

Session 3C

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Emily C. & John E. Hansen Intellectual Property Institute

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SESSION 3: COPYRIGHT LAW

3C. EU Copyright Reform

Moderator:

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Speakers:

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University of Southampton, London

The New EU Copyright Directive: Game Over?

N. Cameron Russell

Western Union, Denver

***The European Copyright Directive: Continued Leadership (and Disruption)
of the Internet Economy?***

Panelists:

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International Federation of the Phonographic Industry (IFPI), London

Jan Bernd Nordemann

BOEHMERT & BOEHMERT, Berlin

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MR. SHAPIRO: Please take your seats. This is the last rodeo of the day. My name is Ted Shapiro. I'm moderating the panel on EU copyright reform. I looked up the word "moderator" in the dictionary just now. Apparently, it's "a substance used for slowing down neutrons in a nuclear reactor." I'm not going to do that.

Today we are going to explore copyright reform in the European Union, which actually includes five instruments: the so-called Portability Regulation,¹ the first Regulation in copyright in the European Union; two items related to the Marrakesh VIP Treaty² (formally the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities); the Digital Single Market (DSM) Directive;³ and the Broadcasters or SatCab Directive.⁴ We will probably just focus on the DSM Directive, but we'll see how it goes. Maybe some people will say something about the SatCab Directive.

First, it has to be said that the completion of, in particular, the DSM Directive is an incredible political achievement on the part of the Commission. That said, I wonder whether the Emperor is wearing any clothes.

As the moderator, I will firmly seize the middle ground by noting that overall EU copyright reform has actually rolled back protection. I will phrase it as a question: Has it actually rolled back copyright protection from the high-water mark which was set by the 2001 Copyright Directive⁵?

Yet, most rightholders are rejoicing, and some copyright owners and anti-copyright stakeholders are in mourning. Most rightholders were willing to accept this rollback in protection in order to get certain rewards from the Directive. Overall, I don't believe they tipped the scale.

Many anti-copyright stakeholders, despite having won some victories in the Directive, are overall mostly unhappy with it. To most observers it looks like the classic

¹ Regulation (EU) 2018/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, 2017 O.J. (L 168/1) 1.

² Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312 (2013).

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, at 98-109, COM(2015) 192 final (May 6, 2015); Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Closing the loop--An EU action plan for the circular economy', 2016 O.J. (C 264) 98-109.

⁴ Council Directive 93/83, 1993 O.J. (L 248) 15-21.

⁵ 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, 2001 O.J. (L 167) 10.

struggle between more copyright and less copyright. Of, course, the reality is always more nuanced, and in most legislative procedures nuance is the first casualty. But we still have national implementation to look forward to, and boy, that is going to be fun!

The 2001 Directive established strong exclusive rights, a balanced approach to exceptions, robust legal protection for technological measures, and respect for contractual freedom in the European Union. All of those aspects have been reduced or rolled back to varying degrees by this latest legislation.

I think you've already had a presentation on all the components of the Directive,⁶ but just to remind you:

- There are two text and data mining exceptions. One of them applies to everything; it's basically a text and data mining exception on steroids.

- There are new exceptions for cross-border teaching, preservation, a crazy mechanism on out-of-commerce works and extended collective licensing (ECL) out the wazoo, with the question being whether opt-out means anything.

- A voluntary mechanism for video-on-demand (VOD) platforms — probably a pointless provision,

- A new related right for press publishers, which when you look at it compared to the related rights held by broadcasters, performers, and producers, you have to wonder also; a new private copy and reprography levy entitlement for publishers.

- The “value gap” provision in Article 17,⁷ which apparently is about clarifying — we'll explore what “clarifying” means — that user-uploaded sites infringe the communication to the public right and do not live in the hosting exemption in Article 14 of the e-Commerce Directive.⁸ This is an incredibly complex provision that may be internally consistent, but we will figure out a way to interpret it now that we have it to make it work, won't we?

- We also have on top of all that a whole new raft of author-performer remuneration provisions — a remuneration principle, a transparency obligation, a contract adjustment mechanism (which is a kind of bestseller clause), and a revocation right — a real shot in the arm for the creative industry in Europe.

Just quickly, because there is another Directive that we may get to talk about, they decided to call it the SatCab Directive, which is a real drag since we already have a SatCab Directive, but I guess we'll call that one now “the 1993 SatCab Directive.” Real quickly, it extends the mechanism for mandatory collective licensing for retransmission rights to cover all forms of retransmission. It extends the country-of-origin principle to almost nothing. It also fixes something called “direct injection.” Does anybody in this room besides Jane Saunders know what direct injection is? I didn't think so.

Let's get started. With that short moderate introduction, I believe that the first speaker is the IPKat from London, Eleonora Rosati, who is going to take the floor. Please, Eleonora.

PROF. ROSATI: Good afternoon, everyone. Thanks so much for inviting me to contribute to this conference this year.

The issues that I would like to tackle in the time at my disposal are essentially three, which I hope will be developed further during the rest of the discussion. The first

⁶ See *Session 1C: Government Leaders' Perspectives on IP*, EMILY C. & JOHN E. HANSEN INTELL. PROP. INST. FORDHAM L. SCH. (2019).

⁷ Directive on Copyright in the Digital Single Market, art. 17, 2019 O.J. (L 130) 92.

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), 2000 O.J. (L178) 1.

one is indeed something that Ted has already mentioned: to what extent do some of the provisions in this DSM Directive represent a departure from the existing *acquis*? The second relates to the transposition phase that is likely to be, I would say, even perhaps iffier than what has been the road to the adoption of the Directive; and the issue there is what room there is for diverging transpositions of this Directive. The final point is a more general reflection as to whether having instruments like directives remains a good way forward for harmonization of copyright in the European Union.

