

End-user flexibilities in digital copyright law – an empirical analysis of end-user license agreements*

Péter Mezei[†] – István Harkai[‡]

Abstract: In the platform age, copyright protected contents are primarily disseminated over the internet. This model poses various challenges to the copyright regime that was mainly designed in and for the analogue age. One of these challenges is related to the fair balance between the interests of rightholders and other members of the society. Copyright norms try to guarantee this balance by granting a high level of protection for rightholders and preserving some flexibility for end-users.

The present article focuses on whether platforms' end-user license agreements contribute to the preservation of that balance, and how they allow for or diminish the exercise of user flexibilities. We collected, analysed and compared the private ordering practices of 17 service providers grouped in four main categories.

Our empirical examination demonstrated that intermediaries offer substantive flexibilities for their consumers, on the one hand, and they meaningfully limit the possibilities and decrease the expectations of end-users by restricting certain uses and providing limited access to contents, on the other hand. We measured the flexibility of the selected platforms, and we provided for the state of the art of platform flexibilities in the period preceding the implementation deadline of the EU's CDSM Directive.

Keywords: copyright law, user flexibilities, platforms, private regulation, end-user license agreements

1. Introduction

In the platform age, copyright protected contents are primarily disseminated over the internet. This model poses various challenges to the copyright regime that was mainly designed in and for the analogue age. One of these challenges is related to the fair balance between the interests of rightholders and other members of society. Copyright norms try to guarantee this balance by granting a high level of protection for the benefit of rightholders and preserve some flexibility for the benefit of end-users. These flexibilities include statutory limitations and exceptions (e.g., private use); resales (covered by the doctrine of

exhaustion); and complaint-and-redress mechanisms. Indeed, end-users' interests as consumers shall also duly be taken into consideration.¹ Platforms, with their private norms, especially end-user license agreements (EULAs) and terms of use/service, might effectively regulate and enforce that balance in their role as intermediaries in the chain of (e-)commerce.

In this article, we intend to contribute to the existing – but limited – literature on the interplay between end-user flexibilities and private ordering mechanisms in the digital copyright ecosystem² with the following question: how do private norms allow for or diminish the exercise

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[†] Associate Professor, Institute of Comparative Law and Legal Theory, Faculty of Law and Political Sciences, University of Szeged; Adjunct Professor (dosentti) of the University of Turku (Finland); Member of the European Copyright Society. Email: mezei.peter@szte.hu.

[‡] Senior Lecturer, Institute of Comparative Law and Legal Theory, Faculty of Law and Political Sciences, University of Szeged. Email: harkai.istvan89@gmail.com.

1 See in general: J. Schovsbo, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' (2008) 4 *Journal of Consumer Policy* 393–408.

2 Compare to e.g. P. Rott, 'Download of Copyright-Protected Internet content and the Role of (Consumer) Contract Law' (2008) 4 *Journal of Consumer Policy* 441–457; T. Riis (ed), *User Generated Law – Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar, 2016); P. Chapdelaine, *Copyright User Rights – Contracts and the Erosion of Property* (Oxford University Press, 2017); A. Perzanowski and C. Jay Hoofnagle, 'What We Buy When We Buy Now' (2017) *University of Pennsylvania Law Review* 315–378; L. Oprysk and K. Sein, 'Limitations in End-User Licensing Agreements: Is There a Lack of Conformity Under the Digital Content Directive?' (2020) 5 *IIC – International Review of Intellectual Property and Competition Law* 594–623; J. David Michels, C. Millard and F. Turton,

of end-user flexibilities related to copyright-protected subject matter?

We have combined both comparative and empirical methodological approaches. Our study covers a meso-level research topic: studying online intermediaries' private ordering mechanisms. With this, we pursue the enhancement of learning and knowledge about the selected topic, and offer an insight into and form recommendations related to the private ordering mechanisms. Such recommendations are timely in light of Article 17(7)–(9) of the European Union's Copyright in the Digital Single Market (CDSM) Directive,³ and they are also capable of introducing the pre-CDSM implementation state of the art of end-user flexibilities.

Our empirical research consisted of a two-phase collection and analysis of data related to 17 service providers, many of which fit into the recently introduced concept of 'online content-sharing service providers' (OCSSPs) under Article 17 of the CDSM Directive.⁴ Based on some variables, we measured the platforms' EULAs regarding selected user-flexibilities. Finally, we graded the flexibility of the selected platforms' EULAs, and compared them in a 'user-flexibility index'.

We found that platforms, which either host primarily or partially user-generated content (UGC), reached a higher user-flexibility score, while platforms that only provide access to the protected subject matter, without any possibility to interact over the platform or create permanent copies of contents, scored less (*UGC effect*). This conclusion is partially due to the fact that existing public norms limit end-user flexibilities in the case of streaming services, and allow for more flexibilities in the case of UGC-related platforms (*regulatory lock-in effect*). Furthermore, the fierce (vertical and horizontal) competition of platforms necessitates the offering of more competitive and hence more flexible services. Platforms that mainly offer one-way streaming services coupled occasionally with a license of limited offline users impose stronger limits on end-users' access to the sites. That is mainly due to their selected business model to build and monetize an all-encompassing, wide repertoire of professional contents that are subject to initial licensing schemes negotiated by them and the copyright holders (*business flexibility effect*).

The structure of the article is as follows. First, we conceptualize 'user-flexibilities' – the *subject* of our research (section 2). Secondly, we introduce our methodology in greater depth: the theoretical framework we applied (including our objectives, the scope of our research, and the considerations of comparability); and the actual process of data collection and analysis. This methodology allowed for the proper selection of the *objects* of our research (section 3). Thirdly, we present our key findings related to the various platforms, as well as introduce our analysis of the flexibility of the selected platforms (section 4). Finally, we conclude our findings and set the scene for a future analysis that follows the obligation to implement Article 17(9) of the CDSM Directive by the EU Member States (section 5).

2. What are end-user flexibilities?

This section conceptualizes the core subject of our comparative research, namely, 'end-user flexibilities'. In section 2.1. we address the notion of 'end-user', and in section 2.2. we discuss the meaning of 'flexibilities' as applied in this article.

2.1. On the notion of 'end-users'

Copyright norms are there to guarantee a high level of protection for the benefit of rightholders,⁵ and to preserve some flexibility for the benefit of end-users (in general to society). Ultimately, the goal of copyright law is to set up a well-functioning ecosystem, to build a playground for stakeholders with markedly different economic and moral interests, and to see-saw incentives, rewards and other benefits. This means that the rightholders are the ones to primarily harvest the fruits of their intellectual creations, but only within the frames of end-user flexibilities. At the same time, this article discusses whether the public and private regulatory norms properly take into consideration the needs and interests of end-users in the platform economy as well.

To reach that goal, first we have to conceptualize end-user flexibilities. In its first prong, end-user, we follow Pascale Chapdelaine's classification. According to her, end-users might be ordered in a hierarchical pyramid.

³ 'Contracts for Clouds, Revisited: An Analysis of the Standard Contracts for 40 Cloud computing Services' (2020) Queen Mary School of Law Legal Studies Research Paper No. 334/2020, 1–79. Most recently, Christian Katzenbach and João Carlos Magalhães, within the frames of the reCreating Europe project, have discussed the content moderation practices of 15 selected (mainstream, alternative and special) platforms. Their research outputs are to be published later in 2021. The core concept of this research is available at <https://www.hiig.de/en/project/platform-governance-and-copy-right/> (accessed 16 December 2021).

⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

⁵ To the contrary, online marketplaces are expressly excluded from the scope of OCSSPs. See *ibid* recital (62).

⁶ 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, recital (9). (Hereinafter: InfoSoc Directive.).

Users with full control over the – typically tangible – copy of the protected subject matter are on the top of the pyramid. Subscribers of audio-visual or music streaming services are listed second. On the bottom level, we can find users of social media and community spaces.⁶ All end-users are interested in having instant access to the available contents,⁷ and they generally believe that service providers are bound to provide access to digital contents, similar to consumables like water, gas, or electricity.⁸ Such access is, however, not self-evident. It is determined by the public rules and private regulations. Indeed, end-users' rights and flexibilities related to third party contents might sensibly decrease depending upon their position in Chapdelaine's hierarchy. She argues that end-users at the top have broader (occasionally property-based) rights. Vice versa, social media users might access and (re)use the protected contents in a more limited way. User-generated contents nevertheless lead to further challenges regarding the initial and secondary ownership/copyright interest over those contents.

2.2. On the notion of 'flexibilities'

We purposefully selected 'flexibilities', an all-encompassing expression, to reflect the broad nature of the benefits (occasionally 'rights'⁹) that end-users might enjoy in a digital copyright ecosystem. However, we do not limit flexibilities to classic copyright limitations and exceptions. Indeed, this word encompasses substantive and procedural, as well as benefits internal (regulated by) and external (imposed on) copyright law.

Some of these benefits are covered by public norms. The most important of these rules are classified as 'limitations and exceptions' to the rightholders' exclusive rights. Among others, these include *end-users' reproductions* (the download of one or more permanent copy or copies; creating a back-up copy); *end-users' disseminations* (resale of copies or accounts; linking); and *culturally or socially desirable uses* (uses for the purposes of

teaching, research, studying, news reporting, parody, caricature, pastiche, quotation, criticism, review; including UGC, if the use fits into an existing limitation or exception).

The scope and beneficiaries of these limitations and exceptions are statutorily set, although their correct interpretation is supported by the occasional case law of the Court of Justice of the European Union (CJEU). Some further statutory provisions limit the exclusive rights, e.g. the doctrine of exhaustion, collective rights management (CRM) or the term of protection. Their applicability in the platform economy is limited to a certain degree. The concept of 'digital exhaustion' (that is, the resale of digital files or accounts) is mainly ruled out, especially in the case of online services.¹⁰ Although CRM has direct relevance in the case of communication or making musical and audio-visual content available to the public, the majority of platforms have nothing to do with collective management organizations. Finally, the provision of public domain contents is less typical (although cannot be excluded) in the platform age. Hence, the majority of service providers deal with mainstream contents that are within the terms of protection.

Besides these substantive statutory norms, there might be *procedural safeguards*, which can guarantee that end-users are not put in a single-sided, detrimental (inflexible) position when using online services. These safeguards range from notice-and-take-down and other complaint-and-redress mechanisms; contract amendments with or without users' agreement; removal of contents uploaded/shared by the user; or the formalities related to the termination of user accounts.

In line with *contractual freedom*, service providers might also be able to offer further flexibilities for the benefit of end-users. These flexibilities are either unrelated to the statutorily regulated flexibilities or they are complementary to it (necessitating proper licensing by the service providers). These flexibilities are determined by the business model of the given service provider, and they are heavily influenced by the 'code', the technological

6 Chapdelaine (fn 2) 191–202.

7 C. Foong, *The Making Available Right – Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar, 2019) 3.

8 R. Frieden, 'What's new in the network neutrality debate?' (2015) *Michigan State Law Review* 747.

9 Exceptions and limitations have been declared to be 'user rights' by the CJEU in several preliminary rulings. Compare to Case C-117/13 *Technische Universität Darmstadt v. Eugen Ulmer* [2014] EU:C:2014:2196, paras 43–44; Case C-469/17 *Funke Medien v. Bundesrepublik Deutschland* [2019] EU:C:2019:623, para 70; Case C-516/17 *Spiegel Online v. Volker Beck* [2019] EU:C:2019:625, para 54. On the "user rights" approach see M. Favale, 'The Right to Access in Digital Copyright: Right of the Owner or Right of the User?' (2012) *The Journal of World Intellectual Property* 1–25; C. Sganga, 'Right to Culture and Copyright: Participation and Access' in C. Geiger (ed), *Research Handbook on Human Rights and*

Intellectual Property, (Edward Elgar, 2015) 560–576.; C. Geiger and E. Izyumenko, 'The Constitutionalisation of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!' (2020) 3 *IIC – International Review of Intellectual Property and Competition Law* 282–306; M. Borghi, 'Exceptions as Users' Rights?' in E. Rosati (ed), *The Routledge Handbook on EU Copyright Law* (Routledge, 2021) 263–280.

