Fall, has only offered a pathetic and useless replay of the lobbying that accompanied the adoption of the directive.

4 A second Statement from three privacy academics targets the European Data Protection Board (EDPB) that is currently drafting some Guidance on data rights and proposes recommendations to enhance

the protection of the four data subject rights, notably the right of access, the right to rectification, the right to erasure and the right to restriction of processing. It further recommends recognising an explicit duty of the joint-controllers to facilitate the exercise of data subject rights and a narrow interpretation of any restriction or limitations to such rights. Concrete examples of how such data rights could be implemented by data controllers are given. This timely Statement also offers the opportunity to revisit thoroughly the EU framework of the rights of data subjects as it critically reviews the legislative provisions of the GDPR and the CJEU case law related thereto.

5 Data protection and copyright, that are the topics of those opening Statements, unexpectedly meet in the contribution by Annelies Vandendriescche and Bernd Justin Jütte that explore the concept of the "public" from the twofold perspective of the two legal fields. Using the notion of a "new public" as developed by the CJEU under Article 3 of the Information Society directive, they suggest to introduce a concept of privacy as controlled public exposure, leading to a better understanding of the divide between public and private spaces in EU privacy law. In doing so, they renew the old debates around the concept of privacy, from Warren and Brandeis to Nissenbaum, digging into the ECtHR case law, to help protect privacy in public spheres, including when sharing personal information on digital networks.

6 The recently adopted directive on copyright in the digital single market is unsurprisingly the theme of some other contributions to this issue. First, Giulia Priora applies a distributive rationale to the notion of a fair remuneration of authors and performers that is scattered in many provisions of the DSM directive, taking ground on the "fair marketplace for copyright", which is one of the objectives of the legislative text.

7 In echo to the Statement on users' freedoms in article 17, Gerald Spindler looks at the adapted liability regime it induces, and at the risk of a conflict between the prohibition of general monitoring for platform providers and the new obligations imposed on video sharing providers, notably their obligation to get a licence for the uploaded copyrighted content.

8 Another crucial reform in intellectual property in the EU was the 2015 trade mark package. It has namely introduced expanded possibility to register non traditional trade marks by suppressing the requirement of a graphic representation of the sign to be protected. Inês Ribeiro da Cunha and Jurgita Randakeviciute-Alpman explore the consequences of a such reform on registration of non-traditional trade marks by relying on an useful comparison with the US situation.

9 Looking forward, Theodoros Chiou closes this issue by addressing machine learning and artificial intelligence (another hot topic for the new EU legislature). But instead of asking the often-analysed question of the copyrightability of the "creations" of AI, he looks at the copyright situation of the use of creative works as input data in the process of machine learning. Are any exceptions applicable to the many reproductions of works necessitated in such process? You have already guessed that the DSM directive also prominently features in that article that assesses the applicability of the new text and data mining exceptions that it provides.

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