Kluwer Copyright Blog

Digital Constitutionalism and Copyright Reform: Securing Access to through Fundamental Rights in the Online World

Christophe Geiger (Luiss Guido Carli University) and Bernd Justin Jütte (University College Dublin) ·
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Fundamental Rights are the constants in many constitutional orders. They provide stability, continuity in values and encapsulate the normative skeleton of a society. Especially in times of change, they serve as guiding principles for citizens, governments and, if push comes to shove, the judiciary. Amongst the many examples in which fundamental rights have demonstrated their value and their essential function, recent reforms in European copyright law have underlined their importance for the European legal order. They have informed important debates and will certainly continue to do so in the coming years. Courts have reshaped and defined the boundaries of exclusive rights in order to protect core values of the constitutional order (see Geiger & Izyumenko 2014; Geiger & Izyumenko 2020). Fundamental rights have helped to adapt rules that were shaped for the analogue world to the digital environment. In this contribution, we highlight two examples which demonstrate the essential function fundamental right can – and must – play in guiding activities in digital world. In this sense, they are good illustrations of the constitutionalization of the online environment. These examples demonstrate new ways of using fundamental rights to regulate

technological developments, to secure creativity and access to information, and to offer new spaces of democratic participation: in short, looking at copyright reforms in the online world from a fundamental rights perspective is a manifestation of what is being conceptualized as "digital constitutionalism" (Pollicino et al.; de Gregorio & Pollicino 2021; de Gregorio 2020).

The adoption of the Directive on Copyright and related rights in the Digital Single Market (Directive (EU) 790/2019, CDSM Directive) brought about important changes in the distribution of rights and responsibilities in copyright law. It introduced new roles for actors who constitute the infrastructure of the internet and entrusted them with tasks that directly affect the fundamental rights of users online. The Directive also created new 'rights' for users, which, however, have been criticized for their restrictiveness and inherent limitations. The role fundamental rights have played in this process, and will inevitably play in exposing some of the shortcomings of this reform, is an important one and helps to provide constitutional legitimacy to the shaping and reshaping of EU copyright law.

It was mainly the introduction of Article 17 CDSM Directive, which reforms the liability exemptions for certain types of platforms, that brought fundamental rights to the fore. This confusingly drafted provision that tries to strike the delicate balance between several established and tested fundamental rights left many questions unanswered. The answers will have to be found by relying on fundamental rights and by examining how the relevant fundamental rights interrelate and interact with each other. The process that led to the adoption of Article 17 and the discussions that followed illustrated different understandings of the substance, relations and hierarchies between the fundamental right concerned. An action for annulment on the basis of Article 11 of the EU Charter of Fundamental Rights brought by the Republic of Poland against certain parts of the provision (Case C-401/19), a Guidance issued by the Commission as a result of the stakeholder dialogue pursuant to Article 17(10) CDSM Directive, and the Opinion of Advocate General Saugmandsgaard Øe in the annulment procedure (see also the fundamentally different understanding in the hearing in Case C-401/19: Keller 2020) all reflected different views on the interpretation and practical application of a norm that will significantly (and this cannot be understated) influence the way European citizens have access to copyright protected material but also communicate and express themselves online (see Geiger & Jütte 2021). At the core of the current uncertainty lies the question who will be responsible for guaranteeing fundamental rights online: online platforms or public institutions?

A second example are the new exceptions for text-and-data mining in Article 3 and 4 CDSM Directive. Their introduction highlights the importance of research for creating an innovative