10 Compare to the recent judgment of the CJEU in Case C-263/18 *Tom Kabinet case: Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV and Others* [2019] EU:C:2019:1111. The judgment sparked, however, significant criticism. Compare to P. Mezei, 'The Doctrine of Exhaustion in Limbo – Critical Remarks on the CJEU's Tom Kabinet Ruling' (2020) 2 *Jagiellonian University Intellectual Property Law Review*. 130–153.

parameters of the given service. These flexibilities include re-download options; use of content on multiple devices; family sharing; sharing (embedding, reposting etc.) options.

On the other hand, some of the public and private regulatory sources are purposefully designed to limit the flexible enjoyment of contents by end-users. Technological protection measures (TPM), territoriality as public norms; geo-blocking (de facto territorialisation of internet¹¹) and the contractual provisions on rights granted to the service providers as private rules, knowingly limit end-users' abilities to access and use contents via online services. EULAs might overstep copyright norms or make end-users consent to a restrictive interpretation of the public rules (including limitations and exceptions). As a result, user flexibilities might be reduced to a mere grant to access contents. At the same time, end-users are not in the position to negotiate the contractual clauses – they can only consent to 'as is' terms.¹² These end-user limitations have their own boundaries, too. TPMs shall be effective in nature to be protected,¹³ and their application is also excluded in various cases under EU law.¹⁴ Geo-blocking¹⁵ has been partially ruled out by the European Union as well.¹⁶ Furthermore, consumer protection rules guarantee that end-users (consumers) might tackle misleading standard contractual clauses.¹⁷

In sum, our article intends to discuss multiple possible dimensions of end-user flexibilities. As Séverine Dussolier has put it, flexibilities might be discussed from an *ontological* perspective (addressing the scope of flexibilities); *hermeneutical* perspective (focusing on the interpretation of flexibilities); *geographical* perspective (whether cross-border uses are allowed); *legislative*

perspective (how European Union Member States have implemented flexibilities); and finally, from a *contractual* perspective (how exceptions and limitations are accommodated in private contracts).¹⁸ From these, we mainly focus on the ontological and contractual perspectives of flexibilities.

3. The article's methodology

The methodology of our research is a combination of comparative and empirical analysis. The *comparative* part of our methodology is necessitated by the focus on public and private rules developed in various jurisdictions and at various (macro and meso) levels (section 3.1.). The *empirical* prong of our methodology is related to the systematic and qualitative analysis of EULAs of selected service providers (section 3.2.).

3.1. Theoretical framework of a meso level empirical research

The goals of our research are, as often is the case in comparative legal scholarship,¹⁹ to enhance the learning and knowledge about the topic of copyright's user flexibilities, support the emergence of evolutionary and taxonomic research efforts, thus de facto helping the process of study and harmonization of the legal systems involved. At the same time, we also intend to offer an insight into and form recommendations related to the private ordering mechanisms. Such recommendations are timely in light of the European Union's CDSM Directive. The directive requires that Member States put in place a complaint-and-redress mechanism for the benefit of end-users; it leaves intact the *acquis* of

11 T. Kra-Oz, 'Geoblocking and the Legality of Circumvention' (2017) 3 IDEA – The Intellectual Property Law Review 387.

12 Oprysk and Sein (fn 2) 597–598.

13 InfoSoc Directive, Article 6(3).

14 Ibid Article 6(4).

15 Geo-blocking technologies make it possible to determine geographical location (based on IP addresses) of the end-user who accessed the content. Such limitation on the accessibility of contents is nothing new. It mimics technological protection measures installed on tangible data carriers, such as region codes of DVDs. On geo-blocking see e.g. S. Earle, 'The Battle Against Geo-blocking: The Consumer Strikes Back' (2016) Richmond Journal of Global Law & Business 1–20; A. Strowel, 'From Content Portability to Data Portability: When Regulation Overlaps with Competition Law and Restrictions Can Be Justified by Intellectual Property' (2016) 2 Competition Law & Policy Debate 63–70; G. Mazziotti, 'Is Geo-Blocking a Real Cause for Concern in Europe?' (2016) 6 European Intellectual Property Review 365–376; A. Roy and A. Marsoof, 'Geo-Blocking, VPNs and Injunctions' (2017) 11 European Intellectual Property Review 672–680; M. Trimble, 'Copyright and Geoblocking: The Consequences of Eliminating Geoblocking' (2019) 2 Boston University Journal of Science and Technology Law 476–502; P.K. Yu, 'A Hater's Guide to Geoblocking' (2019) 2 Boston University Journal of Science and Technology Law 503–529.

16 Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market. The scope of the Regulation is rather narrow. It is focusing on consumer protection, and creates a temporary exception in favour of the end-users in case of short, cross-border travels. The Regulation nevertheless leaves the contractual freedom of the rightholders and platforms intact, thus the licensing agreements can continue to be concluded on a territorial basis. Compare to G. Mazziotti, 'Allowing Online Content to Cross Borders: Is Europe Really Paving the Way for a Digital Single Market?' in T. Pihlajarinne, J. Vesala, and O. Honkkila (eds), *Online Distribution of Content in the EU* (Edward Elgar, 2019) 193.

17 Compare to the subjective conformity criteria of the EU's Digital Content Directive: Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, Article 7.

18 S. Dussolier: *Looking for Flexibility in Exceptions*, Keynote Speech of reCreating Europe, State of Exceptions and Limitations, 1 June 2021.

19 H.P. Glenn, 'The Aims of Comparative Law' in J.M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006) 57–65; L.-C. Wolff, 'Artificial Intelligence ante portas: The End of Comparative Law?' (2019) 3 The Chinese Journal of Comparative Law 491.

limitations and exceptions, and requires OCSSPs to ‘inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law’.²⁰ Our research therefore shows the pre-CDSM implementation state of the art of end-user flexibilities.

In pursuing our goals, we followed Mark van Hoecke’s ‘toolbox theory’, rather than a fixed methodological roadmap.²¹ Among the various methods included in van Hoecke’s comparative legal research ‘toolbox’, our study relied on the functional,²² contextual,²³ and, consequently, the common core²⁴ methods. These methods allowed us to efficiently analyse the effects and the ‘living’ nature of public and private rules, as well as the actual functioning of EULAs.

Successful comparative research shall consistently respond to the question of ‘what shall be compared’.²⁵ In light of this, comparative research allows for the macro-, meso- or micro-level of analysis of the selected research question.²⁶ Our study covers the meso-level research, studying private ordering mechanisms. As such, we focused on regulation *by* platforms (rather than on regulation of or on platforms).²⁷

The comparability of the data was ensured by the careful selection of the research parameters, e.g., the presence/absence of EU general rules; the categorization of user-flexibilities; the type and scope of platforms; the focus of the research (EULAs); the exact focal points (certain provisions and features of EULAs); the timing of data collection.

3.2. The framework of data collection and analysis

The empirical part of our study intended to collect, as well as systematically and qualitatively analyse service providers’ regulations related to user-flexibilities. On the one

hand, our goal was to have a clear view of the private ordering mechanisms of the selected service providers; however, on the other hand, we also wanted to compare the flexibility of these platforms, and address whether they tend to follow or deviate from the public rules on user-flexibilities.

We followed the seminal work of Maurizio Borghi et al. on the categorization of service providers.²⁸

Our selection was driven by two main criteria: (i) service providers shall be at a certain level of development (predominantly web 2.0 models, i.e., models where end user involvement is not only necessary but inevitable), and (ii) they shall offer similar, or almost similar, functions (mainly, hosting, streaming and/or selling of protected works or subject matter via the platform primarily by rights holders and/or end-users).

Prima facie infringing, piratical or rogue websites were excluded. Further relevant factors were the general availability of the selected platforms in the EU, and the availability of English language versions of their EULAs.

We purposefully decided to analyse the basic models of platforms. The majority of sites provide for a free-of-charge basic service, although the default for some platforms is paying for the subscription. We believe that covering all premium models would complicate the comparability of various models. Even more importantly, premium models necessitate the payment of extra (license) fees, which logically exclude user rights from the scope of flexibilities. We believe that the majority of flexibilities are statutory set and not subject to bargains between users and platforms.

A ‘coincidence factor’ was also taken into account. We focused on platforms that we are generally familiar with; that may fit into the concept of ‘online content-sharing service providers’ (OCSSPs) under Article 17 of the CDSM Directive;²⁹ that are broadly used rather than serve niche markets. We did not limit our focus on the biggest players, as is usually done by

20 CDSM Directive, Article 17(9).

21 M. Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) *Law and Method* 1–35.

22 According to van Hoecke, this method practically means that ‘rules and concepts may be different, but that most legal systems will eventually solve legal problems in a similar way’. This method focuses on functional equivalents and differences in various legal systems. Compare to *ibid.*, at 9. On the ‘functionalism’ of comparative law see especially K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, J.C.B. Mohr/Paul Siebeck, 1996).

23 This method focuses on the political-technological-economic environment, which formed the body of the law; it necessitates the empirical observation of case law and other sources of law. Compare to van Hoecke (fn 21) 16–18.

24 This method ‘looks for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among the compared legal systems or the

question how a European rule (...) could be interpreted in such a way that it fits best the different national traditions’. Compare to *ibid.*, at 21.

25 Wolff (fn 19) 491.

26 See van Hoecke (fn 21) 21–22; Wolff (fn 19) 491–492.

27 On the conceptual differences of the various forms of platform regulation see T. Gillespie, ‘Regulation of and by Platforms’ in J. Burgess, T. Poell and A. Marwick (eds), *SAGE Handbook of Social Media* (SAGE Publishing, 2018) 254–278.

28 M. Borghi, M. Lillà Montagnani, M. Maggiolino and M. Nuccio, ‘Determinants in the Online Distribution of Digital Content: An Exploratory Analysis’, (2012) 2 *European Journal of Law and Technology*, available at: <https://ejlt.org/index.php/ejlt/article/view/149/252> (accessed 16 December 2021).

29 The selected platforms will most probably fit into the scope of the newly envisaged categories of ‘online platforms’ and ‘very large online platforms’ under the proposed Regulation on a Single Market for Digital Services (DSA), Article 2(h) and Section 4, respectively.

policymakers³⁰ or researchers (e.g. YouTube,³¹ Instagram³² or iTunes³³).

