

# Editorial

by **Miquel Peguera**

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- 1 This is the first regular issue of JIPITEC in 2021. It has been preceded by two special issues, numbers 12(1) and 12(2), which dealt monographically with specific topics. Special issue 12(1) presented the “Kyoto Guidelines on Intellectual Property and Private International Law” of the International Law Association (ILA) with extended comments. While special issue 12(2) focused on the Directives on Digital Content and Services and on Consumer Sales, and more generally, on consumer contracts and new technologies. This third issue, 12(3), resumes the thread of JIPITEC regular issues, covering a variety of timely and relevant topics, which range from tackling online misinformation to competition law, from intermediary liability to data protection, and from IP rights to Covid-19 tracing applications.
- 2 Online political advertising is the topic addressed in the first article, authored by Natali Helberger, Tom Dobber, and Claes de Vreese. Online political microtargeting is increasingly adopting the practices of sophisticated online commercial advertising, particularly in the context of social media and data-driven platforms. The article shows that, in practice, both commercial and political online advertising have many elements in common, particularly the use of data-driven persuasion strategies, which may impact the ability to make free and informed political decisions. The authors explore whether the way in which the law approaches fairness in commercial advertising may provide valuable lessons for future regulation of political advertising. They find that, indeed, the experience in the field of commercial advertising could serve as a conceptual frame to build on and point to a number of specific takeaways from that legal tradition that could be taken into account when devising a legal framework for political advertising.
- 3 Maryam Pourrahim examines in the following article to what extent EU competition law can foster patent pools as a mechanism for licensing Standard Essential Patents while avoiding anti-competitive practices. The article underscores the significant pro-competitive effects of patent pools and offers a substantive comparative analysis between the US and EU approaches. It suggests some ways for the EU to improve its patent pool legal framework.
- 4 In the next piece, Folkert Wilman addresses the evolution and current status of the liability exemption for internet intermediaries that store and disseminate content uploaded by their users set forth in the e-Commerce Directive. While the author identifies some shortcomings in terms of ineffectiveness in tackling serious illegal content and risks of over-removal, he argues that there are nonetheless good reasons for retaining the key features of the system, as the Digital Services Act chooses to do. The author puts forward that the noted shortcomings should be addressed by enacting complementary requirements and explores to what extent the Digital Services Act proposal contributes to this end.
- 5 In the following article, Bluetooth-based apps for tracing proximity contacts in the fight against Covid-19 provide a case-study for dealing with the more general issue of joint controllership in EU data protection law. Stephanie Rossello and Pierre Dewitte examine the ambiguities of the notion of joint control, combining them with those related to the notion of identifiability of personal data and exploring the scope of the household exemption as well. Applying the theoretical analysis to the case-study, the authors argue that a broad understanding of joint controllership may lead to unexpected results, apparently regardless of whether the architecture of the software system is centralized or decentralized, and note that further clarification from the EDPB, National Supervisory Authorities, the CJEU and domestic courts is needed.
- 6 Competition issues on the availability and use of non-personal machine data, specifically in the field of agricultural data, are tackled in the contribution authored by Can Atik and Bertin Martens. The

authors argue that data-driven agricultural business models lock farm data into machines and devices that reduce competition in downstream agricultural services markets. The article highlights the need for neutral platforms as intermediaries so that farmers can achieve the benefits from applications that depend on economies of scale and scope in data aggregation. While the authors point to regulatory intervention as the last resort to overcome data lock-in and monopolistic market failures, they also underscore the difficulties in designing data access rights.

- 7 Covid-19 is again considered in this issue, now from the point of view of Intellectual Property Law, in a contribution by Emmanuel Kolawole Oke. The author explores to what extent states can realistically invoke the national security exception set forth in Article 73(b)(iii) of the TRIPS Agreement to suspend the protection and enforcement of IP rights in order to facilitate the importation and production of vaccines and medicines to fight against the pandemic. The author considers how this provision has been interpreted and applied so far and while he acknowledges that states may indeed be able to invoke the national security exception in this case, he also argues that such an invocation may not be actually helpful to states lacking local manufacturing capacity.
- 8 Finally, IP rights are also considered in the realm of Artificial Intelligence. Anthoula Papadopoulou examines how copyright law and patent law may interact with AI technology, and particularly whether AI outputs deserve IP protection. Considering legal but also moral and social aspects, the author suggests that the attribution of a sui generis right could be the best option for fostering innovation and competition.

I do hope you will enjoy the issue!

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