

# Editorial

## A Christmas Gift

by **S verine Dusollier**, Professor, Law School, SciencesPo Paris.

  2017 S verine Dusollier

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- 1 What could be a better Christmas gift than an extra issue of JIPITEC? Yes, you are not dreaming, you have in hands (or on your screen), a fourth issue of your favorite online journal, instead of the usual three per year. What else could you wish for, than spending the holidays curled up in your comfy armchair by the fire, with a cup of tea, coffee, or a glass of wine on the table, with your clients, students, and colleagues out of your mind until January, and finally some time to read scholarly articles in your field.
- 2 One of the biggest pieces (not of cake, that will come later) of this new issue is no doubt Josef Drexl's article on ownership of data. Drexl is looking at the (once announced, then possibly left aside - for the time being at least) project of the European Commission to adopt some legal protection for big data, in the form of an exclusive property right or other form of regulation, ensuring some control over data in order to make data economy thrive (or so they say). The EU 'Free Flow of Data' initiative was indeed ignited by a Communication that planned to address the issues of ownership and access to data. The specter of commodification of data, which was already fought against 20 years ago, when the sui generis right in databases was discussed, is coming back. Although the 'Free Flow of Data' draft Regulation published a few weeks ago seems to exclude property rights, it is not certain that it will not eventually return in some form or another.
- 3 Drexl's paper extensively reviews how the data should be regulated, looking at the issues of data ownership and access to data. The paper begins by pondering whether the question of ownership should be raised at all, and what the economic justification would be to add more protection over data than what is already provided by existing laws. Amongst the existing forms of protection, the article analyses sui generis protection in databases, trade secret protection, patent right, unfair competition law, a 'digital' property right, or factual and contractual protection. Then it turns to potential economic justifications for recognising data ownership, but has difficulty in finding any that would be convincing. Therefore, Drexl argues against the creation of a new system of data ownership. As to whether competition law could enhance better access to data, a thorough analysis of the EU competition case law reveals its many shortcomings as regards the data economy, due to its very dynamic nature. Instead the article pleads for state intervention to promote access to data, interoperability and portability, where public interest considerations should play a key role.
- 4 After such an intense reading, allow yourself a break to play with the new console your child received from Santa. When she has humiliated you (despite the fact that you were the best Mario Bros player in your class as a teenager), it would be a good time to come back and read the not-so-unrelated article by Krzysztof Gartska on digitised memories as personal and sensitive data, drawing on the fictional setting of a video game entitled Remember Me, that imagines a world in which human memories can be digitised. Not only your online movements, consumptions, communications, and interactions are recorded and processed by commercial entities, your memories could now be turned into assets too. In this science-fiction world (or perhaps a forecast into the future), are such digitised memories to be considered as personal data and what would that mean? When memories can be stored, shared, erased, or even hacked, issues of data processing

and security abound. This very exploratory article analyses some of them, most notably the possible qualification of digitised memories as personal data and as sensitive data for the purposes of the GDPR. Gartska's conclusion is that the definitions laid down by the GDPR are sufficiently technology-neutral to address any type of personal data, including what could come in the future, and already illustrated by dystopian games and narratives.

- 5 Science-fiction pieces like that are fun, but evidence-based scholarship equally carries virtue. This is what Stef van Gompel's article posits; deploring, as many others, what copyright lawmaking has become, he explores how a traditional doctrinal approach, which looks at formal consistency and legal-theoretical foundations, could gain from evidence-based policy supported by empirical research. To that end, the two approaches' strengths and weaknesses are assessed and a number of concrete recommendations are given to lawmakers, notably the need to remove unnecessary and unproven affirmations, such as the mantra of the need for a high protection of authors, that says nothing of how it would lead to a better copyright, or the liberation from international copyright norms, seen as imperatives that cannot be changed. Additionally, van Gompel suggests to include doctrinal principles related to social and fairness objectives among the evidence to be considered, and not to confine the deliberations about how copyright should be designed to economic evidence. To such end, all positions, from creators and rightholders to users and the public at large, should be considered without letting one prevail over another.
- 6 At that stage of your reading, your tea might have become cold and it will be time to enjoy a refill - maybe with one more piece of that fabulous cake that is left from Christmas Eve - before turning to the article of Eleonora Rosati on the legitimacy of enacting copyright exceptions limited to non-commercial use. She takes the freedom of panorama and quotation as examples that some national laws limit to non-commercial purposes with no corresponding requirement in the 2001 Infosoc directive, and asks whether that would be detrimental to the harmonisation objective of the directive. Her answer is affirmative, particularly as non-commercial or not-for-profit conditions are largely undefined, and such diversity in Member States might impair cross-border uses of copyrighted works. Rosati's conclusion is that Member States should not be entitled to limit the benefit of copyright exceptions to non-commercial uses, if it is not required at EU level.
- 7 Now the countdown to New Year's Eve is closer, those few days of rest have sharpened your mind and the numbers and figures of Bart van der Sloot's

empirical study will come easy for you. Based on a study of around 1000 decisions of the European Court of Human Rights, this paper looks at whether and how harm is compensated and damages awarded in privacy cases. The assessment is based upon different factors, such as the country against which the complaint is directed, the type and number of applicants, the type of damage that is compensated, the type of privacy at stake, and the ground on which a violation is established, each of which resulting in statistical information and analysis thereof. Among the findings of the paper, one can see that in most cases in which a violation of article 8 ECHR has been found, damages were awarded, including for non-pecuniary damages, but for relatively small figures. The compensation of non-pecuniary damages has also increased over time. The amount of awards unexpectedly appears to depend upon the country that is held liable, or the type of privacy violation, as well as upon the section of Court delivering the decision, or the type of persons complaining of a violation (prisoners and migrants having been awarded more limited amounts of money). Van der Sloot's paper joins a promising line of research based on empirical and statistical evidence that could nourish our legal knowledge in privacy, intellectual property, and any other IT-related topic, which JIPITEC would be pleased to publish in the future.

- 8 The JIPITEC editorial team wishes you a very happy holiday and a fruitful year 2018. For those of you, who have deservedly spent the holiday without looking at your emails or internet and who only open this new issue coming back to work in January, we hope that reading this issue will be your first pleasure of the year!

**S  verine Dusollier, December 2017**