In our purposive sampling procedure, a total of 17 platforms are finally included, grouped into four sets of platforms: streaming sites with host function; streaming sites without (or with limited) host function; online marketplaces; and social media.³⁴

Table 1 *Analysed platforms*

Streaming with hosting service	Streaming without hosting service	Online marketplaces	Social media
Soundcloud	Spotify	Steam	Twitter
Bandcamp	Netflix	Electronic Arts Origin	Instagram
YouTube	Disney+	Amazon	Facebook
Twitch		Apple Media Service	
DailyMotion		Google Play	
Pornhub			

At first, an extensive chart was created to contain excerpts from the EULAs of the studied platforms related to 15 different variables. These variables reflected fundamental user-flexibilities: *private users' reproductions* (the download of one or more permanent copy or copies; creating a back-up copy; re-download options; download and use of copies on multiple devices); *private users' disseminations* (family sharing; resale of copies or accounts; linking); *cultural uses* (teaching/research/studying; news reporting; parody/caricature/pastiche; quotation/criticism/review; UGC); *rights granted to the service provider*; *procedural safeguards* (notice-and-take-down and other complaint-and-redress mechanisms; contract amendments with or without users' agreement; removal of contents uploaded/shared by the user; termination of a user account).³⁵

As supposed, we have spotted significant differences between the selected private regulations with respect to the initial variables. This was generally due to their different business models and technological features. In order to guarantee the comparability of

data, our focus was directed at eight variables: (i) the extent of (access) rights; (ii) restricted acts that users are not entitled to perform; (iii) provisions, if any, on UGC; (iv) the license that end-users granted to the platforms or other users; (v) technological restrictions on access; (vi) family sharing and other types of transfer of subscription; (vii) termination/modification of user account/subscription; (viii) procedural safeguards.³⁶

Importantly, this meant that various flexibilities are not covered. The EULAs of the selected platforms are almost uniformly silent on culturally important flexibilities backed by fundamental rights (e.g. freedom of expression), such as citation, parody, educational or research exceptions. Such silence might be due to the fact that these flexibilities are prescribed (and, to a certain degree, are also excluded) by public norms and case law.³⁷

Finally, the platforms were measured according to a 'user-flexibility index'. In this index, we allocated points for each of the eight variables we selected in the second phase of the analysis. The allocable points started with 1 (least flexible) and went up to 5 (most flexible). The highest score was only assigned if the platform allowed the users to near freely complete a given task. Due to the existing – rightholder-oriented – copyright regulations, 5s were neither expected nor granted excessively. The average of independent grades provided for the final score of the platform in the 'user-flexibility index'.

4. Findings

In this part of the article, we introduce the key findings related to the service providers with respect to the eight selected variables. As will be shown, the service providers significantly differ with respect to some of these variables. Consequently, various issues will be elaborated on in more or less detail, depending upon the exact service provider (its business model). First, the variables will be introduced, and, secondly, the user-flexibility index of each platform will be provided.

30 Compare to T. Gillespie, P. Aufderheide, E. Carmi, Y. Gerrard, R. Gorwa, A.M. Fernández, S.T. Roberts, A. Sinnreich and S. Myers West, 'Expanding the Debate About Content Moderation: Scholarly Research Agendas for the Coming Policy Debates' (2020) 4 *Internet Policy Review* 3, available at: <https://policyreview.info/pdf/policyreview-2020-4-1512.pdf> (accessed 16 December 2021).

31 e.g. H. Boshier, 'Key Issues around Copyright and Social Media: Ownership, Infringement and Liability' (2020) 2 *Journal of Intellectual Property Law & Practice* 132–133.

32 e.g. H. Boshier and S. Yeşiloğlu, 'An Analysis of the Fundamental Tensions between Copyright and Social Media: the Legal Implications of Sharing Images on Instagram' (2019) 2 *International Review of Law, Computers & Technology* 172–181.

33 e.g. N. Aragon, 'Calculating Artists' Royalties: An Analysis of the Courts' Dualistic Interpretations of Recording Contracts Negotiated in a Pre-Digital Age' (2017) *Cardozo Law Review De Novo* 204–206.

34 These categories are not conclusive, indeed, there is a huge variety of online services. e.g. Microsoft is finally not covered by this research, as the company's Service Agreement – encompassing all online services of Microsoft – could not be comparably classified into any of the four selected groups of platforms.

35 The initial data collection took place between September and December 2020.

36 The secondary data collection took place between March and May 2021.

37 Compare to fn 14 above.

4.1. Streaming sites with hosting service

a. Analysed variables

From the five platforms listed in this category, YouTube is the market-leading platform of licensed and user-generated audio-visual and audio contents. Twitch serves a sub-cultural group: the gaming community. DailyMotion collects mostly news-related videos. Pornhub is one of the biggest sites for adult content. Finally, Soundcloud is an online audio sharing platform. The key feature of streaming sites with hosting service is that they simultaneously provide access to licensed content (of professional artists) and UGC. As such, their service fits into various and sometimes quite contradicting legal concepts, from copyright's communication/making available to the public to E-commerce Directive's hosting safe harbour.

Table 2 Permitted acts (viewing, listening or displaying contents)³⁸

'Personal' (all platforms)
'non-commercial' (YouTube, DailyMotion, Bandcamp)
'limited' (Twitch, Pornhub, Soundcloud, Bandcamp)
'worldwide' (Bandcamp)
'non-sublicensable' (Twitch, Pornhub, Bandcamp)
'non-assignable' (Soundcloud)
'non-exclusive' (DailyMotion, Pornhub, Soundcloud, Bandcamp)
'non-transferable' (DailyMotion, Pornhub, Soundcloud, Bandcamp)
'revocable' (DailyMotion, Pornhub, Soundcloud)
'conditional' (Pornhub, Soundcloud)
'royalty-free' (Pornhub)

Pornhub expressly allows users to 'create and display transient copies of the Website and Works as necessary to view them'.³⁹ Pornhub furthermore grants a 'download license' to allow users to 'download or otherwise copy the works'. Under this license, users

are not buying or being gifted copies [...] instead, they are licensing a limited, revocable, non-sublicensable, non-transferable and non-exclusive right to possess and use the copies for personal, non-commercial uses.⁴⁰

This license does not allow users to 'reproduce, distribute, communicate to the public, make available, adapt, publicly perform, link to, or publicly display the Websites and/or Works or any adaptations'.⁴¹ Soundcloud also

allows users to download (copy, rip or capture) contents, supposedly the uploader of the said content enabled the download functionality.⁴² If Bandcamp or the identified copyright holder permits it, users might be allowed to 'use', 'modify', 'reproduce', 'distribute' and 'store' content of the platform.⁴³ Social media functions (especially sharing and linking) are regularly provided by these platforms. Interestingly enough, Pornhub excluded the deep linking, framing or in-line linking of its content, if Pornhub's site or any portions of it may be 'displayed or appeared to be displayed' as well.⁴⁴

Table 3 Restricted uses⁴⁵

'Reproduce' and 'distribute' (YouTube, Twitch, DailyMotion, Pornhub, Bandcamp)
'display' (YouTube, Twitch, DailyMotion, Pornhub)
'download' (Twitch, DailyMotion)
'store' (Bandcamp)
'copy', 'rip' or 'capture' (Soundcloud)
'transmit' or 'broadcast' (YouTube, DailyMotion)
'communicate to the public, make available' or 'link to' (Pornhub)
'sell' and 'license' (YouTube, Twitch, DailyMotion)
'modify' (YouTube, Twitch, DailyMotion, Bandcamp)
'alter' (YouTube)
'adapt' and 'publicly perform' (Twitch, Pornhub)
'create derivative works' (Twitch, DailyMotion)
'redistribute', 'delete', 'deactivate any content protection mechanisms', 'enhance', 'edit', 'translate', 'reverse engineer', 'decompile' and 'disassemble' the website/service or works/content (Twitch, DailyMotion)
'rent, sell or lease access to the platform' or 'sell or transfer, or offer to sell or transfer, any SoundCloud account' (Soundcloud, also Bandcamp)

The *restricted uses* are more broadly construed by these platforms.

Twitch further forbids users to cache pages; 'create, upload, transmit, distribute, or store any content that is inaccurate, unlawful, infringing'; or to 'delete, remove, circumvent, disable, damage, or otherwise interfere with' security features.⁴⁶ Twitch's Soundtrack, a 'streamer tool', allows users to play licensed music in the background of live streams. Users, however, 'may not create on-demand content containing materials from Soundtrack, or live stream content that includes music

38 YouTube ToS, Permissions and Restrictions; Twitch ToS 7; DailyMotion ToU 6 and 6.9; Pornhub ToS, Conditional License to Use Our Intellectual Property; Soundcloud ToU, Your use of the Platform; Bandcamp ToU, Content and License.

39 Pornhub ToS, Conditional License to Use Our Intellectual Property.

40 Ibid.

41 Ibid.

42 Soundcloud ToU, Your use of the Platform.

43 Bandcamp ToU, Content and License.

44 Pornhub ToS, Conditional License to Use Our Intellectual Property.

45 YouTube ToS, Permissions and Restrictions; Twitch ToS 7 and 9; DailyMotion ToU 4; Pornhub ToS, Conditional License to Use Our Intellectual Property; Soundcloud ToU, Your use of the Platform; Bandcamp ToU, Content and License.

46 Twitch ToS 9.

or other materials from Soundtrack outside the Service'.⁴⁷

The selected platforms generally allow for the *upload of one or more type of user-generated content* (e.g. audio-visual contents, including adult contents and live streams; messages; text; comments; audio/sound; images/photos; graphics; applications; code or other data), but uniformly require that the said content shall respect third parties' intellectual property rights.⁴⁸ Soundcloud enables uploaders and users to interact with each other.⁴⁹ YouTube, PornHub and Soundcloud expressly note that they might analyse the uploaded contents to detect infringements.⁵⁰ Bandcamp grants the right to upload contents for 'fans' and 'artists' alike.⁵¹

Table 4 *The common elements of the licenses granted to the streaming sites with hosting service*⁵²

'Non-exclusive' and 'royalty-free' (all services)
'worldwide' (YouTube, Twitch, Pornhub, Soundcloud)
'sublicensable' (YouTube, Twitch, Pornhub)
'transferable' (YouTube, DailyMotion, Pornhub)
'to the furthest extent', 'for the maximum duration', 'unrestricted' and 'irrevocable' (Twitch)
'limited' and 'fully paid up' (Soundcloud)
'unlimited' and 'perpetual' (Pornhub).

Table 5 *Licensed uses by the platforms*

'Reproduce' and 'distribute' (all services)
'use" (YouTube, DailyMotion, Pornhub, Soundcloud)
'modify' (YouTube, Twitch, DailyMotion)
'display' (YouTube, Twitch, DailyMotion, Soundcloud)
'perform' (YouTube, Twitch, Pornhub, Soundcloud)
'publish' and 'translate' (Twitch, Pornhub)
'adapt" and 'create derivative works' (Twitch, Pornhub, Soundcloud)
'compile' (Soundcloud), 'market' (DailyMotion, Pornhub)
'represent', 'stream', 'replay', 'exploit', 'exhibit', 'show', 'compress' (Twitch)
'listen to offline', 'repost' and 'transmit' (Soundcloud)
'broadcast' (Pornhub)
'communicate' and 'make available' (Pornhub, Soundcloud)

Users of the platforms are also entitled to use or view the content, e.g. reproduce, distribute, modify, perform, display and communicate as per the terms of YouTube, Pornhub and Soundcloud.⁵³ On Bandcamp, both artists and fans shall grant an extensive license for the use of their uploaded UGC. Artists shall grant a license that includes the right to reproduce, distribute, publicly perform, publicly display, create derivative works of, communicate to the public, synchronize and otherwise exploit on behalf of the uploader and in line with the functionalities of the service; to allow end-users to receive contents and to reproduce them on any and all controlled devices for non-commercial purposes.⁵⁴ Fans grant a slightly broader license: they shall accept that subsequent users might use, edit, modify, reproduce on any and all controlled devices, distribute, prepare derivative works of, display and perform their submissions for personal and non-commercial purposes.⁵⁵

None of the analysed platforms applies significant *technological restrictions* other than those that are necessary to enforce the terms and conditions related to the restricted uses.

Family sharing is not an issue for this group of platforms, as registration is not a prerequisite for the use of standard service in the majority of cases. (Upgraded or premium models are not covered by our research.) *Other types of transfers*, e.g. resales or rental, either are excluded expressly, as introduced above or have no relevance in the lack of ability to acquire permanent and portable copies of contents via the platform.