Does this Directive clarify the law as it already was with Recital 64⁹? The “value gap” provision in Article 17, new obligations for online content-sharing service providers (OCSSPs), states that the provision clarifies the law as it already is; that is, subjects that fall within the definition of OCSSPs communicate to the public.

As you may know, there is currently a case pending before the Court of Justice that was referred by the German Federal Court of Justice last September that relates to the liability of YouTube as a primary infringer for acts of “communication to the public.” That is a referral under the InfoSoc Directive,¹⁰ not of course the new Directive. It is arguable that, after the clarification brought about by the new Directive, a case like that in relation to the question of “communication to the public” certainly will have reduced relevance. Nonetheless, it remains an important case because it will be an opportunity for the Court of Justice to continue in its construction of what “communication to the public” is, and it might also have an impact on understanding to what types of subjects this liability applies.

Having said that, this is a chart attempting to simplify Article 17. It has become a very lengthy provision, and arguably it might be the case that “communication to the public” is just the law as it has already developed. The Court of Justice has indeed given aims in this respect.

If we look at the content of the provision, arguably there are parts that are not just a clarification because they detail quite extensively what these new implications will be, and some things, like mitigation measures and exemption regimes, are not part of what the law already says.

A second question is: What room is there for diverging national transpositions? The Directive is quite heterogeneous in its content. There are provisions that are very detailed. They read like the provisions of a regulation rather than those of a directive. Other provisions, such as those that relate to author and performance contracts with a remuneration mechanism, arguably leave more room for diverging national transpositions.

Having said that, I would offer that there is not much room for diverging transpositions for the following reason. It is true that harmonization is not a goal per se, but if harmonization initiatives are undertaken at the EU level by means of directives, then one might wonder whether it is desirable for Member States to transpose the Directive in very different ways, which would defeat the objective of harmonization, i.e., to remove differences. In the past this is not something that has always happened. We have had examples where in relation to the InfoSoc Directive Member States have transposed the relevant provisions very differently, and referrals made to the Court of Justice have resulted in clarifications by the Court that what Member States did was indeed wrong.

Having said that, in the DSM Directive there are provisions that are admittedly ambiguous. If we take the example of the press publishers right, the Directive fails to address something that was really key to the previous national experiences, i.e., whether or

⁹ General Data Protection Regulation, recital 64, 2016 J.O. (L119) 1-88 (EU).

¹⁰ 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, 2001 O.J. (L 167) 10.

not the right can be waived. As the Directive is silent on this point, arguably this might be quite a point of contention at the Member State level. The result might be that in some Member States the right can be waived and in other Member States it is an unwaivable right.

Is the instrument of directives a good way forward? So far copyright harmonization has taken place where the only two examples of regulations are very narrow and focused. But indeed, the experience of the DSM Directive, in a sense, tells us what the future might hold. Some of the instruments adopted so far were amended to provide an internal market for copyright-protected content, and this is something that has happened when differences in the Member States' laws that were perceived as representing barriers were removed, etc.

But the DSM Directive goes beyond an internal market goal. If we look at provisions like the press publishers right, Article 17, but even for text and data mining, these are provisions that were meant to achieve more and actually to resemble the idea that the European Union has of what copyright law should be on this continent.

If that is the case, then perhaps a serious discussion needs to be undertaken as regards something that the European Commission a few years back called a "long-term dream," the full harmonization of copyright, because indeed what we have now are not just rules that remove differences, but they are rules that substantially shape what copyright law in Europe is supposed to achieve.

I will conclude with that. Thank you for your attention.

MR. SHAPIRO: Thank you very much, Eleonora.

It's an interesting question, this concept of clarifying, because Member State implementation is going to be so complicated and probably such a big fight, if in the pending *YouTube* case,¹¹ even though it may be moot in some respects, they say that in fact this is clarifying the *acquis*, i.e. clarifying what *YouTube* already does. But what if they say that *YouTube* isn't? Does that then change your equation in terms of what Member States have to do?

What is the position, Marco, of the European Commission on the *YouTube* case?

MR. GIORELLO: We have just submitted our observations on the *YouTube* case to the Court, but I'm not sure to what extent this is already public, so I would prefer not to comment.

If you want, I just would like to comment, however, on the clarification.

MR. SHAPIRO: Please clarify.

MR. GIORELLO: It is very clear to me that the intention was not just to clarify the law. It may be that this Recital is written with the word "clarifying," but there are plenty of other elements in the Article itself which make clear that this is a new regime. There is no consensus about what is the *status quo* at the moment as regards the copyright liability of user-uploaded content platforms and whether they may be subject to the safe harbor provision in the e-Commerce Directive. In any case, I would not read too much into the term "clarifying" in the Recital.

MR. SHAPIRO: So ignore the recitals.

Of course, I think Eleonora's point was referring more to the first half of Article 17, Article 17(1–3), which might be clarified (or not). Of course, there are other elements of Article 17 that Member States will have to do.

¹¹ Bundesgerichtshof [BGH] [Federal Court of Justice], Sept. 14, 2018, I ZR 140/15, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2018-9&Seite=5&nr=87859&pos=170&anz=265> (Ger.).

Now looking at it from another angle, Lauri, what is your view on the extent to which this is clarification or not?

MR. RECHARDT: I would agree with you. Certain parts of the Article definitely seem rather like clarifications when you look at the CJEU case law or when you look at the Commission's first draft, where — you remember — the liability provisions were actually in the recitals. So definitely, as regards to the parts dealing with the application of the rights and the application of the safe harbors, they look like clarifications of what is already the good law.

