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Copyright law in dispute

Digital access culture vs. analogue culture of exclusivity

by Alexander Peukert

Through digitalization, the social importance of copyright law has grown considerably. Moreover, the culture of exclusivity established by copyright law conflicts fundamentally with the culture of access prevalent on the internet. An example for this is the dispute over the EU's latest copyright directive. Does it ring in the end of the internet as we know it, or does it »only« see to fair remuneration for those working in the creative economy?

On the evening of 5 March 2019, hundreds of demonstrators, mostly between 20 and 40 years of age, marched through Frankfurt city centre. »We are many! We are loud! You are stealing our freedom!« resounded through the streets. Posters read: »Save the Internet« and again and again: »No to Article 13«.

It rarely happens that a single article of an EU directive that has not yet even come into force triggers spontaneous demonstrations – organized online – in several German cities. With Article 13 of the draft (at that time) for a Directive on Copyright in the Digital Single Market, the said field of law has achieved dubious prominence. While in the analogue age only a few legal experts as well as originators and companies in the cultural sector dealt with copyright law more closely, today it is a regular topic in the daily news and political debate.

Reasons for the growing significance of copyright law

The reasons for this growing significance and the conflict-laden nature of copyright law are of a technical, economic, social and not least legal character. The prolific availability of computers and growing storage capacities make it possible to digitalize more and more text, sound and image data. Via the internet, any of this content

can, in principle, be made accessible and retrieved by anyone from anywhere at any time. The architecture of the internet does not provide for a central instance that would control this mass communication and no such instance yet exists. Search engines and platforms for user-generated content, such as YouTube, Facebook and Wikipedia, aggregate, select and present the net's wealth of information without demanding that users pay for it. Insofar as their activities are not based on donations – such as is the case, for example, with Wikipedia – they systematically sell advertising space by evaluating users' personal data and finance themselves in this way.

As appealing as this access culture may be from the standpoint of internet users, who are graduating from passive consumers to active producers, and of major service providers, it seemed in the past and continues to seem threatening from the standpoint of professional creators and traditional exploiters, e.g. publishing houses and music labels. This is because their existence was based until now on the sale of copyright-protected content. Some sectors have still not succeeded even today in shifting their analogue business model into the internet age. While scientific publishing companies adhered stubbornly to their subscription system and have meanwhile become powerful database providers, and the music and film industry can look ahead to a rosy future in licensed streaming services such as Spotify and Netflix, in particular press publishers continue to lament readers' ruinous free-of-charge mentality and at the

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- Through digitalization, the social importance of copyright law has grown considerably.
- The culture of exclusivity established by copyright law conflicts fundamentally with the culture of access prevalent on the internet.
- Already in the early days of the internet, international treaties were concluded at the instigation of the USA, the then EC and Japan to extend copyright protection on the »information highway«.
- In the dispute over the EU's latest copyright directive, the question is: Does it ring in the end of the internet as we know it? Or does it »only« see to fair remuneration for those working in the creative economy?

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same time a parasitic exploitation by services such as Google News.

A short history of digital copyright law

Copyright law can, however, scarcely be held responsible for these economic upheavals because the internet has never been a copyright-free space. Even back in the 1980s, when the first universities in West Germany were connected to the internet, digital copies were subject to permission as a matter of principle. In 1996 already, that is, at a time when the internet had not yet reached the broad masses – two international treaties were concluded by the World Intellectual Property Organization (WIPO) in Geneva at the instigation of the USA, the then EC and Japan, the purpose of which was to extend the culture of exclusivity in copyright law to what was at that time called the global »information highway«. In 1994, Stanford law professor Paul Goldstein described the goal of this regulation with the metaphor of the »celestial jukebox« (Goldstein, 1994): All content should be accessible to everyone from anywhere at any time – but only in return for payment. To let this vision become reality, the WIPO treaties of 1996 extended copyright law to every copy – however temporary – in the memory of a computer, subjected every upload to the exclusive right of making available and prohibited the circumvention of digital rights management systems. It is these legal infrastructures on which paid subscriptions are based – from Elsevier's ScienceDirect to Netflix and WELTplus. Copyright law therefore did not lag behind but instead in many areas even forged ahead of

technical and economic development (Peukert, 2014).

From this time on, problems persisted more than anything in the enforcement of applicable law. Regardless of how complete it is, there is little that statutory law can do against organized crime and decentralized, anonymous file-sharing networks, such as BitTorrent. Yet here too measures were stepped up. The operators of the piracy website kino.to, which was financed from advertising, were sentenced to several years in prison. Access providers are obliged to block internet pages whose content systematically infringes copyright. And owners of WiFi connections are liable for anonymous file sharing using their IP address, unless they name the member of their family or household actually responsible.

A special aspect: The liability of host providers such as YouTube

By contrast, highly contentious and ultimately today still unresolved is the question of the liability of platform operators for user-generated content, first and foremost YouTube, which Google already took over in 2005, its founding year. As with Facebook, its user numbers meanwhile exceed the billion mark. According to company figures, 400 hours of video material are made accessible via the platform every minute. The age group of 18 to 49 year-olds, which is particularly important for advertising, uses the service to a large and continuously growing extent for entertainment and information as well as for educational purposes (Hasebrink et al., 2017, page 106 f.).

This brings us back to the demonstration in Frankfurt on 5 March 2019, since the demonstrators were above all concerned about the future of YouTube. They were afraid that Draft Article 13 of the Copyright Directive would lead to extensive »upload filters« and thus to »censorship«. They saw a threat in the strengthening of copyright law to the open internet where »you« too can also become a public creative individual.

