

A new framework for copyright policy?

Kluwer Copyright Blog
March 16, 2020

Philippe Rixhon (UCL Centre for Blockchain Technologies)

Please refer to this post as: Philippe Rixhon, 'A new framework for copyright policy?', Kluwer Copyright Blog, March 16 2020, <http://copyrightblog.kluweriplaw.com/2020/03/16/a-new-framework-for-copyright-policy/>

Impartial observers of the 2018-19 debates around the new European Directive on Copyright must have been mystified. They were used to the acrimonious disputes between lobbies representing conflicting short-term economic interests. No surprise there. The shock came from elsewhere; from citizen reactions, community responses and societal questions.



What if these reactions, responses and questions were more than a superficial hiccup triggered by a new regulation, but indeed a symptom of a much deeper malaise caused by a growing inadequacy of our policy framework? What if the relations between humans and their products – necessary policy considerations – would no longer be sufficient?

Recent work on political philosophy can be applied to the new Directive on Copyright and help reunite meaning with reality, and reality with feasibility.

Rethinking EU politics and policymaking

Nicole Dewandre argues that Hannah Arendt's well-known but controversial distinction between labour, work and action provides a basis for transforming European politics and policymaking. Arendt would bring the theory needed for the Union to move beyond the modern trap it fell into thirty years ago. At that time, the Commission shifted its purpose away from enhancing interdependence among Member States through a common market towards achieving an internal market to boost growth and create jobs. Arendt would provide the tools to transform the conceptualisation of agents and relations that fuels the growing dissatisfaction among many Europeans towards policymaking. By applying this shift, policies could change their priorities and better address the needs and expectations of plural political agents and European citizens.

Practically, Dewandre's research leads to a three-dimensional policy framework that keeps and goes beyond the market relationship between humans and products – the basis of most Western policies – to include the community relationship between humans and humans, and the society relationship between humans and ecosystems. That framework could exceed the 1D angle used by lobbies to flex their muscles, offer a 3D perspective on societal issues and reconcile citizens with policymaking.

Rights in publications

Let's have a look at Recital 54 of EU/2019/790, one of the recitals introducing Article 15 on the protection of press publications concerning online uses.

"A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society []. Publishers of press publications are facing problems in licensing the online use of their publications []. In the absence of recognition of publishers of press publications as rightsholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient".

In this wording, ethics considerations sound instrumentalised to justify individual economic interests, hence somehow disqualified.

Let's place the recital in the 3D framework and rewrite: *"A free and pluralist press is essential to a vibrant public space. It informs public debate and supports the proper functioning of a democratic society".* Now, the ethical principle is affirmed without being instrumentalised.

And continue to rewrite: *"In the transition from print to digital, publishers of press publications are facing problems in securing revenues allowing them to fulfil their mission in democratic societies".* The reality – the publishers' difficulty in monetising their work in the digital era – is recognised, but without anticipating the solution.

The new three-dimensional policy framework abandons the dichotomy between efficiency and ethics, and instead of a trade-off seeks a combination of both. It adds the community and society dimensions to the market considerations and allows meaningfulness to emerge, while still sticking to reality.

In the case of rights in publications, the new 3D framework allows the move from a stakeholder-based approach (relying on the assumption that trade-off between conflicting interests leads to optimal policy outcomes), where the survival of press publishers is a mere market consideration, to a meaningful public debate on the sustainability of quality journalism.

Reuniting reality and feasibility with meaning

The new Directive on Copyright specifies what is needed to implement Article 15 –

- Licensing and enforcement of rights in press publications (Recital 54);
- (Automated) contracts or licences listing the stakeholders in an IP asset (Recital 59);
- Tracking transfer of authors' rights (Recital 60); and
- Compensation-sharing schemes (Recital 60).

Which won't work without solving a few (!) challenges such as –

- Checking the reliability of information (Recital 55);
- Distinguishing between public & private, commercial & non-commercial uses of press publications (Recital 55);
- Agreeing on technically enforceable definitions of "reproduction", "communication to the public", "publisher of press publication" (Recital 55), "press publications" (Recital 56) and "short extract" (Recital 58);
- Following the dynamism of blog business models from amateurs to professionals (Recital 56);
- Distinguishing between hyperlinking, different types of search engine presentation, and different types of news aggregators' presentation, e.g. summaries vs. fading introductions (Recital 57); and
- Distinguishing between facts and other literary works, e.g. when is a photograph more than a fact? (Recital 57).

Meeting these specifications and solving these challenges requires a whole programme of technology and governance developments, without which this Directive will only bring more meaningless complexities. One of the first technical necessities is the capability to identify content; texts, pictures, graphics, titles and more.

An exemplary alternative –

- We can stay in the 1D framework and continue to sell identifiers that authors or press publishers attach to their content. This is a proprietary, complicated, slow and expensive process; or
- We could move to the 3D framework, develop digital-content-based identification and put it in the hands of authors and all other stakeholders on the press value network. Self-generated biometrics for digital content! This could be an open, simple, fast and affordable system.

Adopting a new 3D framework for copyright policy would not only be relevant for writing directives and regulations to do justice to the market and communities and society. It would also advance technologies which would enable an alignment of the interests of this triad. It could reunite meaning with reality and reality with feasibility. It could lead to a constructive dialogue between stakeholders and reconcile citizens with policymaking. Worth trying, isn't it?