




Freedom to Share

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For a few decades now, digitisation has posed the biggest challenge to copyright protection and the proper balance between multiple interests at stake. Since the early stages of the information society, those challenges have multiplied with the advent of the platform society and, more recently, the algorithmic society. “Information wants to be free” but it is “immeasurably valuable”, so identical copies of protected works that can be duplicated endlessly at close to zero marginal cost represent an unprecedented threat to copyright holders. Platforms might aid in disseminating protected content online and, in doing so, might internalise substantial value that belongs to creators. Finally, with the advent of all-powerful, ubiquitous algorithms, copyright enforcement has been delegated to automated means. These tools are inherently incapable of an equity assessment of privileged uses of protected content, and thus inherently infringe upon users’ freedom of expression. This is no small policy issue as, by inherently limiting freedom of expression online, automated content moderation hinders democratisation and affects our future in ways that we can hardly predict.

So far, the emerging challenges brought about by the information, platform and algorithmic society have been addressed only through sub-optimal solutions. Copyright law and creativity policies in the digital environment need a new social covenant that reconciles the interests of platforms, rightholders and users. In this regard, a new road map for copyright enforcement online might be emerging thanks to the Court of Justice of the European Union (CJEU). In C-401/19 “*Poland v. Parliament and Council*”, the CJEU has reviewed the compliance of proactive filtering in user-generated content platform with the protection of freedom of expression. The decision should serve as a blueprint for a new social covenant that better balances the multiple competing interests at stake in online creativity.

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The new social covenant is predicated on the assumption that there is a fundamental right of users to share content lawfully and make lawful use of protected content on online platforms. The CJEU implies the existence of this fundamental right by noting that the “implementation of the obligations imposed on those service providers cannot, in particular, lead to the latter’s taking measures which would affect the essence of *that fundamental right of users who share content on their platforms* which does not infringe copyright and related rights” (C-401/19, para. 80). Thus, no action can be undertaken by platforms in collaboration with rightholders that limit such fundamental right to share.

European copyright law – and any national implementation of copyright enforcement mechanisms online, such as the transposition of Art. 17 of Directive 790/2019 (para. 99) – must be construed in light of this fundamental right of users to share. In this context, the CJEU stresses again, as it did already in *Telekabel* and *Funke Medien*, that there is nothing in the wording of Art. 17(2) of the EU Charter of Fundamental Rights or in the Court’s case-law to suggest that that copyright is inviolable and must for that reason be protected as an absolute right (para. 92). Instead, the fundamental right to share lawful content, which is a qualification of freedom of expression, is a superior right. This conclusion is further qualified in the domain of copyright enforcement on user-generated content platforms by highlighting the superior stance of the rights provided for in Art. 17(7) versus the obligations in Art. 17(4). According to the CJEU, Art. 17(7) is not limited to requiring online content-sharing service providers to make their “best efforts” to make available user-generated content for purposes of quotation, criticism, review, caricature, parody or pastiche, as in the case of the obligations provided for in Art. 17(4), but prescribes a specific result to be achieved (para. 78).

In enforcing this new fundamental right to share lawful content, the CJEU provides and clarifies a set of principles that should govern user-generated creativity online via a new social covenant between platforms, rightholders and users:

- (1) users enjoy a fundamental right to share lawful content (para. 80);
- (2) intellectual property rights must be protected (para. 82) but they are not absolute (para 92);
- (3) any limitation of freedom of expression of online users must respect the essence of the right of freedom of expression (para. 76):
 - (3.1) thus, such limitations shall not result in the prevention of the availability of lawful works, and in particular they should not affect legitimate uses, such as exceptions and limitations (para. 79);
 - (3.2) no obligations can be imposed on service providers, whose implementation leads to such result (para. 80);
- (4) the need for safeguards to freedom of expression is all the greater where the interference stems from an automated process (para. 67):

- (4.1) filtering systems which do not distinguish adequately between unlawful and lawful content are incompatible with freedom of expression (para. 86);
- (4.2) in particular, in order not to disproportionately restrict the freedom of expression of users, measures filtering and blocking lawful content when uploading must be excluded (para. 85);
- (4.3) in addition, measures adopted by service providers must be strictly targeted (para. 81);
- (4.4) so that filtering does not (must not) lead to general monitoring, meaning that service providers cannot be required to block content that to be found unlawful would require an independent assessment of the content and copyright exceptions and limitations that might apply to it (para. 90);
- (4.5) thus, filtering and blocking when uploading must be limited to manifestly infringing content or “likely infringing uploads”, as only manifestly infringing content does not require independent assessment of the lawfulness of content.

The specific acknowledgment of a fundamental right of users to share lawful content, coupled by safeguards against its limitation especially via ubiquitous automated tools, is an important step in “reconciling copyright with cumulative creativity”. The major lesson that can be drawn from the CJEU decision in C-401/19 is that copyright law – and algorithmic tools that might enforce copyright online – should not hinder the development, or the existence altogether, of new forms of cultural and artistic expression that the internet revolution has brought about, which are in fact a reflection of a broader societal change towards the sharing economy empowered by the “wealth of networks”. The new social covenant for online creativity should first endorse the absolute principle that the law must not induce architectural changes that make unlawful creative activities beyond the law. This might not be the case under an acritical implementation of Art. 17 of Directive 790/19, and the CJEU decision must instead be read as a clear endorsement of that principle.

In the “copyright wars” that have been fought online for almost three decades now, users continue to remain an accidental casualty. This time the friendly fire comes from machines that are meant to protect copyright but, in doing so, block lawful content and hamper the users’ fundamental right to share. When copyright is enforced online, opaque algorithmic decision-making processes might become a foe, rather than a friend, and society must not delegate to them decisions regarding our fundamental right to share content online just because it is more efficient to do so. Instead, users should be at the center stage of the copyright debate, so that copyright law can be construed first and foremost as a “users’ right” that promotes freedom of expression and information under a “user-based copyright theory for commonplace creativity”. Timely, in C-401/19, the CJEU is strengthening – once

again in the last few years – the centrality of the user in copyright discourse and redressing misperceptions on proportional balancing of competing rights that recent legislation might have brought about.

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