The selected platforms unanimously declare their freedom to amend their terms and conditions, and require end-users either to accept expressly (by confirmation) or impliedly (by continuous use) the changes of the terms.⁵⁶ The termination of the rights (and license) of users is possible either in case of illicit usage, or by the deletion or removal of the content from the platform by the user. Pornhub maintains the right to distribute, perform server copies of contents.⁵⁷ YouTube, DailyMotion and Pornhub declare that users retain all rights over the contents generated by them.⁵⁸ Bandcamp uses a rather unfriendly language regarding

47 Twitch ToS 18.

48 YouTube ToS, User Content; Twitch ToS 8; Dailymotion ToU 6 and 6.1; PornHub ToS, Content Posted by Users and Models.

49 Soundcloud ToU, Your use of the Platform.

50 YouTube ToS, Your Content and Conduct Uploading Content; PornHub ToS, Content Posted by Users and Models; Soundcloud ToS, Liability for Content.

51 Bandcamp ToU, Intellectual Property Rights – Fans and Intellectual Property Rights – Artists.

52 YouTube ToS, Your Content and Conduct Licence to YouTube; Twitch ToS 8; DailyMotion ToU 3.1; Pornhub ToS, Content Posted by Users and Models.

53 YouTube ToS, Your Content and Conduct Licence to Other Users; Twitch ToS 7; DailyMotion ToU 3.2; Pornhub ToS, Content Posted by Users and Models; Soundcloud ToS, Grant of license.

54 Bandcamp ToU, Intellectual Property Rights – Artists.

55 Bandcamp ToU, Intellectual Property Rights – Fans.

56 YouTube ToS, Modifying this Agreement; Twitch ToS 6; DailyMotion ToU 2; Pornhub ToS, Cancellation.

57 Content Posted by Users and Models, available at: <https://www.pornhub.com/information/terms#terms> (accessed 16 December 2021).

58 YouTube ToS, Account Suspension and Termination by You; DailyMotion ToU 3.3; Pornhub ToS, Content Posted by Users and Models.

modification and termination. First, it transfers all responsibility to the end-users to check the terms of use (ToU) periodically but also declares that continued use of the service constitutes acceptance of the changes.⁵⁹ Secondly, the termination of the access might happen ‘at any time, with or without cause, with or without notice, effective immediately, which may result in the forfeiture and destruction of all information associated with your membership, including, without limitation, any access to any Music you may have purchased through the Service’.⁶⁰

Procedural safeguards are of crucial importance for hosting services, especially if the hosted content is UGC. YouTube removes or takes down such content that ‘is in breach of the agreement or may cause harm to YouTube or the users, or third parties’.⁶¹ The removal is mandatory, ‘if the user does not have the rights to use the content’.⁶² In case of material or repeated infringement, YouTube may terminate or suspend the access and the user’s Google Account as well.⁶³ YouTube’s terms of service (ToS) limits the platform’s liability for the content submitted by users,⁶⁴ and also for third-party websites and online services.⁶⁵ All other platforms exclude their liability for UGC. Illegal contents can be removed, screened, or edited by the service at any time, with or without notice, but the platforms exclude the obligation to monitor their sites on a general level and *ex ante*. The violation of the terms may result in termination or suspension of access.⁶⁶ Per Soundcloud’s ToS, copies available in offline mode will remain available for not more than 30 days after the removal of the contested content from the platform.⁶⁷

The selected platforms generally allow users to submit a complaint against the (allegedly) erroneous take-down of end-user content.⁶⁸ YouTube allows an appeal both in case the uploaded content is removed in line with its DMCA policy,⁶⁹ and in case YouTube’s Content ID identifies a match between a protected content and the latter user-generated content. Users shall first dispute Content ID’s finding, and if the copyright owner denies

the dispute, the user can file an appeal.⁷⁰ Any complaints and counter⁷¹ Users of Twitch can ‘arbitrate disputes with Twitch’, but the way users can seek relief is limited. The process of arbitration prevents users from ‘suing in court or from having a jury trial’. The dispute should be notified within 30 days.⁷² Any action taken related to the service must be commenced within one year.⁷³ DailyMotion users can submit a copyright counter-notification if the uploaded content was removed in error, or if it does not infringe third-party copyright. The appeal of the user is forwarded to the third party that has initiated the take-down of the content. Restoration is completely at DailyMotion’s discretion.⁷⁴

b. User-flexibility index

The key aspect of the flexibility of streaming sites with hosting service is that they are equally providing free-of-charge access to licensed/professional and user-generated contents. This business model clearly correlates with the architecture and flexibility of services. The way services monetize their contents necessitates the allowance of broader access rights (which are still more limited than the grant of license to the platform), including social media functionalities. The technological restrictions on accessing contents are also more limited, in order to allow for the broader enjoyment of contents. Indeed, some platforms provide for even more flexible solutions, e.g. offline access or download option (in case the original uploader enabled that functionality). As these services are free to the general public, the relevance of family sharing or other transfer of access rights is limited. It is sensible that YouTube has the most developed procedural safeguard system,⁷⁵ while the other services either mechanically comply with the standards introduced by the Digital Millennium Copyright Act (DMCA), or – conversely – they miss regulating the complaint-and-redress mechanism in great details (so that end-users lack relevant information on this possibility).

59 Bandcamp ToU, Modification of Terms of Use.

60 Bandcamp ToU, Termination.

61 YouTube ToS, Your Content and Conduct Removal of Content by YouTube.

62 YouTube ToS, Your Content and Conduct Removing Your Content.

63 YouTube ToS, Account Suspension and Termination by YouTube for Cause.

64 YouTube ToS, Other Legal Terms Limitation of Liability.

65 YouTube ToS, Other Legal Terms Third-Party Links.

66 Twitch ToS 9; Dailymotion ToU 5.2; Pornhub ToS, Monitoring and Enforcement; Termination; Soundcloud ToS, Liability for Content; Bandcamp IPP.

67 Soundcloud ToS, Grant of license.

68 e.g. Pornhub, DMCA Takedown Form; Bandcamp IPP.

69 YouTube, Appeal Community Guidelines actions, available at: <https://support.google.com/youtube/answer/185111> (accessed 16 December 2021).

70 YouTube, Dispute a Content ID claim.

71 See <https://support.google.com/legal/troubleshooter/1114905?hl=en> (accessed 16 December 2021).

72 Twitch ToS D.

73 Twitch ToS E.

74 Dailymotion ToU II.

75 Compare to e.g. M. Perel and N. Elkin-Koren, ‘Accountability in Algorithmic Copyright Enforcement’ (2016) 3 *Stanford Technology Law Review* 510–516.; K. Erickson and M. Kretschmer, ‘“This Video is Unavailable”: Analyzing Copyright Takedown of User-Generated Content on YouTube’ (2018) *JIPITEC* 75–89; S. Jacques, K. Garstka, M. Hviid and J. Street, ‘An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity’ (2018) 15(2) *SCRIPTed* 277–312.

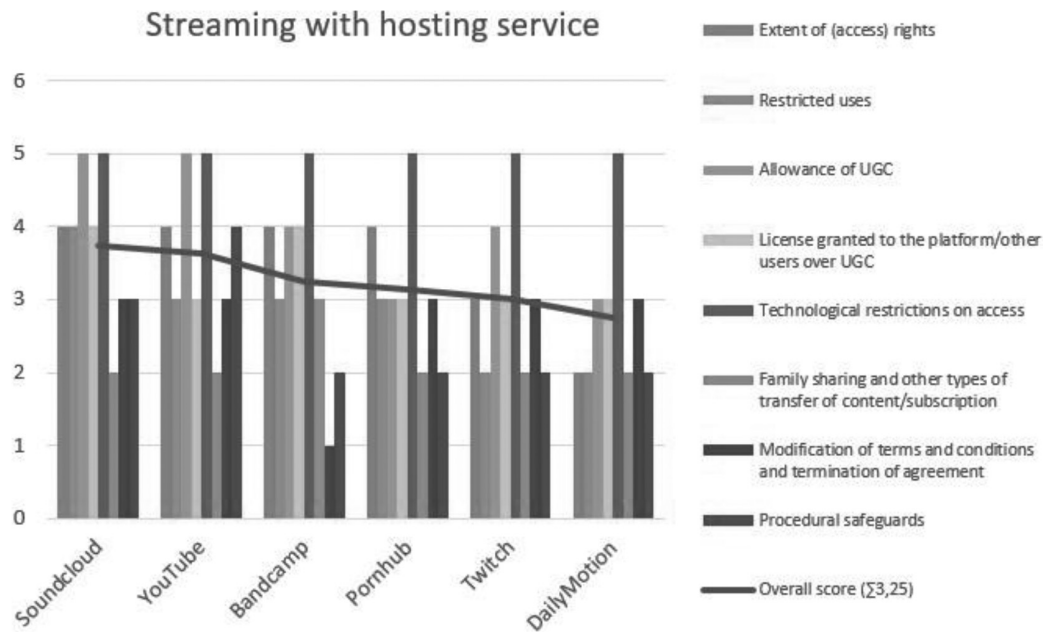


Figure 1 User-flexibility index of streaming sites with hosting service

Based on our findings, we conclude that Soundcloud is the most, and DailyMotion is the least user-friendly streaming site with hosting service. The average score of this group of services is 3.25 points.

4.2. Streaming sites without (or with limited) hosting service

a. Analysed variables

The key feature of this group of service providers is that their business model is based on the on-demand provision of professional/licensed audio or audio-visual contents, and mainly disable (or limit to a certain degree) the uploading of UGC to their system.

Disney+ and Netflix grant users a limited, non-exclusive, non-transferable *right to access* and view or use their contents and the service; these licenses are ‘non-sublicensable’, ‘personal’, and ‘non-commercial’;⁷⁶ as well as revocable in case of Spotify.⁷⁷ Disney+ and Netflix further exclude that ownership interests are created or transferred by the purchase of a license to use their services.⁷⁸ Netflix offers a feature called ‘Offline Titles’, according to which ‘some content is available for temporary download and offline viewing on certain supported devices’, but the number of downloadable content and the supported devices is limited.⁷⁹

Table 6 Restricted uses

‘reproduce’ (Disney+, Spotify)
‘rip’, ‘record’, ‘transfer’, ‘redistribute’, ‘broadcast’, ‘make available to the public’ and ‘sell, rent, sublicense or lease’ (Spotify)
‘distribute’, ‘archive’, ‘publish’ and ‘modify’ (Netflix)
‘display’ and ‘perform’ (Netflix, Spotify)
‘create derivative works’, ‘circumvent’, ‘decompile’, ‘disassemble’ and ‘reverse engineer’ (Netflix and Disney+)

Disney+ further prohibits the use of its product for ‘any commercial or business-related uses’ and Disney also forbids users to sell or assign any rights in the Disney Products granted to them in the license agreement.⁸⁰

Netflix does not have any *UGC* functionality, and therefore there is no rule on the *grant of license* to the service provider. Disney+ permits users to ‘create, post, upload, distribute, publicly display, or publicly perform UGC’. Users of its service are also entitled to ‘create derivative works using [...] copyrighted works’.⁸¹ Disney does not claim ownership over UGC, but grants users a

non-exclusive, sublicensable, irrevocable and royalty-free worldwide license [...] for the full duration of those rights to use, reproduce, transmit, print, publish, publicly display, exhibit, distribute, redistribute, copy, index, comment on, modify, transform, adapt, translate, create derivative works based

76 Netflix ToU 4.1. and 4.2; Disney+ ToU 2.A; Spotify §5.1.

77 Ibid.

78 Netflix ToU 4.2; Disney+ ToU 2.A.

79 Netflix ToU 4.2.

80 Netflix ToU 4.6; Disney+ ToU 2.B; Spotify TCU §5.1 and §9.

81 Disney+ ToU 7.B.

upon, publicly perform, publicly communicate, make available, and otherwise exploit” the UGC, “without the requirement of permission from or payment to the users [...].⁸²