Then there are the subsequent provisions which, if you want to put it in a benign way, are novelties. But at the same time, I would also say that even the so-called “mitigation measures,” if you read them properly, actually reflect the knowledge standard already established by the CJEU for finding direct liability.

MR. SHAPIRO: I'm sure that Member States like Poland and Italy and Germany will be reading them benignly. The Commission's initial proposal walked such a fine line, it was almost like they proposed the compromise from the outset.

Now let's move all the way across the Atlantic. We heard the debate in the preceding panel of what a mess America is in in this regard only; everything else is hunky-dory.

Justin, as an observer on the left coast, what is your view? Has the “consensus,” as I think you referred to it, from the late 1990s and early 2000s been broken by the Europeans? I mean, how dare they!

PROF. HUGHES: First, Ted, I don't understand why you are —

MR. SHAPIRO: You're not allowed to answer a question with a question.

PROF. HUGHES: No, I'm not going to answer it with a question. But I don't understand why you and others are getting so frantic about the word “clarify,” because in politics we all know that they write the word “clarify” when they are changing things. That's just a move in the legislative game. So, to take a word out of the Recital and exhaust so much of the oxygen of the room on it I don't understand.

Is this a departure from the grand consensus that emerged after 1998 with the Digital Millennium Copyright Act (DMCA)¹² and the 2001 e-Commerce Directive and subsequently the People's Supreme Court interpretation of Chinese law and subsequent regulations in China and Japan and Australia and Singapore pressed by the United States in free trade agreements? Yes, it is a departure from the consensus. But maybe it is time to depart from the consensus because the consensus was built on an assumption that the Internet was profoundly dumb, and we know that the systems and platforms deployed on the Internet are significantly able to detect things which back in 1998 and 2000 we didn't think they could.

So it is time to revisit that consensus. To the degree this puts a tremor under everyone, great.

MR. SHAPIRO: Very good. Thank you.

I don't know if it's franticness. I think it is the case that people understand “clarify” as you do and that it means something more akin to “introducing” perhaps. But I'm sorry to take up so much oxygen with that. I hope everyone can breathe.

Let's look at it now from the point of view of Germany. Jan, what does Article 17 bring vis-à-vis and over and above existing case law, and what's the notion of who is covered by this?

MR. NORDEMANN: That's a very interesting question, Ted. As some of you in the room may know, Germany struggled quite a bit with the *YouTube* cases and has quite

¹² The Digital Millennium Copyright Act, 17 U.S.C. § 512.

extensive case law on YouTube and then in the end, as Eleonora has already told us, went to the CJEU to ask them whether already under the old law YouTube was directly liable.

The question really is: What is the relationship between the old and the new law? That I think is a very, very tricky question. Marco just said Article 17 is a new regime. YouTube is probably covered now because I see Article 17 as “the YouTube law.”

But what about the rest? There are a lot of others exempted. For example, Wikipedia is exempted. If Wikipedia is directly liable under the old law, are they now exempted under Article 17, or does the old law apply? Marco is nodding his head. I would be of the same opinion.

When it comes to startups, we have an explicit exception for startups for a certain period after they were founding them and with certain turnovers. What about them? Are they covered? If they are outside Article 17, are they covered? Do they have a privilege? Do they come under the old law?

With this background, it is at the moment the prevailing opinion in Germany that when it comes to implementing, we should wait for the CJEU to decide *YouTube* before we implement the new Directive on a national level.

MR. SHAPIRO: That’s why we’re having this discussion, to see whether we are going to get anything interesting out of the Court of Justice that may give some clues, I suppose, for national implementation because it is going to be a very difficult issue.

A follow-up question. I don’t completely understand the carve-out for. There is a kind of super-mitigation one for startups and then a middle one for more popular startups. Article 17 says that these OCSSPs “communicate to the public,” but if they are small, they do not. Is that what it says?

MR. NORDEMANN: No.

MR. SHAPIRO: They are just not liable for it?

MR. NORDEMANN: Yes. If you are a new startup and you don’t jump above a certain turnover, then you qualify for some kind of a privilege, which probably also covers liability under the old law. That is how I understand it. But I assume that probably there will be different views in different Member States and we will have diverging implementations.

MR. RECHARDT: With respect, I slightly disagree with you. First of all, I really think Article 17 in that respect is a special regime, and if you are not covered by the definition, you will fall under the old law. Which is of course slightly paradoxical because it means that startups that do not meet the definition fall under the old law and they are either fully liable or not liable in the first place.

The lighter liability regime means that if you are a startup, what you have to do to avoid liability is to use your best efforts to get a license and, failing that, apply notice and takedown. This is a true novelty. It is a very light liability regime or a way to avoid liability.

MR. SHAPIRO: You are even envisaging a situation where they could be in a worse situation?

MR. NORDEMANN: That is what I don’t understand, and maybe it’s because my opinion is wrong, which could well be true.

MR. SHAPIRO: It’s very complicated, as you saw in Eleonora’s chart.

The issue, Marco, of startups became a huge political football that you were forced to deal with, I guess.

MR. GIORELLO: Yes. In the final version of the Directive start-ups are not excluded from the scope. The political discussion at some point was whether they should be excluded from the scope — e.g. Wikipedia — and therefore remain subject to the current law — that is, the possible application of Article 3 of the InfoSoc Directive and of Article 14 of the e-Commerce Directive — or whether, on the other hand, they should be included

but subject to a lighter regime. The final text of this Directive is that startups are included but subject to a lighter regime.

What was behind that? It was all about the burden on small companies due to the possible application of content ID or other technology recognizing and ensuring the unavailability of unauthorized content in the scenario where licenses between rightholders and service providers are not concluded. This position was primarily championed by Germany. Against this background the final text of Article 17 includes startups in scope but does not oblige them to deploy best efforts to ensure unavailability of unauthorized content from the outset.

