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EDITORIAL

What Is the Future of Creators' Rights in an Increasingly Platform-Dominated Economy?

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As lockdown regimes have forced nearly everyone to stay at home in many parts of the world, an increasingly larger portion of global audiences started relying upon a small number of digital platforms to access arts, culture and entertainment. When theatres, concert halls, clubs and other performing arts venues closed in response to COVID-19, many artists spontaneously started broadcasting live performances from their homes and recording studios. This unexpected change showed what the creative sector might look like if hundreds of millions of users had to simultaneously rely mostly on digital services to access music, films, TV programs and other artistic productions.

A major concern is that the largest online platforms, some of which have long exceeded one billion users, have acquired and exert too much economic power to the detriment of consumers, suppliers and competitors. The undisputed dominance of a handful of tech companies in controlling (or deeply influencing) access to creative works raises existential questions for cultural industries, their core businesses, and even more so for the authors and performers who must make a living.

A first question concerns the value of digital content: what is the function content plays in a platform-dominated economy? This question arises from the technical reality that platforms' commercial value is not so much in the content as it is in their personal data collection and very sophisticated and secret algorithms. Social media platforms such as YouTube and Facebook, as well as on-demand content suppliers like Spotify and Netflix, are ultimately data-analytics businesses. Appealing content is a bait to keep their users active on their platforms as much and as long as possible. The main commercial purpose of these businesses is to collect, process and sell targeted advertising based on extensive user data.

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In these data-driven media environments, creative works are either made available for free as user-generated content (for instance, YouTube and Facebook) or in exchange for a monthly subscription fee (for instance, Spotify Premium and Netflix). Moreover, in the last decade social media have changed and expanded the same notion of content creation.[1]

YouTube is by far the most prominent example of this phenomenon. As a first mover in the social media industry, YouTube has gone through a process of radical transformation since 2007, when Google acquired and restructured it, enabling and encouraging new forms of grassroots professional productions. This new content production model cuts off intermediaries and instead relies on well-developed content management technology and legal infrastructure. In this ecosystem, for instance, YouTube's own proprietary technology, "Content ID", allows creators and copyright holders to enforce and monetise their rights inside the platform. Facebook relies on third-party technology (Audible Magic) to perform the same tasks. The data shows that an increasingly relevant number of today's artists consciously decide to partner directly and exclusively with YouTube, entering into individual agreements under which each artist (and their production teams) earn a little more than half of the advertising revenue their content generates.[2] This is a clear example of how a very large platform is changing the nature of content production to serve its own data-analytics business.

A second question is whether the phenomenon of "content platformisation" can be ultimately beneficial to artists and content creators, broadly defined. The answer, in my view, is "no", at least for the vast majority of copyright holders. While social media services have allowed creators to keep building their digital audiences, the logic underlying online platforms, as a whole, systematically penalises creators.

- First, platforms' algorithms and filter bubbles inevitably increase existing inequalities between superstars and other professional creators. Predictive technologies and network effects can easily help very few contents become viral by giving prominence only to works users are expected to like on the grounds of their behaviour on the platform or other users' preferences and suggestions.
- Second, although social media help artists and creators market their own image and reputation, it also triggers a race to the bottom in the price and remuneration of professionally created content. Historically, for more than a decade social media have taken advantage of a legal principle of technological neutrality and broad liability exemptions to scale up without having to worry, at least in advance, of contents their users made available to the public.[3] This long-term

[1] Stuart Cunningham and David Craig, *Social Media Entertainment – The New Intersection of Hollywood and Silicon Valley* (New York University Press 2019) pp. 11–14.

[2] These agreements enable monetisation of content exploitation based on a split of advertising revenue between each creator of original content (55%) and YouTube (45%); *see* Cunningham and Craig, *Social Media Entertainment*, cit., p. 46. Interestingly, revenue splits have shifted from a high of 70/30 granted to YouTube's premium creators to an ordinary split of 55/45.