Users of Disney+ shall ‘represent and warrant that they own the UGC’ and ‘they have the necessary rights and permissions contained in the UGC’, and if so, they paid all royalties, fees, or other payments due.⁸³ Disney + ‘may monitor, screen, post, remove, modify, store and review UGC or communication [...] at any time and for any reason’.⁸⁴ Otherwise, Disney+ takes no responsibility for content posted or sent by the users.⁸⁵ Spotify users are also allowed to upload or contribute content to the platform’s service. These UGCs are nevertheless generally limited in their scope, as they mainly cover pictures, texts, messages, information, playlist titles, descriptions and compilations. At the same time, Spotify requests users to ‘promise’ that none of these contents infringes third parties’ rights.⁸⁶ On the other hand, users shall grant a broad (non-exclusive, transferable, sub-licensable, royalty-free, perpetual, irrevocable, fully paid, worldwide) license for Spotify to use such UGC. Users are also required to ‘waive and not enforce’ their moral (or any equivalent) rights.⁸⁷

Netflix applies *technological restrictions* to limit the access of its service on a geographical basis. As Netflix’s ToU describes,

[u]sers may view the content primarily within the country in which they have established their account and only in geographical locations where Netflix offers their service and has licensed such content. The content that may be available to watch will vary by geographical location and will change from time to time.⁸⁸

Portability of content is limited in line with the ‘chosen subscription plan’.⁸⁹ Spotify expressly prohibits the circumvention of territorial restrictions of the platform.⁹⁰ Disney+ is silent on this topic, but in general, it prohibits any circumvention of any content protection system or digital rights management (DRM) technology, or to bypass, modify, defeat, temper with, or circumvent any of the functions or protections of the Disney Products.⁹¹ In the EU, the 2017/1128 Regulation on Cross-border Portability imposes restrictions on the online service providers regarding the portability of the content and

subscription to the service. On the one hand, Article 3 obliges the service provider to enable cross-border portability. On the other hand, Article 7 expressly prohibits any contractual provisions that can prohibit cross-border portability or limit it to a specific time. Such contractual provisions are not enforceable.

Netflix applies a rather restrictive logic regarding *sharing the right to access the service*, except for family sharing. Its ToU states, “[t]he Service and any content viewed through the service are for personal and non-commercial use only and may not be shared with individuals beyond household’.⁹² Bandcamp prohibits selling, licensing, renting or otherwise using or exploiting the contents for commercial purposes or if that violates any third parties’ rights.⁹³ Spotify expressly excludes all possible ways of dissemination of contents (as discussed above), but it remains silent on family sharing. Disney+ has no express rules on sharing.

The studied EULAs contain similar language regarding the *modification and termination of access*. Netflix maintains the right to change the ‘subscription plans and the price of the service from time to time’. These changes apply no earlier than 30 days.⁹⁴ Termination or restriction of access might take place ‘if users violate the Terms of Use or are engaged in illegal or fraudulent use of the service’.⁹⁵ Spotify applies similarly flexible terms related to the modification of its TCU (e.g. notification is provided, if ‘material changes’ are made to the agreement).⁹⁶ The infringing use of Spotify and Disney+ might lead to the termination of the user account.⁹⁷

The scope of *procedural safeguards* varies in this group of platforms. As Netflix does not offer any host service for UGC, it only regulates the possibility to submit copyright infringement claims,⁹⁸ but it has no complaint-and-redress mechanisms for erroneous content removal. Disney+ allows for ‘any dispute, action, or other controversy, whether based on past present, or future events, between you and us concerning the Disney Products or this Agreement’.⁹⁹ The parties agree to arbitrate all disputes, ‘except disputes relating to the ownership or enforcement of intellectual property rights’.¹⁰⁰ Disputes that are not subject to arbitration will be heard either in the state or federal courts located in

82 Ibid.

83 Ibid.

84 Ibid.

85 Ibid.

86 Spotify TCU §7.

87 Spotify TCU §8.3.

88 Netflix ToU 4.3.

89 Netflix ToU 4.3.

90 Spotify TCU §9.7.

91 Disney+ ToU 2.B. i., ix.

92 Netflix ToU 4.1.

93 Bandcamp ToU, Content and License.

94 Netflix ToU 3.5.

95 Netflix ToU 4.6.

96 Spotify TCU §2.

97 Disney+ ToU 1.H and 7.B; Spotify TCU §9.

98 Netflix Legal Notices Copyright.

99 Disney+ ToU 8.

100 *ibid.*

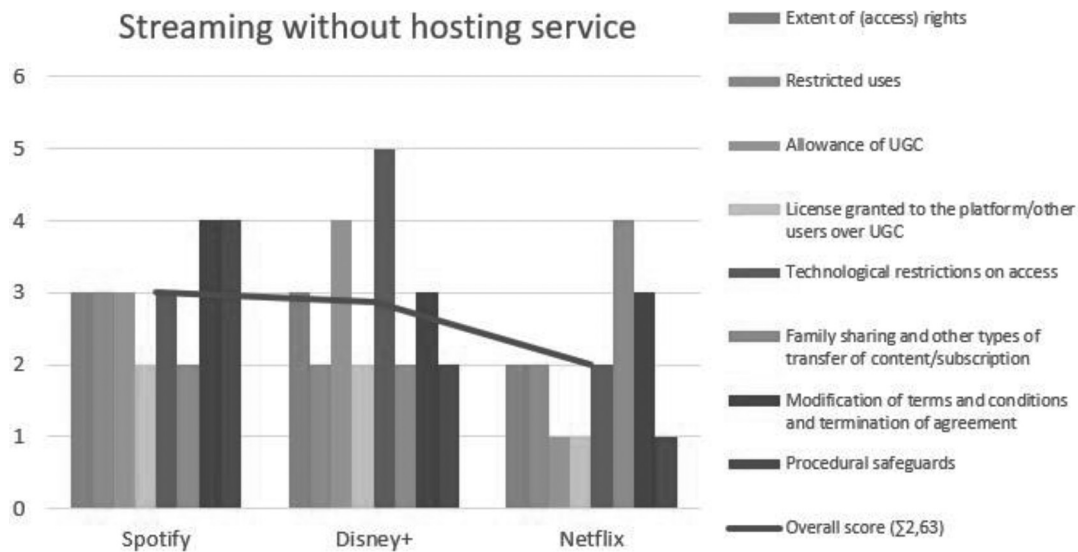


Figure 2 User-flexibility index of streaming sites without (or with limited) hosting service

Los Angeles or New York.¹⁰¹ Spotify operates a DMCA-compliant notice-and-take-down procedure, and also allows for the submission of counter-notices. Spotify, however, does not provide a blanket form to submit such counter-notices.¹⁰²

b. User-flexibility index

Streaming sites without a (or with limited) hosting service are mainly providing licensed/professional content on-demand. This business model is the primary reason for finding these platforms to be much less flexible than streaming sites with associated hosting services. The high risk of losing the revenues in audio and audio-visual contents necessitated rightholders and service providers to agree on stricter terms regarding the use of the platforms' services. This is clearly visible from the limited scope and strict language of the respective EULAs. More technical restrictions are applied, social media functionalities are mainly disabled, flexible solutions, e.g. offline access or download option are rare in the basic models of the services (indeed, they are core features of premium models). At the same time, e.g., Netflix applies an option of family sharing, which is a broad user-flexible solution. These platforms operate their own procedural safeguards, which are in line with the DMCA. These procedures are, however, mainly oriented towards the protection of rightholders' interests, and do not support end-users in complaining

against (allegedly) extensive moderation of their contributions.

Based on our findings, we conclude that Spotify is the most, and Netflix is the least user-friendly streaming site with hosting service. The average score of this group of services is 2.63 points.

4.3. Online marketplaces

a. Analysed variables

This group of service providers contribute to the dissemination of predominantly digital contents by professional and, to a certain degree, private creators/developers. The model's leading challenge is how to regulate the acquisition of contents by end-users.

Online marketplaces generally provide 'personal' and 'non-commercial' (all services), 'non-exclusive' (Steam, EA Origin, Amazon, Google Play), 'non-transferable' (EA Origin, Amazon), 'limited' and 'non-sublicensable' (Amazon) *access rights*, where the services and contents are licensed, not sold, granted or waived.¹⁰³ All services might be used by signing up for the service, and opening an account (and hence providing personal data) to the service provider. Steam, EA Origin and Google Play require a running client and permanent internet connection to access the content/server of the service.¹⁰⁴

Apple Media Services offers the most flexible solutions to access contents. It is allowed e.g. to use contents from up to five different Apple IDs on each device; to

101 Disney+ ToU 9.A.

102 Spotify TCU §10 and Spotify CP.

103 Steam SA 2.A; EA Origin UA 2; Amazon CU, License and Access; Apple Media Service TC, Services and Content Usage Rules, and Licensed Application End User License Agreement; Google Play TS, 2.

104 Steam SA 2.A; EA Origin UA 1; Google Play TS, 2.

burn audio playlists of purchased music to discs for listening purposes up to seven times; to use Individual Apple Music membership on up to 10 devices (from ten only five can be computers); to use DRM-free contents on a reasonable number of compatible devices that users own or control; to use DRM-protected contents on up to five computers and any number of devices that users sync to from those computers; to download apps and videos on a permanent basis (although access to these contents terminates once the user's subscription ends); or to stream audio-visual contents on up to three devices simultaneously. Apple also recommends creating back-up copies for safety purposes.¹⁰⁵

Google Play's TS applies the expressions 'purchase', 'buy' and 'sale contract' in the same sentence, but elsewhere it declares that 'Content that you purchase or install will be available to you through Google Play for the period selected by you, in case of a purchase for a rental period, and in other cases as long as Google has the right to make such Content available to you'.¹⁰⁶ As such, it effectively reduces 'purchase' to a limited access right to browse, locate, view, stream or download content to synchronized devices. At the same time, Google Play, similarly to Apple's cloud service, allows for online storage (including scans and matches of files stored on local devices of users) of acquired contents.¹⁰⁷

Google Play's TS similarly includes a broad range of restricted uses, which include the prohibition of

redistribution, the use of stream-ripping, stream capture or similar software to record or create a copy, the circumvention, disabling or defeating any of the security features or components, and the removal of watermarks, labels or other legal or proprietary notices.¹⁰⁹ The restrictions under Apple Media Services' TC might be indirectly deducted from the scope of access rights (which are limited to personal and non-commercial uses).

Online marketplaces sensibly regulate UGC in a different manner. EA Origin is quite restrictive in this regard, and focuses mainly on the limitations of a UGC-experience. Users are not allowed to 'publish, post, upload, or distribute' such illegal or unauthorized UGC.¹¹⁰ If the UGC violates EA Origin's terms, the platform is entitled to 'remove, edit, or disable UGC'. Otherwise, 'EA is not responsible or liable for UGC, or for removing it. EA does not pre-screen UGCs'.¹¹¹ To the contrary, Steam enables interaction with other users, to create and to share via a more vivid and flexible user interface. Users can incorporate content into Fan Art. By doing so, they are entitled to 'use, reproduce, publish, perform, display, and distribute Fan Art on a non-commercial basis'.¹¹² The Steam interface can be used for generating further UGCs other than Fan Art that can also be made available to other users or to Steam.¹¹³ Amazon allows for posting of reviews, comments, communications and other content on its site, as long as they are not infringing third parties' rights, including IP rights.¹¹⁴ Apple Media Services allows users to submit 'materials' such as comments, pictures, videos, and podcasts, but only as long as users have the permission, right or license to do so.¹¹⁵ Google Play is designed to offer only authorized contents, rather than pure UGC. As such, even amateur content developers are treated as rightholders in Google Play's ecosystem.