That said, it is also interesting to note that the threshold for startups to be excluded from this *ex ante* obligation is very low, 5 million unique visitors per year. In this type of services that is an extremely low threshold and not many players, if any, may eventually benefit from the lighter regime.

It remains to be seen whether this lighter regime will have any real impact in the market.

MR. SHAPIRO: Let's take one more point on this and then we'll have the next presentation. We'll take one more point here.

We are very focused on Article 17, but what the heck. The Article 17 mechanism is meant to encourage licensing and, in the absence of licensing, it is a kind of enforcement mechanism, I suppose.

I have heard that the film industry, Stan, has been less interested in Article 17 overall than some of the other content sectors. I was wondering what your perspective is on how this new provision will be used by the people that you represent.

MR. McCOY: The overall emphasis on getting a license for an OCSSP is misplaced for any industry that relies on an exclusivity type of business model. By and large, those types of businesses are not interested in licensing anyone other than their exclusive distributors. So all of this "get a license" taken to its extreme can be quite problematic if you're relying on enforcement, particularly if you are looking at it from the standpoint that the price of what started out as a clarification, as Lauri said, became something else later. The price of that was basically to construct a second tier of liability protections for these OCSSPs.

We don't know how all of this will be implemented. There are many, many devils in the details, so it's difficult to make blanket statements about that.

But one of the most troubling possibilities we have already seen emerge from political discussions in Germany where there has been talk about implementing Article 17 with no upload filters based on some kind of a notion of global licensing. It seems to have been developed by politicians and not by anybody who knows anything about copyright, so hopefully it will go away and die quietly.

But the notion that you could come out of this with the idea that big OCSSPs can elude their copyright obligations by just throwing pennies at rightholders is what I thought we were trying to avoid when we got into this to begin with. It's a strange place we've wound up in.

MR. SHAPIRO: Just for clarification, global licensing means a compulsory license, in case anybody was wondering.

Let's jump to the next presentation. That's you, Cameron.

MR. RUSSELL: You may be wondering why someone from Western Union is here. It's because (1) it's Hugh's world, and we all live in it; and (2) I recently taught copyright here at Fordham, and it's nice to be back. I'm on a privacy sabbatical. I will try to have a light touch and provide some color that I think is relevant and relates to some of

the points that have strangely already come out, even though it is taking kind of a broad view as to how we got here and I think is kind of the elephant in the room.

In terms of a broader context of Internet regulation encompassing copyright but in addition to copyright, twenty years ago we took a past model of “just preserve this Internet.” The overall rationale for everything was: “Don’t stifle innovation; nurture growth of a robust Internet; how can we let the Internet flow from end to end?”

We designed liability regimes in that light to grow the Internet. We were scared of things that we do not really care about too much, anymore, like spam. We still care about porn and spyware. But then we caught on to this ability for rampant pirating as well.

We talked about the Digital Millennium Copyright Act (DMCA) in the last session with the hybrid model for Internet intermediaries, so I won’t go into that.

But also, I think it is relevant that at the beginning of this journey, at least in the United States, we had a regime called the Communications Decency Act¹³ and Section 230, which provided blanket immunity for Internet platforms specifically for content that was defamatory. That really exhibits the emphasis we were putting on building the Internet and providing this blanket immunity for online service providers.

The landscape is obviously vastly different from 1996, when the Communications Decency Act was crafted. Facebook didn’t exist in 1996, and it would be seven more years before MySpace would even exist.

I think the elephant in the room is we now have large players built from U.S. soil. We now have Facebook skewing public opinion, skewing all types of other things.

I think this prior model of the Communications Decency Act is still relevant here (1) to exhibit the level of bending over backward to incentivize innovation and growth of the Internet, but (2) also incentivizing speech protection through certain concessions and regimes for Internet liability.

This is now intersecting with the debate around some of the aspects of the Directive, I think, especially the knowledge commentary-type exceptions and limitations. The same general argument is being made here: “We need the Internet to be a place for free-flowing ideas; Internet regulation should be minimal to protect, no matter what.”

But perhaps things have changed, and, as Justin said, maybe it is time to reset, and I think that’s what is happening here.

Politically, to bring in the larger political context, the General Data Protection Regulation (GDPR)¹⁴ just came into effect. It reset data privacy globally. I think it has been a success. It was a reset of the same types of players but in the data protection space. Simultaneously, we have antitrust being used to reset these giants that were created with these incentive systems.

I think the elephant in the room may be we have been overly submissive, kow-towing to certain business models over a long period of time, and Europe has just had enough. The copyright reform effort is part of a trilogy or more of points of attack on resetting the norms, the *status quo* that we see today. That is the political view, but it leads into the practical considerations, the apolitical, alegal context of the technological realities. The GDPR was met with many practical objections, but they seem to be slowly working in the new norms.

Just one example of enforcement in this space coming out of Poland recently. The GDPR has only been in effect since May 25th of last year. There was a particular enforcement action against a data scraper. The business model was built on scraping

¹³ Communications Decency Act, 47 U.S.C. § 230.

¹⁴ General Data Protection Regulation, 2016 J.O. (L119) 1-88 (EU).

Internet data, which of course had become commonplace, and one of the components of the GDPR is to provide notice prior of the collection of the personal data.

The target company with the enforcement action against them had the response: “Well, how would we possibly do this practically? Our business model was built in this way. It would actually cost us more to provide that notice in advance and try to target and locate these individuals than it would be worth for this business model.” The data protection authority’s response was like, “Right, so maybe the business doesn’t need to exist.”