[3] Digital Millennium Copyright Act (DMCA) 1998, Public Law 105-304, 112 Stat. 2860, which amended Title 17 US Code by adding Sec. 512 ("Limitations on liability relating to material online"); Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("e-Commerce Directive") [2000] OJ L 178/1, Art. 14.

privilege, which the EU formally abolished in 2019, is still considered to be the main source of the so-called "value gap" between the content creators' earnings from a service like YouTube and on-demand subscription-based services such as Spotify and Deezer, whose licensing fees are estimated to be ten times higher.[4]

– Third, the creative sector, and in particular the music industry, still lacks an adequate repertoire information infrastructure. It is only through content management technologies and detailed rights management information that online platforms can reward individual creators in a fair and proportionate way. In data-driven businesses, a single music rights database seems indispensable for creators to effectively exercise their rights. Commercial deals in digital music are very complex as they require detailed information on the intellectual property of each musical composition and sound recording. Moreover, musical compositions and phonograms belong to different rightholders, who are often difficult to identify. Even subscription services such as Spotify, Apple Music and Deezer, which choose and curate their content, negotiating and paying remuneration based on the effective popularity and success of a certain track or album, cannot ensure proportionate remuneration if they cannot count on reliable, standardised and unequivocal rights ownership information coming from the creative sector.
– Finally, there is an inevitable problem of information asymmetry across online platforms, whose owners treat information about artist and content producers' compensation as a trade secret. The data we know of comes either from certain artists' disclosures in breach of confidentiality clauses in their contracts with the platforms[5] or from tech companies' spontaneous statements.[6] In this environment, creators cannot easily negotiate deals because they have no idea of the value of their works and how much a platform is earning through their exploitation.

A third question is whether the law can help creators make their intellectual property more effective and whether regulation, in this scenario, would be justified from a public policy perspective. This a complex question that the EU and the US

[4] Interviews the author conducted in the first half of 2019 in Europe and in the US revealed that YouTube's advertisement-based royalties are – on average – in the range of USD 80 to 100 per million of viewings. This amounts to a per-stream average fee ranging from USD 0.00008 to 0.00011, which is approximately ten times lower than the per-stream fees an independent artist and composer earns from services like Spotify, Pandora and Apple Music: *see* Giuseppe Mazziotti, "A Data-Driven Approach to Copyright in the Age of Online Platforms", *EUI Department of Law Research Paper 2020/07* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3655027 accessed 5 October 2020.

[5] For instance, cellist and composer Zoe Keating is well-known in the music industry for releasing her annual royalties from major music services; *see* Alissa Meyers, "A music artist breaks down exactly how much money Spotify, Apple Music, Pandora and more paid her in 2019", *Business Insider*, 9 January 2020.

[6] For example, in January 2013 Google's chief business officer disclosed to the press that one of the most-watched YouTube videos at that time ("Gangnam Style"), created by popstar Psy, had reached 1.23 billion viewings. Each time a user streamed this video on YouTube, it generated an exceptionally high fee of 0.0065 cents, for a total of USD 8 million revenue (a half of which was paid to the content creator); *see* Christopher Mims, "Google: Psy's 'Gangnam Style' Has Earned $8 Million on YouTube Alone", *Business Insider*, 23 January 2013.

are addressing in very different ways. We are currently in the midst of a political and trade war in which the EU, as a data- and knowledge-rich economy, is seeking to protect its citizens and legacy content industries from the way in which US-based "over-the-top" digital service suppliers exploit personal information and creative output.

Unlike the US, whose economy benefits directly from its own internet and communication industry, the EU has decidedly moved towards forms of *ex ante* regulation of online platforms. A prominent example of such a move was the adoption of the 2016 General Data Protection Regulation (GDPR). In 2018 the European Commission clearly showed its intent to create a legal framework where the largest social media platforms have enhanced responsibilities and must play a decisive role in preventing, removing and keeping offline a broad variety of illegal content, including copyright-infringing materials.[7]

At a later stage, EU law distanced itself even further from an original principle of platform neutrality by adopting new measures aimed at promoting fairness towards copyright holders and companies whose business relies on online intermediaries' and online platforms' services.