Table 7 *Restricted uses*¹⁰⁸

'Copying', 'distribution', 'reverse engineering' or 'use/derive source code' (Steam, EA Origin)
 'photocopy', 'reproduce', 'publish', 'translate', 'modify', 'disassemble', 'decompile', 'create derivative works', 'remove any proprietary notices', 'sell', 'grant security interest in', 'transfer reproductions', 'rent', 'lease' and 'license' the available contents (Steam)
 'resale', 'collection and use of any product listings, descriptions, or prices; any derivative use of any Amazon Service or its contents; any downloading, copying, or other use of account information for the benefit of any third party; or any use of data mining, robots, or similar data gathering and extraction tools', 'framing techniques'; as well as 'compilation', 'modify', 'create derivative works', 'distribute', 'assign any rights to, or license the Amazon Software in whole or in part' and 'reverse engineering' with respect to computer programs (Amazon)

Table 8 *Rights granted to online marketplaces*

'Worldwide' and 'non-exclusive' (Steam, EA Origin, Amazon, Apple Media Services)
 'perpetual' (EA Origin, Amazon, Apple Media Services)
 'irrevocable' (Amazon)
 'royalty-free' (Amazon, Apple Media Services)
 'sublicensable' (EA Origin, Amazon)
 'transferable' and the use is 'without further notice, attribution or compensation to the user' (EA Origin)

105 Apple Media Service TC, Services and Content Usage Rules.

106 Google Play TS, 3 and 4.

107 Google Play TS, 2.

108 Steam SA 2.G; EA Origin UA 2; Amazon CU, License and Access and Additional Amazon Software Terms.

109 Google Play TS, 2.

110 EA Origin UA 6.

111 EA Origin UA 5.

112 Steam SA 2.D.

113 Steam SA 6.

114 Amazon CU, Reviews, Comments, Communications, and Other Content.

115 Apple Media Service TC, C.

Both Steam and EA Origin necessitate the *granting of broad rights* and entitlements regarding their (and their users') use of UGCs.

Among the permitted uses 'use', 'reproduce', 'modify', 'create derivative works from', 'transmit', 'communicate', 'publicly display', 'publicly perform' can be found.¹¹⁶ Steam further lists 'distribute', 'transcode', 'translate' and 'broadcast',¹¹⁷ while EA Origin acquires the right to 'host' and 'store' UGC.¹¹⁸ Google Play applies the same standard of rights granted to Google by all and any uploaders/sellers.

The rules on *technological restrictions* show significant differences, too. EA Origin does not guarantee permanent availability of the service, content, or entitlements in all locations. It also does not guarantee that its service can be accessed on all devices, or in all geographical locations.¹¹⁹ Steam requires the creation and running of an account, as well as to permanently maintain an internet connection to use the content.¹²⁰ Amazon is silent on technological restrictions. Apple Media Services, to the contrary, is generous in this regard, as it allows for simultaneous uses even if DRM is applied; but a significant amount of content is DRM-free on Apple Media Services. Google Play strictly protects the various technological restrictions (e.g. it applies watermarks) and prohibits any possible circumvention of them. Google Play also expressly declared that the availability of contents might vary between countries.¹²¹

Secondary dissemination (especially resales of contents and transfer of subscriptions) is generally excluded by online marketplaces. Nevertheless, some service providers grant flexible options to share contents with end-users. The 'Subscription Marketplaces' of Steam allow users to trade, sell, or purchase 'certain types of subscription', such as licenses related to virtual items.¹²² Besides offering access to contents on multiple devices and in multiple copies generously, Apple Media Services offers for a broad family sharing possibility as well. As such, users might share eligible contents with up to six members of a family (although users can only belong to one family at a time, and cannot join any family more than

twice a year).¹²³ Google Play loosely declares that family sharing might be available.¹²⁴

Online marketplaces are uniformly strict regarding contract *modification and termination*. EA Origin might modify the agreement from time to time. If users continue to use the service, they accept the changes, but any revisions will become effective only 30 days after posting on EA Origin's website.¹²⁵ Steam and Google Play are obliged to notify users at least 30 days prior to the amendments; but continued use means acceptance of the modifications.¹²⁶ Amazon, however, remains silent on how it intends to inform its clients of changes. To the contrary, it merely declares that it 'reserve(s) the right to make changes' to its CU.¹²⁷ Apple Media Services similarly reserves the right to make amendments to its terms, which become immediately effective; the continued use of services are deemed to be acceptance of such terms; but Apple isn't obliged to notify its clients of the changes.¹²⁸ Online marketplaces generally allow for the termination of the service by the user, or by the platform, in case the user breaches any terms of the agreement, e.g. unlawful, improper, or fraudulent uses.¹²⁹ Similarly to its modification terms, Apple Media Services might terminate the agreement with its client without notifying them of the decision.¹³⁰

Online marketplaces' *procedural safeguards* also show great diversity. Steam operates both a notice-and-take-down system to manage copyright infringements,¹³¹ and a complaint-and-redress mechanism for the benefit of users. This latter mechanism is two-staged. At first, users must try to seek a solution via the Steam support site.¹³² If the support team cannot provide a remedy to the problem, the parties must arbitrate any claims related to either the agreement, the use of Steam, or user account, 'except IP, Unauthorized Use, Piracy, or Theft'.¹³³ Claims in these fields must be brought in a court with jurisdiction.¹³⁴ EA Origin's mechanism is slightly similar. Users must first seek remedy via customer support.¹³⁵ Every dispute, other than that related to intellectual property, falls under the scope of binding arbitration. The parties must try to informally settle the

116 Steam SA 6.A; EA Origin UA 5; Amazon CU, Reviews, Comments, Communications, and Other Content, Apple Media Service TC, C.

117 Steam SA 6.A.

118 EA Origin UA 5.

119 EA Origin UA 4.

120 Steam SA 2.A.

121 Google Play TS, 2 and 4.

122 Steam SA 2.D.

123 Apple Media Service TC, D.

124 Google Play TS, 2.

125 EA Origin UA 14.

126 Steam SA 8; Google Play TS, 2.

127 Amazon CU, Site Policies, Modification, and Severability.

128 Apple Media Service TC, Contract Changes.

129 Steam SA 9.B; EA Origin UA 8; Amazon CU, License and Access; Google Play TS, 2.

130 Apple Media Service TC, Termination and Suspension of Services.

131 Steam NCI.

132 Steam Support.

133 Steam SA 11.

134 Ibid.

135 EA Help.

dispute 30 days prior to initiating the arbitration.¹³⁶ Amazon, however, only operates a DMCA-compliant notice-and-take-down regime,¹³⁷ and directs any user complaints to a compulsory arbitration mechanism.¹³⁸ Apple Media Services only regulate a general copyright notice system. It might be used by both professionals and users, if they believe that any content on Apple’s services infringe a copyright of the given person.¹³⁹ Google Play’s TS is silent on copyright procedures related to allegedly infringing materials, but any such complaints and counter-claims might be submitted via Google’s condensed, central page.¹⁴⁰

b. User-flexibility index

Online marketplaces are generally shy on providing flexible access rights to end-users. This approach is mainly due to the online marketplaces’ role in the dissemination of primarily third party contents that are only licensed to these platforms by the content creators. Hence the stricter ‘as is’ terms. Similarly, while online marketplaces creatively call ‘dissemination’ of contents as a sale, transfer or purchase, these acquisitions remain outside of the scope of the right of distribution and the doctrine of exhaustion. These, in conjunction with certain platforms’ (e.g. Steam’s) reliance on UGC/fan art, the

requirement of broad grants of rights by users on UGC for the benefit of platforms in exchange of unpaid data sharing,¹⁴¹ the strict modification and termination terms, and (in the majority of cases) the underdeveloped complaint-and-redress mechanisms lead to an asymmetric contractual situation and limited user flexibilities. The fact that the overall average score of online marketplaces is still higher than that of streaming sites without a hosting service is mainly due to various meaningful business model flexibilities, like Apple’s broad service involving redownloads, family sharing and multiple device uses or Google’s well-developed complaint-and-redress mechanisms.

Based on our findings, we conclude that Apple Media Service is the most, and Amazon is the least user-friendly streaming site with hosting service. The average score of this group of services is 2.9 points.

4.4. Social media

a. Analysed variables

Social media’s business model is predominantly based on the sharing of personal and publicly available information by and among end-users (including professionals who are willing to publicize their activities, including

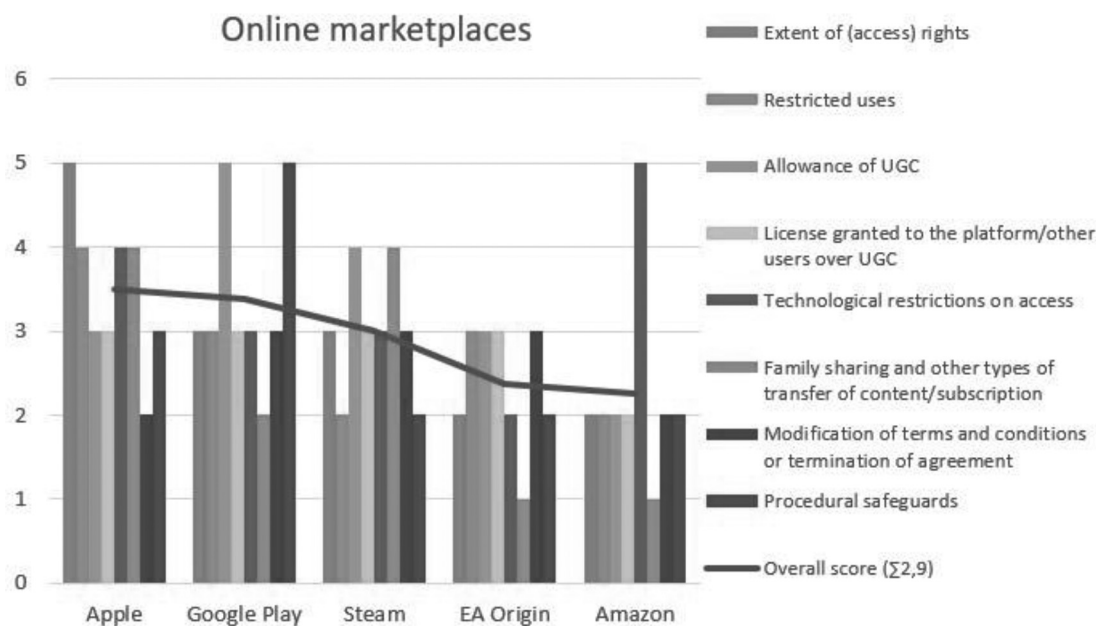


Figure 3 Flexibility index of online marketplaces

136 EA Origin 15.
 137 Amazon CU, Notice and Procedure for Making Claims of Intellectual Property Infringement.
 138 Amazon CU, Disputes.
 139 Apple Media Service TC, Copyright Notice.

140 See <https://support.google.com/legal/troubleshooter/1114905?hl=en> (accessed 17 December 2021).
 141 On the monetization of ‘free labour’ see S. Kopf, ‘“Rewarding Good Creators”: Corporate Social Media Discourse on Monetization Schemes for Content Creators’ (2020) *Social Media + Society* 1–12.

protectable subject matters). It is based on constant, general and public availability of data rather than proprietary or exclusive access to that (even if platforms offer space to privately host information, too).