In the copyright context, with automation challenges and technological difficulties, it seems to be analogous in that it’s kind of: “We are going to prescribe a set of rules that we think are fair. Figure it out with technologies you have available, with the resources you have available at some level. If certain business models don’t exist in the long run, then that’s a product of trying to rebalance the landscape.”

That’s my take.

MR. SHAPIRO: You referred to a trilogy, and you referred to copyright, which we’re obviously talking about. You referenced privacy. You referenced European competition law. What is the possibility that this trilogy has resonance in this country?

MR. RUSSELL: In the United States?

MR. SHAPIRO: “It must be Kansas.” [Laughter]

MR. RUSSELL: I think the trilogy is effective because the Internet economy doesn’t have borders. Anyone who has global reach is having to make decisions about how to put in force compliance mechanisms that are efficient and that cross borders.

We were talking about how these things could be incorporated in a Member State’s national law, etc., but I think practically businesses may look at these types of things — copyright reform, GDPR, other perhaps incoming efforts — and say, “We just need to figure out a way to streamline our business practices to comply with everything everywhere.”

Perhaps in this case with copyright it’s more difficult because with user-generated content it provides more autonomy for the general public to do whatever they are going to do, whereas a lot of times you can more easily control within the data protection world what you are capturing.

MR. SHAPIRO: You are referring a bit to the sort of extraterritorial effect. Do you think the United States will emulate any of this stuff legislatively?

MR. RUSSELL: To continue this analogy, the GDPR came into effect, and now we have the new consumer privacy law in California, and now it will be in Brazil next year.

If you take this privacy analogy where Europe absolutely was the leader — “We’ve had enough. We’re not going to subscribe to others’ rules anymore, and now we’re gonna reset the landscape, and if you’re gonna touch Europe, then you play by our rules” — I think that has had an effect in this country.

MR. SHAPIRO: Justin, you wanted to comment on that?

PROF. HUGHES: I just want to add something. Long ago Bernt Hugenholtz came up with the phrase “the transatlantic accelerator” for how the laws go back around. That’s definitely the case in California, where we have a state privacy law that was passed at the state assembly in the shadow of a state proposition, but also the tech companies conceded to the California law because of the GDPR. We are still fighting that because there’s a question now whether Congress will attempt to preempt the California law.

I want to get away from Article 17 and to make sure we cover all the Directives. I just wanted to recount — Marco knows this story — when the European Union came out with the proposed Directive and Regulation to implement the Marrakesh Treaty, private parties in the United States — the blind and the book publishers and the libraries — were in the midst of negotiating the implementing legislation because the implementing legis-

lation the Obama Administration had proposed wasn't satisfactory to at least one or more sides. The three-sided negotiations that I was participating in were well underway and we had virtually reached consensus, and then Brussels dropped their draft Regulation and their draft Directive.

I said, "Everybody, we have to pause."

Sure enough, one of the parties came back and said, "Look, I can no longer say to my stakeholders that we can do this deal because the deal is so different in Europe."

We had to reset the clock and reach a new conclusion. So it does have tremendous impact.

MR. SHAPIRO: Giuseppe, in the exchanges that we had previously you said we should not forget that EU copyright reform goes beyond the adoption of the DSM Directive, and you were referring, of course, to the SatCab Directive. I gave a very, very brief, pretty flip even for me, overview of that directive that started out life as a regulation, which is one of Eleonora's favorite legislative instruments.

What is the contribution of the SatCab Directive to the Digital Single Market?

PROF. MAZZIOTTI: None. No contribution. It started as a small instrument and became much smaller than it was. It's the evidence that the Digital Single Market is just something that we talk about mostly to coordinate the responses of the Member States to similar issues but not to favor or to advance in any possible way cross-border trade when it comes to content.

Last year we had a debate about the Portability Regulation, another small instrument that went through. That is very good. But in order to maintain this kind of territorially fragmented market it is mostly due to the structure of the audiovisual industry. So there was no contribution whatsoever.

MR. SHAPIRO: Stan, do you agree with that? I know that the audiovisual sector had big concerns with the Regulation as proposed, and indeed the scope of country of origin was narrowed down during the legislative process. Do you agree with Giuseppe's assessment of no contribution?

MR. McCOY: No, I wouldn't agree with the assessment of none. I think we are still concerned about the scope of what is contained in that Directive.

Just for those who aren't familiar with it, what was originally proposed was a "buy one and get twenty-seven free" rule for online services of broadcasters. As a result, if you were a broadcaster licensed to provide online services within your jurisdiction, you could serve them all over Europe based on a legal fiction associated with your home-country license.

That was, of course, extremely disturbing for anyone who values their contractual freedom to choose a different licensee in different markets. Shockingly, although the European Commission doesn't seem to realize this, the right person to distribute your work in Bratislava might not be the right person to distribute it in Barcelona and Bologna and Bremerhaven and everywhere else in Europe. Europe is a mega-diverse market. I think the interest of the audiovisual sector has been to preserve the ability of rightholders to serve that market in diverse ways.

That rule was fortunately rolled back very considerably in the legislative process. That's a good thing. It still exists for inhouse productions of broadcasters, and that's a step in the wrong direction from our standpoint. The internal market should be about tearing down barriers to serving all of Europe but not dictating business models for how to do it.

MR. SHAPIRO: Before we flip back to Giuseppe, let me ask Marco a question because it might help to understand more the mechanism.

One of the things I've struggled with in the SatCab Directive from the very beginning was what is a "broadcaster," because that is not defined in the legislation. We

now have a system where only a very small bit, if you will, is covered, “broadcasters’ own ancillary services.” Many broadcasters just sell their channels to platforms, so when the platform provides an ancillary service, presumably that is not covered by the country-of-origin principle; is that correct?