As pointed and overblown these concerns were, they nonetheless have a core of truth, since Article 17 of the EU Directive, which in the end indeed came into force, aims at tightening the liability of online service providers »for the sharing of online content«. To date, such intermediaries that host content have only been regarded as »interferers«. This is because they do not themselves make content accessible but instead merely make a platform available for third-party content. However, as this per se lawful service significantly increases the risk of copyright infringements, it has been officially accepted for over 20 years that unauthorized content, having



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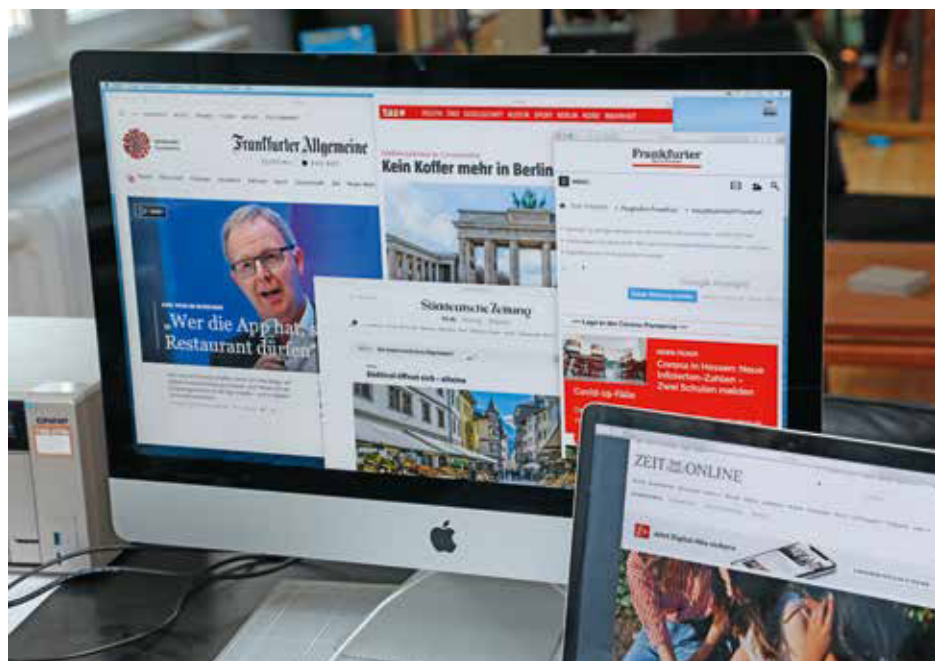
been reported accordingly, must be deleted (notice and takedown). About ten years ago, case law additionally obligated host providers to suppress content permanently once it has been deleted. Filter technologies are already used for such a staydown, which prevent content already deleted from being unlocked again.

YouTube has successfully endeavoured to make a virtue out of this liability. Namely, rights holders were given the opportunity to monetize infringing content – that is, to participate in the advertising revenue surrounding the content – instead of always just having it deleted. However, among others for GEMA, a music rights management organization headquartered in Berlin, this was not enough. On the basis of the argument that YouTube selects and presents illegal content with the intention of making a profit and should therefore not be regarded as merely enabling third-party infringements but itself as the perpetrator of such copyright infringements, it demanded damages equivalent to a licence fee, such as Spotify has to pay. The lawsuit, which has been pending for a decade, has not yet been finally adjudicated. Several cases currently lie before the European Court of Justice in which the copyright liability of various host providers, including YouTube, is to be decided.

Article 17 of the Directive on Copyright in the Digital Single Market

In parallel to this, in 2016 the European Commission published the draft for the directive on copyright in the digital single market finally adopted in 2019. However, it gave YouTube and other comparable services only very vague guidelines. The impetus for tightening up the corresponding provision in the interest of better and fairer remuneration for people in the creative economy came rather from the Member States and the European Parliament. Here, the culture of exclusivity in copyright law clashed at a neuralgic point with the net's technical and social culture of access. Established media and their representatives found themselves in head-on confrontation with the major online intermediaries and their users.

Who has left the field victorious in this confrontation has yet to be seen. The corresponding Article 17 of the EU Directive comprises no less than ten paragraphs and almost exactly as many characters as this paper. Copyright owners can credit themselves with the fact that from now on operators of sharing platforms will be liable for damages alongside the uploaders as perpetrators of copyright-infringing content. As a consequence, their legal position shifts in the direction of closed media platforms licensed through and through, such as Spotify and Netflix, which end customers can only consume with-



out adding content. In the meantime, the proponents of the access culture have been able to prevent, at least temporarily, the openness of services that share UGC (user-generated content) from becoming an incalculable liability risk even for huge multinationals such as Alphabet/YouTube. This is because if they (1) undertake »every effort« to obtain permission from the rights holder, (2) use upload filter systems to identify content already reported by rights holders and (3) immediately delete and permanently block any remaining illegal content, they escape further liability.

The deadline for implementing this highly complex provision expires in June 2021. It can be expected from the debates now commencing in political Berlin that copyright law will soon pop up again in the daily news. Whether the numerous legal issues centring around Article 17 will have been clarified by the highest court in the land by the time I retire 20 years from now is rather doubtful. Digital copyright law remains an exciting evergreen! ●

Ruinous free-of-charge mentality? Press publishers still have difficulty shifting their analogue business model into the internet age. Despite a much-used web presence, they are still dependent on income from the sale of printed newspapers.