Twitter provides a ‘personal’, ‘worldwide’, ‘royalty-free’, ‘non-assignable’ and ‘non-exclusive’ license to *access and use* the service.¹⁴² Neither Facebook’s ToS, nor Instagram’s ToU includes any similar term. Both documents highlight the primacy of personalized experiences, and the connected, global and free speech oriented nature of the services.¹⁴³

As social media platforms primarily focus on the dissemination of user content, they rarely *restrict uses* by straight regulatory limitations. To the contrary, they either have general prohibitions (e.g. users cannot do anything that violates someone else’s IP rights)¹⁴⁴ or they encode the available functionalities, and expressly state that users shall use (and not misuse) the interface and instructions of the platform.¹⁴⁵ Such ‘flexibility’ is therefore delusive: end-users might only do what they are allowed to do by the code.

Social media services allow for the broad use of original contents and UGC, including literary (e.g. tweets), visual (e.g. images), audio (e.g. music) and audio-visual (e.g. from clips and animations to longer videos). The analysed platforms unanimously declare that the users retain the rights on the contents submitted, posted or displayed by end-users.¹⁴⁶ Twitter expressly requires users to warrant for the lawful nature of the said contents (including the acquisition of the necessary authorization to disseminate information).¹⁴⁷ Platforms further declare that they retain the right (but are not generally obliged) to remove all and any infringing content from their services.¹⁴⁸

Social media platforms necessitate the *granting of broad* [‘worldwide’, ‘non-exclusive’, ‘royalty-free’, ‘sublicensable’ (all services); ‘transferable’ (Facebook; Instagram)] *rights and entitlements* to ‘to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute (...) for clarity, these rights include, for example, curating, transforming, and translating’ UGC (Twitter);¹⁴⁹ ‘to host, use, distribute, modify, run, copy, publicly perform or

display, translate, and create derivative works of your content’ (Facebook and Instagram).¹⁵⁰

Social media services are quite flexible in this respect as regards *technological restrictions*. The terms of Facebook and Instagram are generally silent on this topic, but the platforms’ functionalities (their code) clearly delineate users’ possibilities in this respect. Twitter has a distinct and detailed description of the technological features of the use of its service.¹⁵¹ These provisions (descriptions, rather than regulations) might limit the user experience at the user interface level (e.g. exclusion of download option), but they do not apply restrictions like geo-blocking.

Secondary – especially unchanged – *dissemination* of user submissions is of crucial importance for social media. All selected platforms regulate that end-users must allow fellow users, in line with the applied interface, to enjoy and share contents via social media. As, however, end-users do not transfer any ownership interests to platforms, platforms cannot allow others to acquire any interests over the exact content posted on the social media. As such, at least theoretically, secondary uses are strictly limited to intangible postings rather than the acquisition and resale of any uploaded (maybe copyright protected) materials.¹⁵² Family sharing has no role in social media. All users have their own registration/identity, and the sharing of profiles is both unnecessary and excluded.¹⁵³ Facebook and Instagram have recently limited end-users’ flexibilities regarding secondary dissemination. With effect on 1 October 2020, these platforms changed their terms to exclude the unauthorized embedding of third parties’ images.¹⁵⁴

Social media services reserve the right to unilaterally *modify the terms of service*. Twitter explains that it ‘will try to notify’ users of the changes, but upon the continuous use of the service the end-user agrees to be bound by the new terms.¹⁵⁵ Facebook and Instagram notifies users at least 30 days before the changes happen, and allow users the ‘opportunity to review’ the new terms. This nevertheless leaves users with only two options: either to follow the new terms by continuous use of

142 Twitter ToS 3. Your Rights and Grant of Rights in the Content.

143 Facebook ToS 1; Instagram ToU, The Instagram Service.

144 Facebook ToS 3.2; Instagram ToU, Your Commitments.

145 Twitter ToS 4. Using the Services.

146 Twitter ToS 3. Your Rights and Grant of Rights in the Content; Facebook ToS 3.3; Instagram ToU, Your Commitments.

147 Twitter ToS 3. Your Rights and Grant of Rights in the Content.

148 Twitter ToS 3. Content on the Services; Facebook ToS 3.2; Instagram ToU, Content Removal and Disabling or Terminating Your Account.

149 Twitter ToS 3. Your Rights and Grant of Rights in the Content.

150 Facebook ToS 3.3; Instagram ToU, Your Commitments.

151 See <https://help.twitter.com/en/using-twitter> (accessed 17 December 2021).

152 But compare to the famous Richard Prince case discussed below.

153 Facebook ToS 3.1; Instagram ToU, Your Commitments.

154 D.L. Cade, ‘Instagram Says You Need Permission to Embed Someone’s Public Photos’ (*Petapixel*, 5 June 2020), available at: <https://petapixel.com/2020/06/05/instagram-says-you-need-permission-to-embed-someones-public-photos/> (accessed 17 December 2021); B. Hillen, ‘Mashable Embedded Image Copyright Case Revived Over Surprising Facebook Statement’ (*Digital Photography Review*, 25 June 2020), available at: <https://www.dpreview.com/news/7591192231/mashable-embedded-image-copyright-case-revived-over-surprising-facebook-statement> (accessed 17 December 2021).

155 Twitter ToS 6. General.

the service or terminate the user account.¹⁵⁶ The platforms might terminate the user account upon the material breach of the terms of service. The user might voluntarily *deactivate* her account as well. In the case of Twitter, all information (including the username and the uploaded information) will be permanently erased following a 30-day cool-off period, if the user does not request to reactivate the account.¹⁵⁷

These platforms offer a detailed set of *complaint-and-redress mechanisms*. Twitter’s DMCA policy both offers rules on smooth content removal, as well as a clear mechanism to retract the mistakenly removed content.¹⁵⁸ Facebook and Instagram offer only a general guideline on counter-notifications, but miss offering a helping hand to end-users in enforcing their rights against false removals.¹⁵⁹

b. User-flexibility index

Since end-users are the primary generators of contents on social media, these platforms set up an architecture to offer the broadest and most flexible environment to share and access information with others. Professional

creators are also able to (and many of them, especially influencers and celebrities, practically) use social media to share protected expressions. End-users’ freedoms are nevertheless elusive in the sense that platforms strictly code the functionalities of their websites.

This is best evidenced by the recent changes of Instagram’s and Facebook’s terms related to embedding. The recent US case law shows that certain courts are ready to sidestep the ‘server test’ developed some time ago in the *Perfect 10 v. Amazon* case.¹⁶⁰ Most recently, various US federal courts argued that not only the person, who originally uploaded to and hosted a given content on a server, but subsequent link setters shall also be liable for the use of the content (especially framed/embedded images/videos).¹⁶¹ The changes to the terms of social media platforms are therefore to limit the chances of liability (of both users and the platforms themselves).

However, such developments might have unexpected side effects. In certain circumstances, the secondary use of UGC shared over social media might be found fair use under US law. But if Richard Prince displaying enlarged UGC photos on the wall of art galleries or selling those photos with slight textual/visual complements to the

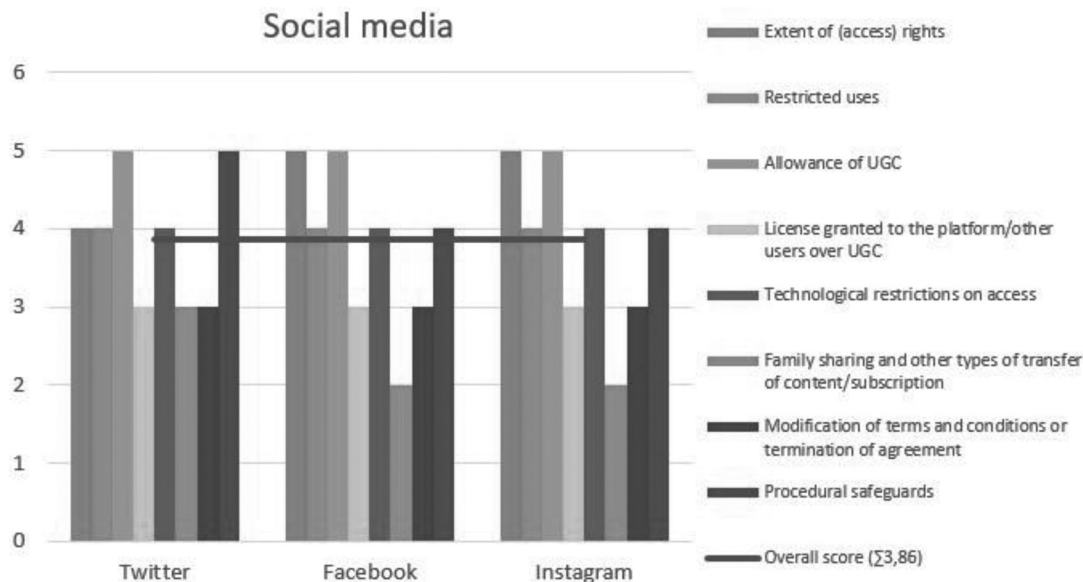


Figure 4 Flexibility index of social media platforms

156 Facebook ToS 4.1; Instagram ToU, Updating These Terms.

157 See Twitter’s <https://help.twitter.com/en/managing-your-account/how-to-deactivate-twitter-account> (accessed 17 December 2021); Facebook’s <https://www.facebook.com/help/224562897555674?ref=tos> (accessed 17 December 2021) and Instagram’s provisions, available at: <https://help.instagram.com/370452623149242?ref=igtos> (accessed 17 December 2021) in this regard.

158 Twitter CP.

159 See Facebook’s <https://www.facebook.com/help/1020633957973118> (accessed 17 December 2021) and Instagram’s https://help.instagram.com/126382350847838?helpref=page_content (accessed 17 December 2021) identical terms in this regard.

160 *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (2007).

161 *Justin Goldman v. Breitbart News Network, LLC, et al.*, 302 F.Supp.3d 585 (2018); *Sinclair v. Ziff Davis, LLC*, 454 F.Supp.3d 342 (2020); *McGucken v. Newsweek LLC*, 2020 WL 2836427 (2020).

image is lawful,¹⁶² then the limitation on resharing of images by news reporters or even non-commercial users by the code of platforms might seem to be unproportioned. Like the other analysed platforms, social media services have ‘as is’ terms. Their modification and termination shows therefore minor differences compared to the other EULAs. The termination of any user account has much more legal implications from a data protection or unfair competition perspective.¹⁶³

Based on our findings, all platforms in this group scored 3.86 overall.

5. Concluding remarks

5.1. Discussion

End-user expectations to digital contents have never been higher. It is clearly demonstrated by the rising number of subscriptions to the different online services or the registered users to social networking sites and the number of orders submitted via online marketplaces. Users expect fast access to preferably an unlimited number of online contents. Platforms have created diverse business models, so they intend to and can satisfy end-users’ needs in a markedly different manner.

End-user (consumer) expectations and contractual phraseology are, however, in clear conflict. On the one hand, plenty of EULAs’ language is overly complicated. Indeed, in some jurisdictions, several terms and conditions (of Twitter and Facebook) were found to be void due to their unreasonable language.¹⁶⁴ On the other hand, the majority of end-users do not read ‘as is’ terms and conditions as they find these provisions hard to understand.¹⁶⁵ At the same time, end-users’ expectations are high with respect to the used service.¹⁶⁶ They expect ‘a contract to contain more favourable terms than it actually provides’.¹⁶⁷

This article intended to analyse how flexible EULAs of selected platforms are, related to end-users’ expectations and also related to the flexible use of the services, and whether private ordering mechanisms contribute to the fair balance of the interests of various stakeholders.

Based on our empirical research, we conclude our findings in the following four points.