MR. GIORELLO: Yes, that is correct. The country-of-origin principle only applies to the broadcasters’ own online ancillary services (e.g., simulcasting, catchup), not to other players, such as platforms to which the broadcaster sells its programmes.

MR. SHAPIRO: That’s very comforting.

The question really is — and I’ll let Giuseppe try to tackle it — when exactly and for whom exactly is the country-of-origin principle triggered?

PROF. MAZZIOTTI: I think at the very beginning, if we look at history, it was done basically for the public broadcasters, also with a known commercial end in mind. The idea was that of advancing the mutual understanding and knowledge of someone else’s culture and language. That is something that is always underestimated, especially here in the United States, but we should also consider the cultural policy goals that are enshrined into the copyright law of the Europe Union. We tend to forget that the European Union also participates in broadcasting.

MR. SHAPIRO: We just heard how many cities start with B.

PROF. MAZZIOTTI: First of all, when I replied in a very negative way, a very clear way, to your question, I forgot to emphasize the crucial issue is to define what the Digital Single Market is.

My answer, mind you, is correct in the sense that the Digital Single Market is not what the current major audiovisual producers want. In my view, the platforms — not only Netflix but also YouTube, which is an extraordinary content producer — are showing that another business model has been very successful because they do distribute on a multi-territorial basis. If you look at what Netflix is doing, Netflix is achieving the Digital Single Market by itself with a vertical integration of distribution and content production.

Just to add a reflection on what Cameron was saying, it’s not only the GDPR. There is a form of platform regulation that is coming out from the European Union which is extremely interesting in my view. The audiovisual media service has been a standard for services like Netflix, and now Netflix and Hulu and similar services are obliged to contribute to the financing of local European film production. So basically the obligations of the old broadcasters have been transferred to the new broadcasters, let’s say.

The very new regulation on platform-to-business data disclosure is not very much antitrust. Even though antitrust is probably more effective in the European Union than it is in the United States, the antitrust type of remedy is episodic. Europe is seeking a more structural solution and looking at the possible new duty of data disclosure of the larger platforms to businesses who depends on platforms, e.g., booking.com and Amazon.

This is a brand-new Regulation that is now being approved in the European Parliament. There will be the endorsement of the Council soon. This is significant evidence of the fact that the European Union is trying to, let’s say, regulate platforms in many ways. Not only privacy was correctly recalled, but there is much more coming out right now.

MR. SHAPIRO: Okay, but you are straying a little bit further afield than I had thought we might want to go.

Does anybody want to make another point on the SatCab Directive?

MR. RECHARDT: Yes.

MR. SHAPIRO: I was going to ask you what the music industry thinks about it, but I thought that was too simplistic.

MR. RECHARDT: I think it would stand, but for us it is even more toxic for the simple reason that in many countries we do not have exclusive rights. We cannot negotiate

the deals to begin with, which means that you get twenty-seven for the price of one subject to compulsory license.

MR. SHAPIRO: So this is because the country-of-origin principle refers to basically three types of services — simulcast, catchup, and promo materials. When it comes to simulcast, you have a remuneration right.

MR. RECHARDT: In some countries we still have a remuneration right instead of normal exclusive rights, which obviously everyone should have.

MR. SHAPIRO: Everyone should have exclusive rights, I agree.

With that, let's now flip back over to the Directive and explore a little bit the press publishers' right. Jan, you have some experience with this in Germany, where a law was adopted previously. Not much came of it because Google de-indexed Germany, I think. But what has your experience been with that?

MR. NORDEMANN: Indeed, Germany has several years of experience with a neighboring right for press publishers that is a little different but structurally more or less the same as the new EU neighboring right. But so far, although it has been in place for years, as I said, there has not been any relevant income for press publishers because of this right.

Why is that so? Because there is one major player, not to say a market-dominant player, Google, in the room, who refuses to pay. Google unrolled a policy towards press publishers in two steps. The first step was, "If you ask us to pay for this, we will de-index you."

MR. SHAPIRO: Not the whole country, though.

MR. NORDEMANN: No, not the whole country, and they are not de-indexing pirate sites, but they threatened to de-index the press publishers who didn't volunteer to give them a license for free.

But then they changed their policy and kind of said, "We will index you, but in a lighter version," which also was very unfavorable for press publishers. So in the end the press publishers granted for-free licenses.

There is nothing you can do about this under copyright law because it is an exclusive right in Germany, and it's the same in Europe. It's an exclusive right, and of course you are free to license for free also your exclusive rights.

But there is antitrust law. If you are a market-dominant firm you are regulated. You cannot ask for any price you want to and it may be abusive to ask for a free license. There is an antitrust case pending. The press publishers lost it in the first instance, but I think with a very poor judgment. It was appealed. But the case may go nowhere. It should go to the CJEU, or at least to the German Federal Supreme Court. The problem is that the underlying German press publishers' right was probably not notified properly to the European Commission, and that's why it is for formal reasons not valid.

The CJEU will decide on whether the formalities are kept. I'm pretty skeptical that this case will survive, so we will not have an antitrust answer. But I'm quite sure that on the European level the same antitrust scenario will come up. There will be antitrust litigation, particularly against Google as the major player in this respect, and it will probably be years before this question is resolved and before the press publishers can get any revenue out of this.

MR. SHAPIRO: They can't de-index the entire European Union.

All right. Shifting gears again, I referred to the shot in the arm for the creative industry in Europe through the adoption of what are now Articles 18–23, the transparency, bestseller, remuneration principle, and the revocation clause, along with an alternative dispute resolution mechanism. These are provisions that you should all know in some cases exist in nearly every Member State. The Germans want to take credit for it, but they exist

in many Member States. It is just that German lawyers are so good at making money off of them.

With these provisions elevated to the European level, albeit with a huge margin for discretion in terms of implementation that I think Eleonora referred to, the question is, Stan, what will be the impact on the film industry?