digital market in the EU. These new exceptions permit the collection and storage for the purposes of text and data mining of works protected by copyright to which the user has lawful access, without the need to obtain prior authorization from the copyright owners. This will enable researchers whose activities fall within the scope of the exceptions to generate datasets, and they will facilitate other new and important economic activities, including the development of applications and training processes for artificial intelligence systems (Geiger 2021). However, the restrictive scope and potential technological override of these exceptions already provide arguments for a revision based on fundamental rights, mainly by constructing a right (to research) out of existing fundamental rights such as freedom of information, freedom of art and science, freedom of expression and others. It could even lead, in the mid-term, to inform constitutional reforms since the current constitutional framework for intellectual property in the EU does not provide the appropriate tools to ensure an inclusive, innovative and creative environment and that also promotes cultural participation. The creation of 'new' fundamental rights in not unprecedented. The right to conduct a business if of relatively new provenance, it is not even included in the ECHR. New circumstances and new phenomena can justify, arguably, the creation of new fundamental rights or the rearrangement or consolidation of existing rights. Whether the mining of text and data for research purposes can be efficiently conducted depends on the shaping of the scope of the right (recognized within a constitutional order) to engage in such activities. Arguments for an extensive interpretation of the scope and for a reasonable implementation of a right to mine data and text can be bolstered better with a substantive fundamental rights framework that either redefines the existing understanding of the IP clause in the Charter Article 17(2) (Geiger 2021) or serves as a proportionate counterweight against assertions of competing fundamental rights, such as the right to (intellectual) property.

The construction of new fundamental rights must, however, be approached with care for the same reasons that a balancing of competing fundamental rights must be conducted carefully. A 'right to research' (arguably already contained in the right to academic freedom read in conjunction with other fundamental rights) must be properly rooted in and grown out of our national and international fundamental rights traditions. However, a discussion over such a right can be fruitful and valuable in exposing the fault lines created by digital disruption in the balance in copyright law, and many other areas of the law for that purpose. Developing fundamental rights, whether new ones or the relations between existing ones, to make them fit for digital changes is essential and a task that will determine whether digital technologies can be discussed with the language of fundamental rights.

The difficulty in evaluating and interpreting existing law and in conceptualizing new fundamental rights in a digital context or against the background of a digital setting cannot lead to an uncritical digitization of fundamental rights. It needs to be assessed if the possibilities and realities of digital realms justify a separate fundamental rights doctrine. Fundamental rights must function as connectors between analogue and digital contexts. While digital technologies are certainly not exempt from the rule of law, including fundamental rights, neither should fundamental rights work differently in different contexts. Their appreciation might differ based on contextual factors, their methodology and substance cannot. Ensuring the temporal continuity and a careful and steady developments of fundamental rights, their substance and their inviolable essence is a public function, the bodies considered guardians of fundamental rights – the European Court of Human

Rights, the European Court of Justice, and the national constitutional courts – must ensure that constitutional traditions are carried forward into the digital domain. This public function cannot be left the private operators and legislative intervention must be considered with caution.

In conclusion, we argue that reflections on digital constitutionalism needs to be urgently introduced when envisaging the current and future copyright reforms and more generally the legal regulation of the online environment, in order to inform sound policies and judicial guarantees for the fundamental rights of citizens. It calls for innovative ways to establish closer links between potential regulation authorities to be created in the context of ongoing legislative changes (such as e.g. the CDSM and DSA, see Frosio & Geiger 2021, Geiger & Jütte 2021, Geiger & Jütte 2021) with fundamental rights discourse and to secure procedural mechanisms that would allow the enforcement of user rights, in particular in the field of research. In fact, the recognition of user rights and their enforceability in the digital environment can be seen as one of the ways to re-establish the interests of ordinary users of copyright content not only and not so much vis-à-vis the State, but rather against powerful private actors involved in the digital environment regulation. Thus, "considering the enforceability of copyright limitations in the online world as a procedural safeguard for fundamental rights of users can be seen as a materialization of what "digital constitutionalism" can add to the debate and it is expected that user rights will be increasingly considered as an important constitutional counterpart to the rise of control exercised by private actors over access and use of copyright-protected content" (Geiger & Izyumenko 2021). However, this will be difficult to put in practice if the constitutional framework for IP in the EU continues to be ill-conceived; therefore, in order to better foster and maintain constitutional legitimacy in digital contexts in the sense of a digital constitutionalism, more ambitious reforms at constitutional level will be needed in order to secure a vibrant and inclusive creative environment in the EU.

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