The first of such measures is Directive 2019/790, where its well-known Art. 17 establishes a higher standard of copyright accountability for social media.[8] Veering away from the safe harbour provision embodied in Art. 14 of the 2000 e-Commerce Directive, Art. 17 requires social media companies to obtain a licence for all contents uploaded by their users and to restrict access to unauthorised works. The main goal of this provision is to protect legacy content industries, which are pillars of Europe's cultural and linguistic diversity and produce outside the domain of online platforms. Moreover, this copyright directive codifies a principle of fair and transparent remuneration, addressing the issue of asymmetric information by granting individual authors and performers an access right regarding data on profits that all online platforms derive from different types of content exploitation.[9]

This transparency-enhancing objective is common to another 2019 EU regulation, which seeks to force online platforms and search engines to disclose to their business customers how their services determine their ranking of search results, the possibility of influencing such ranking (through direct or indirect remuneration) and different conditions and channels through which platform users can offer their goods and services to the public.[10]

These measures are totally alien to US law, where broad implementation of the 1998 Digital Millennium Copyright Act's liability exemptions and platform neutrality regulations (such as Sec. 230 of the 1996 Communications Decency

[7] Commission Recommendation 2018/334 on measures to effectively tackle illegal content online [2018] OJ L 63/50.

[8] Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/6/EC and 2001/29/EC [2019] OJ L130/92.

[9] Directive 2019/790, Arts. 18 to 23.

[10] Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57.

Act) reveal a radically different policy.[11] Although in today's US political and legal discourse it is common to hear that Google, Facebook and Amazon have become a threat to democracy and should be broken up under antitrust law, US law seems unfit to remedy the extreme corporate power that the largest platform owners have acquired.[12] As the Supreme Court held in a leading antitrust decision, a monopoly is an important element of a free-market economy and is desirable because it induces the risk-taking that produces innovation and economic growth.[13] Moreover, as Tim Wu recently emphasised, the US merger control system is currently based on a "consumer welfare" standard under which the US government cannot block a merger if it is unable to prove that it would result in increasing prices for consumers.[14] This standard is inapplicable in the platform economy, where large tech companies offer their services for free and instead are compensated through the acquisition of users' personal data. This situation sharply contrasts with Europe, where the EU Commission, acting as the EU antitrust authority, has used competition law against tech companies' abuses of their dominant position and certain anticompetitive practices with the aim to protect competitors, and not only consumers.[15]

The only front where EU and US policymakers seem to align is the development of rights information infrastructures. The EU pursued this goal indirectly, when it passed a 2014 directive that obliges collecting societies to use technologies and databases that make their licensing activities fit for purpose in the digital age.[16] In the US, a 2018 music copyright law reform assigned to the Copyright Office the task of supervising the creation of a musical works database to support the ability of a newly established State-backed collecting society ("Mechanical License Collective" or MLC) to identify music rightholders in streaming services and to remunerate them.[17] This is a more radical model, which is surprising for a jurisdiction with an unparalleled commitment to capitalism and industry-led solutions.

[11] 47 US Code, Sec. 230 grants immunity to websites from liability for defamation arising from comments of their users. In the same way as the 1998 DMCA, Sec. 230 was based on the assumption that holding websites responsible for user-generated content would have hindered the fast development of the internet as we know it.

[12] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018), p. 132.

[13] *Verizon Communications Inc. v. Trinko*, 540 US 398 (2004).

[14] Tim Wu, *The Curse of Bigness*, cit., pp. 120–123.

[15] Multi-billion-euro fines issued against Google as of 2017 are a prominent example of the EU Commission's approach to the platform economy; *see*, respectively, EU Commission, "Antitrust: Commission fines Google Euro 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service", Press release, 27 June 2017; "Antitrust: Commission fines Google Euro 4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine", Press release, 18 July 2018; "Antitrust: Commission fines Google Euro 1.49 billion for abusive practices in online advertising", Press release, 20 March 2019.

[16] Directive 2014/26/EU on collective management of copyright and related rights and on multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72.

[17] Musical Works Modernization Act (MWMA) 2018, which is part of a broader Act, the Music Modernization Act (MMA) 2018, Public Law 115-264, 132 Stat. 3676, which revised Title 17 US Code, Sec. 115.

Despite their different approaches, the fact that EU and US legislative measures place so much emphasis on data infrastructures and codification of rights to transparency shows that there is a common understanding on how crucial data have become for the exercise of creators' rights. Access to information on content-related exploitations would strengthen creators' bargaining power and make their rights more effective and commercially valuable. Enforcement mechanisms, such as the convoluted ones incorporated into Art. 17 of Directive 2019/790, per se, will be of little or no help if creators cannot have access to information that, so far, has been kept secret in tech companies' black boxes or in collecting societies' records and archives.