MR. McCOY: I think there are a few concerning things in Chapter 3 of the Directive. To give you one example, Article 22 of the Directive is titled “Right of Revocation,” and it calls on Member States to ensure that where an author or performer has licensed or transferred their rights in a work on an exclusive basis, the author or the performer can revoke in whole or in part the license or transfer if there is a lack of exploitation.

Producers in the film and television sector exist to bring together a lot of creative contributions and make a very complex work. I’ll give you one example that I read about in the press. The recently critically acclaimed Glenn Close movie *The Wife* took thirteen years to go from the script to the start of principal photography.

In a world where any EU creative contributor, notwithstanding having signed away an exclusive option for a given period of time, could grow impatient with how long it was taking and revoke that option, you see potentially grave implications from that for the ability of producers to do what it is that producers do.

Eleonora said something important about non-harmonization at the beginning. The Directive does have a lot of good but vague guidance in there, saying: “Well, you have to take into consideration the situation that there might be multiple creative contributors; you have to take into consideration that there might be a need for sectoral exemptions.” Absolutely those are things that have to be considered from the perspective of the audiovisual sector. But will they be uniformly and appropriately considered in every single Member State? I’m worried about that.

MR. SHAPIRO: Has this been a consideration, Lauri, for the music industry? We don’t have any representatives of authors or performers on the panel, but maybe someone in the audience will speak for them in a minute. What is the impact from the perspective of the music industry?

MR. RECHARDT: It really remains to be seen how the provisions are implemented. As you said, most Member States have some form of provisions already, in particular on contractual adjustment, and some also have reporting obligations.

I think as an industry we are slightly in a different place than, say, the audiovisual industry. As a rule, record companies already pay royalties to artists. Moreover, they have normally contractual reporting obligations.

But, like the audiovisual industry in the music industry, many recordings have multiple contributors, including non-featured performers that are paid agreed session fees, so how to deal with those situations and how the sectoral specificities are taken into account are of concern.

There is one thing we need to be absolutely clear however: fair remuneration to artists and authors is like a glass of cold milk and a chocolate chip cookie — you cannot really argue with that. As an industry we depend on the artists and treating them fairly, so we definitely would not argue with that.

What you can argue about, though, is some of the proposed mechanisms and whether those are disproportionate means to achieve the objective.

MR. SHAPIRO: We have touched on a number of aspects of both Directives. There are obviously a number of other ones.

I would like to open it up to the audience. Does anybody want to ask a question of the panelists or of the speakers or want to raise an issue that hasn’t been touched upon yet.

QUESTION [James Bouras, attorney at law]: This is for Mr. Shapiro or anybody else on the panel. What do you think of the French announcement that HADOPI,¹⁵ CNC,¹⁶ and one other group¹⁷ will have the power to catalog, inventory, and evaluate content ID technologies and to recommend changes?

MR. SHAPIRO: Anybody want to take that one?

PROF. MAZZIOTTI: The European Commission will play an important role in verifying what the industry standards will be on a sector-by-sector basis. I assume, in response to your question, that France will have to, first of all, inform the Commission about this idea, and the Directive speaks about standards and whether or not this technology will perform the tasks that the new provision has assigned to these tools.

QUESTIONER [Mr. Bouras]: It's all a little vague right now.

MR. SHAPIRO: Would you like to comment on that, Marco?

MR. GIORELLO: Yes, very quickly. Just to confirm that indeed the application of Article 17 will require a lot of work on the ground on the practical tools and the practical application of the notion of "best efforts" to ensure the unavailability of non-authorized content. Practically speaking, common work at the EU level will be needed on the application of content ID technologies. This is the job that we will have at the European Commission in the next two years, also keeping in mind the objective to avoid creating a fragmented situation across different Member States. We need to make sure that we have a regime which is applied uniformly across Europe.

QUESTIONER [Mr. Bouras]: Will Eleonora make her Article 17 chart available as a T-shirt? [Laughter]

MR. NORDEMANN: One question here for Marco because I know, talking to the national legislators, it is very important for them to get Commission guidelines. Will this work be finished before national implementation is up?

MR. GIORELLO: Most likely yes. That, of course, is something that we have really not started discussing, but the Directive calls for the Commission to issue the guidance, which logically has to be a tool to facilitate implementation.

MR. SHAPIRO: Don't worry.

MR. GIORELLO: It's something that has to be done.

MR. SHAPIRO: Don't worry too much, Jan. It will take five or six years for the twenty-seven or twenty-eight Member States of the European Union to implement these two Directives.

MR. RECHARDT: Twenty-eight? You are an optimist.

MR. SHAPIRO: That may be why they are leaving now.

Carlo?

QUESTION [Carlo Lavizzari, Lenz Caemmerer, Basel]: I have a question regarding Chapter 3 and the platforms. Many user uploaders write licenses whereby the uploader grants all sorts of rights to the platform. Do you think that Chapter 3 would apply

¹⁵ Haute Autorité pour la Diffusion des Œuvres et la Protection des droits d'auteur sur Internet [1] or, loosely in English, "Supreme Authority for the Distribution and Protection of Intellectual Property on the Internet").

¹⁶ Computer Numerical Control.

¹⁷ The CSPLA (Le Conseil supérieur de la propriété littéraire et artistique). See CENTRE NATIONAL DU CINEMA ET DE L'IMAGE ANIMÉE, https://www.cnc.fr/professionnels/actualites/le-cspla-lhadopi-et-le-cnc-lancent-une-mission-conjointe-detude-et-de-propositions-sur-les-outils-de-reconnaissance-des-contenus-protéges-sur-les-plateformes_967299 (last visited Jun. 23, 2020).

to such contracts as well? In other words, at that point authors would have a right to get information, to revoke these conditions, and also for transparency.