First, users are granted a more limited range of flexibilities with respect to the use of intangible or service-like contents. On the one hand, these flexibilities are narrowed down by the legislation itself. For example, the doctrine of exhaustion unquestionably applies in the analogue world; but it is practically ruled out by courts in Europe (and in the US) in the digital domain. On the other hand, the examination of the selected EULAs evidenced that platforms also tighten the grip on the potential uses of their services. For example, limitations or bans are placed on access to contents on a geographical basis or secondary dissemination. Technical protection measures are strictly applied in many cases. EULAs are either silent on some significant end-user flexibilities (e.g. freedom of expression-based exceptions and limitations, which might be covered by fair use in the US) or they are not clear enough on the practical application of those flexibilities (e.g. well-developed notice-and-take-down regime, but loose(r) complaint-and-redress mechanisms). Similarly, various service providers apply misleading language, e.g. they speak of ‘sale’, ‘purchase’ and the like, although the EULAs are purposefully limited to offer a license to the clients of the service providers. We believe that close attention shall be paid to the EULAs’ ‘as is’ nature, the asymmetric granting of rights (less to users, more to platforms), the misleading language and the occasional lack of conformity with user expectations. In sum, platforms are in a position to further limit end-users’ flexibilities in certain aspects, but, in doing so, they do not intend to keep any fair balance between rightholders and end-users. The majority of private regulatory provisions are there to strengthen the platforms’ position in this ‘balancing game’.

Secondly, paradoxically, our empirical findings show that Chapdelaine’s hierarchy of end-users’ power is incorrect. We certainly share her opinion that ownership-based user rights are the strongest ones and hence such users can unquestionably be ranked at the top of the end-user hierarchy. At the same time, our analysis suggests that social media users are granted broader

162 *Patrick Cariou v. Richard Prince, et al.*, 714 F.3d 694 (2013), *cert. denied*, 134 S.Ct. 618 (2013).

163 On social media and the ‘right to be forgotten’ see e.g. E. Georgiades, ‘Down the Rabbit Hole: Applying a Right to Be Forgotten to Personal Images Uploaded on Social Networks’ (2020) 4 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1111–1155. Court proceedings related to the unfair nature of WhatsApp’s terms and the sharing of WhatsApp data with Facebook were initiated in Italy. Compare to A. Cervone, ‘Unfair Contract Terms and Sharing of Data with Facebook, towards a Better Protection of Social Media Users: The WhatsApp Cases’ (2017) 2 *Italian Antitrust Review* 204–214.

164 On two French high court decisions see Boshier (fn 31) 125.

165 A. Perzanowski and J. Schultz, ‘Digital Exhaustion’ (2011) *UCLA Law Review* 896; Perzanowski and Hoofnagle (fn 2) 335; P. Racine, ‘Copyright Digital Exhaustion: A Public Interest Approach for the Retransfer of Licensed Digital Content in Canada’ (2019) *Intellectual Property Journal* 367–370; Boshier (fn 31) 125; S. Karapapa, ‘Exhaustion of Rights on Digital Content Under EU Copyright: Positive and No Perspectives’ in T. Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar, 2020) 490.

166 e.g. S.V. Helm, V. Ligon, T. Stovall and S. Van Riper, ‘Consumer Interpretations of Digital Ownership in the Book Market’ (2018) 2 *Electronic Markets* 177–189.

167 Perzanowski and Hoofnagle (fn 2) 321.

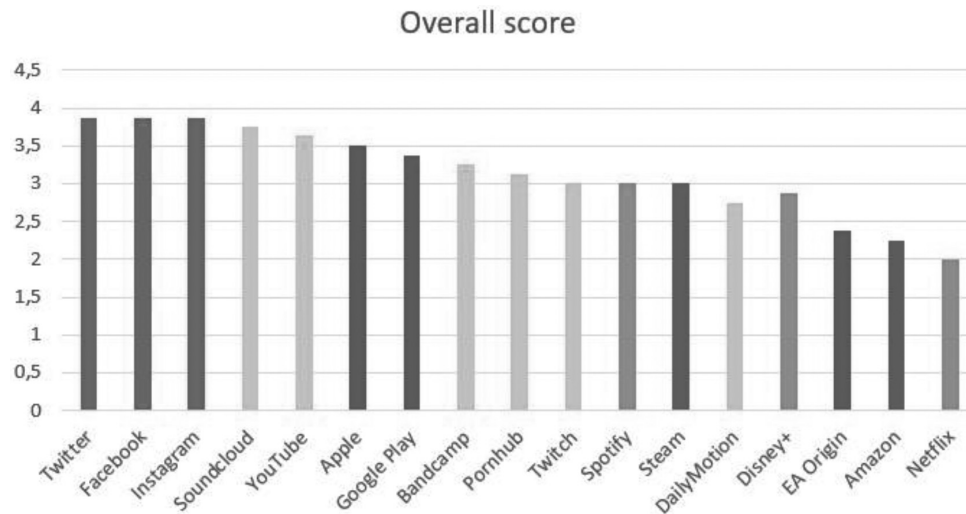


Figure 5 Overall flexibility index of analysed platforms

flexibilities than users of streaming platforms. Users of social media platforms therefore exercise greater control – both at the upload and the access level – over the available contents. We call the importance of UGC for the overall flexibility of a given platform the *UGC effect*.

Thirdly, end-user flexibilities are heavily affected by the legislative framework. This means, on the one hand, various service providers, especially those that offer licensed professional contents, are limited by the existing copyright rules. Vice versa, platforms that are based on or offer UGC as well enjoy an environment of greater flexibility. We call this phenomenon the *regulatory lock-in effect*.

Fourthly – and, to a certain extent, most importantly – end-user experience is heavily affected by the fierce competition of various platforms. The horizontal (service-based, e.g. Facebook v. Twitter) and vertical (company- or portfolio-based, e.g. Apple v. Facebook) competition of service providers necessitate learning from each other, and sometimes overbidding competitors' offers. (In the 'streaming wars', such overbidding is currently focused on the quantity of the available repertoire.) Quite a lot of end-user flexibilities stem from this competition, e.g. secondary dissemination, family sharing or UGC-sharing and further user benefits, e.g. subtitles,¹⁶⁸ that this article could not address. We call this phenomenon the *business flexibility effect*.

5.2. Overall flexibility index

Taking all these points into account, our final conclusion is that social media platforms reached the highest average score, as they offer broad rights to upload and access UGC, and – in light of the fierce competition with other service providers – they tend (and are required) to offer more flexible options to upload and access those UGCs. Streaming sites with a hosting function and online marketplaces tend to score less, mainly due to their more significant regulatory lock-ins, e.g. related to the limited transfer of rights via their platforms. Streaming sites without a hosting function 'performed' the worst. They offer very limited space for UGC, they are locked-in to the public laws, and their competition effects mainly their technical functionalities rather than the flexibilities granted for the benefit of end-users.

5.3. Outlook – the CDSM Directive on the horizon

The majority of the analysed platforms were founded under/are subject to US norms.¹⁶⁹ Our research indicates that these platforms shall update their terms and conditions with an EU effect once the EU Member States implement Article 17 of the CDSM Directive.¹⁷⁰

Article 17, besides the new liability regime of OCSSPs, also includes notable rules on user-flexibilities. Paragraph (7) requires that OCSSPs do not prevent the

168 'How Netflix Is Creating a Common European Culture' (*The Economist*, 31 March 2021), available at: <https://www.economist.com/europe/2021/03/31/how-netflix-is-creating-a-common-european-culture> (accessed 17 December 2021).

169 D.B. Nieborg and T. Poell, 'The Platformization of Cultural Production: Theorizing the Contingent Cultural Commodity' (2018) 11 *New Media & Society* 4285.

170 To a lesser degree, Article 7 of the CDSM Directive might be of importance, too. Here, the directive expressly declares contractual provisions to be unenforceable that limit the functioning of Article 3 (text- and data-mining by research organisation); Article 5 (distant and digital education); and Article 6 (cultural preservation).

availability of lawful UGC, and that users are able to rely on e.g. parody or quotation during the use of platforms to receive and impart information. Paragraph (8) makes it clear that OCSSPs shall not generally monitor their system, which will necessitate the proper oversight of UGC's legality and their coverage by the relevant limitations and exceptions. Paragraph (9) obliges OCSSPs, on the one hand, to put in place effective and expeditious complaint-and-redress mechanisms, and, on the other hand, to inform end-users in their EULAs of the availability of limitations and exceptions under EU law.¹⁷¹ Indeed, the European Commission, in its lately published Guidance on the implementation of Article 17, declared the liability regime subject to the proper functioning of end-user safeguards.¹⁷²

Nevertheless, how exactly the 27 Member States will implement and how platforms will comply with Article 17(7)–(9) of the CDSM Directive in practice, as well as what case law will develop regarding the conformity of EULAs under the Digital Content Directive, is a question to be addressed in our second phase of research.

Likewise, in case the proposed DSA will be accepted by the EU legislation, the second phase of research shall directly address some new rules related to 'online platforms' and 'very large online platforms', e.g. terms and conditions (Article 12), internal complaint-handling systems (Article 17), out-of-court dispute settlement (Article 18), measures and protection against misuses (Article 20) and codes of conduct (Article 35).

Annex: Terms and conditions (last accessed on 17 December 2021)

Amazon Conditions of Use (CU) (<https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM>)

Apple Media Services Terms and Conditions (TC) (<https://www.apple.com/legal/internet-services/itunes/us/terms.html>)

Bandcamp Intellectual Property Policy (IPP) (<https://bandcamp.com/copyright>)

Bandcamp Terms of Use (ToU) (https://bandcamp.com/terms_of_use)

Dailymotion Terms of Use (ToU) (<https://www.dailymotion.com/legal/terms>)

Disney+ Terms of Use (ToU) (<https://disneytermsofuse.com/english/>)

EA Help (<https://help.ea.com/en/>)

EA Origin User Agreement (UA) (<https://tos.ea.com/legalapp/WEBTERMS/US/en/PC/>)

Facebook Terms of Service (ToS) (<https://www.facebook.com/terms.php>)

Google Play Terms of Service (TS) (https://play.google.com/intl/en-us_us/about/play-terms/index.html)

Instagram Terms of Use (ToU) (https://help.instagram.com/478745558852511/?helpref=hc_fnav)

Netflix Terms of Use (ToU) (<https://help.netflix.com/legal/termsfuse>)

Netflix Legal Notices Copyright (<https://help.netflix.com/legal/notices>)

Pornhub Terms of Service (ToS) (<https://www.pornhub.com/information/terms>)

Pornhub DMCA Takedown Form (<https://www.pornhub.com/information/dmca>)

Soundcloud Terms of Use (ToU) (<https://soundcloud.com/terms-of-use>)

Steam Notice of Copyright Infringement (NCI) (<https://steamcommunity.com/dmca/create/>)

Steam Subscriber Agreement (SA) (https://store.steampowered.com/subscriber_agreement/)

Steam Support (<https://help.steampowered.com/en/>)

Twitch Terms of Service (ToS) (<https://www.twitch.tv/p/ru-ru/legal/terms-of-service/>)

Twitter Copyright Policy (CP) (<https://help.twitter.com/en/rules-and-policies/copyright-policy>)

Twitter Terms of Service (ToS) (<https://twitter.com/en/tos#intlTerms>)

Twitter Parody, newsfeed, commentary, and fan account policy (PNCF) (<https://help.twitter.com/en/rules-and-policies/parody-account-policy>)

YouTube Terms of Service (ToS) (<https://www.youtube.com/t/terms?gl=GB>)

YouTube Appeal Community Guidelines actions (<https://support.google.com/youtube/answer/185111>)

YouTube Dispute a Content ID claim (<https://support.google.com/youtube/answer/2797454>)

171 On Article 17(9) see especially S.F. Schwemer and J. Schovsbo, 'What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in P. Torremans (ed), *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer, 2020) 569–589.

172 *Communication from the Commission to the European Parliament and the Council – Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, Brussels, 4.6.2021, COM(2021) 288 final, 18–25.