MR. SHAPIRO: Are you asking whether an individual who uploaded user-generated content — so they are the author — and they signed the license that basically is worldwide, nonexclusive, can use Article 22?

PROF. MAZZIOTTI: First of all, I think we are underestimating what the platforms are doing in terms of content production. Once again, YouTube started one decade ago. Facebook is starting now.

I would respond positively to your question, saying in the Directive there is an important statement about fairness and about transparency, as you said.

Value is very much the elephant in the room. How many of you know how much YouTube pays for 1 million viewings? Between €80 and €100. This value is not revealed anywhere because it is secret, it is confidential, but you can ask.

MR. SHAPIRO: But the question is: If they have a huge success, can you invoke the bestseller clause against them? [Laughter]

PROF. MAZZIOTTI: In my view, yes. Obviously, I am optimistic and you are more prudent. I agree with you that it will be very difficult to implement the Directive in due time. There will be delays and so forth.

But if you look at the wording of the Directive, the reference is to the producer but also the sublicensees. How many of you know how YouTube produces content? There is a group of ex-MTV producers at YouTube who basically sign artists.

MR. SHAPIRO: Now you're mixing things. There are two components. YouTube has its own channels with content that it has produced, and there is also user-generated content. This was a question about user-generated content. It is a good one. The Directive is not completely clear on that issue.

Would somebody like to propose an answer to that?

PROF. MAZZIOTTI: To me, logically it depends on whether the individual creator has a direct contractor relationship with YouTube, in which case I would say that the provisions on transparency apply. If YouTube is just the eventual distributor of the content that I create and goes to the producer, I would receive something from YouTube only in specific circumstances which are quite specific.

MR. SHAPIRO: There is a hand up there.

QUESTION [Martin Schaefer, Boehmert & Boehmert]: This is also a question most presumably for Marco. Is the Directive about harmonizing on the highest or on the lowest level? So is there an obligation to match the provisions, or can you go beyond them in the sense of establishing stronger protection; or are you effectively kept from doing so, which is, of course, as you said, Ted, knowing that there are so many provisions in so many different fields the Directive is tackling? Do substandard provisions have to be on that level, or is it even so that things that go beyond in terms of protection must be cut down to the level of the Directive? It's a question that is absolutely not addressed in the Directive. Normally, it is always addressed in a directive.

MR. SHAPIRO: Sometimes you just know by looking at a given provision. The question is whether it's a minimum harmonization or maximum harmonization or maybe a mix, depending on the provision.

MR. GIORELLO: I think in my opinion a mix. Actually, now I think there are even some references in some parts of the Directive about the level of harmonization, at least in some recitals. The chapter on remuneration in my opinion is minimum harmonization.

MR. SHAPIRO: It has to be, doesn't it?

MR. GIORELLO: The part on exception is now more complex because it is minimum only as regards the space that Member States will still enjoy to go beyond if allowed by the 2001 Directive in cases where there is an overlap. But it's really not a "one size fits all," and it depends on the type of provisions.

MR. SHAPIRO: A great question.

Gentleman way in the back. Please state your name and affiliation.

QUESTION [Patrick Grüter, The Walt Disney Co., Brussels]: I have a question for the European Commission but maybe the panel as well. There is a general rule in extended collective management in this Directive, and there were previously a number of specific rules on collective management. Is this the new safety valve to enable what the United States has with fair use?

MR. GIORELLO: Of course, this is an opinion. I would not look at it from this perspective. This provision was not in the original Commission proposal. It was added during the negotiations because meanwhile we had a judgment of the Court of Justice which put in question the entire system of extended collective licenses, which are very much used in particular in the Northern European countries. So there was a political willingness to have a legal basis on extended collective licenses.

We did it with a number of safeguards and boundaries. We need to see how this will work. But frankly I don't see any direct connection with fair use. It was there to safeguard certain national systems that were in danger based on the current case law.

MR. SHAPIRO: We have a Finnish guy on the panel, and the Finns are obviously experts on extended collective licensing.

MR. NORDEMANN: Thanks, Ted.

MR. RECHARDT: Maybe I'm being too optimistic, but I would actually say that the provision might even be a step in the right direction in that it sets conditions for the application of the ECL,¹⁸ because what we are starting to see in a number of countries are pretty wacky applications of ECL in ways in which it was never intended to be used, as a solution for all kinds of alleged licensing problems. As I said, maybe I'm too optimistic.

MR. SHAPIRO: I've seen cases where opt-out was meaningless.

I see a Danish person in the room. Danes are also experts on ECLs.

QUESTION [Charlotte Lund Thomsen, International Video Federation]: I think *the* Danish person in the room.

Lauri, just because you're a Finn and you're the expert, could you talk a little bit about difficulties in opting out from standard collective licensing — I think that's actually at the root of Patrick's question — and whether it actually becomes compulsory licensing because you can't make use of the opt-out provisions that Marco was also reassuring us?

MR. RECHARDT: I don't think there's any need to the point too much. The CJEU has confirmed that the opt-out has to be a real opportunity to opt out; it must not be an unduly burdensome process. In addition, the CMOs¹⁹ managing rights under ECL must seek to inform the "non-member" right owners of what they are doing so that if they don't want to be part of the ECL they can then opt out.

In light of some recent national developments, it is better to have actual conditions for the application of ECL than just let it go wild.

MR. SHAPIRO: Was that the final gun? Okay. So I guess we are done. Thank you to the panelists, to the speakers, and to the audience.

Peace, love, and copyright, everybody.

¹⁸ Extended Collective Licensing.

¹⁹ Collective Management Organisations.