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The Gap

ICT-revolution's Challenges
to Legal Institutions

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Foreword

This report has been prepared during my NEPT-traineeship (National Expert in Professional Training) in the European Commission, (at that time called Information Society and Media Directorate General (DG INF50) and now Communications Networks, Content and Technology), from October 2011 to February 2012. I thank the Commission, the Directorate-General, and the Ministry of Employment and the Economy for providing this great opportunity to see from a new perspective on how the European Commission works.

I have had the privilege to work in the team of Advisor Bror Salmelin at Directorate H, ICT Addressing Societal Challenges. ICT offers new services and possibilities to individual citizens but sometimes also challenges our institutions. Innovation is at the core of this development, and open innovation – as advocated by the Open Innovation Strategy and Policy Group – provides the most promising area of future growth in the internet and especially social media services. As for terminology, it has to be remembered that the word 'institution' is used here in a broad sense (based on institutional theory) without reference to specific institutions such as 'European institutions' or the like.

The quick and constant development of ICT, as illustrated by Moore's law, continues to be a moving target also from legal point of view. My intention is to raise the question, is the current state and development of ICT also affecting our legal environment in an unprecedented way, challenging our traditional legal institutions and mindsets.

Mikko Huuskonen

Executive Summary

A popular version of Moore's law means the doubling of computer capacity every 18 months. This continuing development challenges not only economic structures and traditional businesses, but finally also many legal institutions. The examples of these challenges are clearly seen especially in areas of personal data protection and copyright, which are discussed in this document.

The challenges of legal institutions in light of the ICT development are many. Legal institutions have developed during very long periods of time based on geographical restrictions and the geographical organization of national states. The internet changes geography as we know it. The legal institutions matching the global, seamless operation of the internet are still developing.

Law-making as a rule is a slow and tedious process. The European Union – or any other multinational organization for that matter - is a challenging environment from the viewpoint of rapid law-making. And it does not help that we tend to build laws on existing business models, which in the internet age may become obsolete very quickly.

This makes the legal adaptation to the challenges of Moore's law even more difficult. The question becomes, in what way we may have to rethink our traditional, European legal culture? The parliamentary law-making process is seen as the main source of law in Europe, but we may have to accept a parallel source of law in the more dynamic - yet more uncertain- court practices in law-making regarding technology sensitive areas such as the internet.

Many questions arise from this point of view – what are the ultimate rights of users that we have to protect, not only as citizens and individuals, but also as producers of their own 'Life Data'? What is the new role of state institutions and courts in this legally very challenging ICT-environment? And is there a degree of flexibility that we have to tolerate to encourage risk-taking needed in innovation and growth of the ICT-sector?

The report puts forward these questions, concentrating especially on individual's Life Data. It seems evident – whether we like it or not, whether we planned it or not – that we are heading towards a future where law-making also takes place in the courts, i.e. new, technology-related common law. This requires a system of strong basic, fundamental rights, but we are bound to face the fact that the rapid ICT development may keep the traditional legislative law-making processes lagging behind. It seems highly likely, that the courts, and the Court of Justice in the European Union in the forefront, will face increasing need for expertise in technology and ICT-related areas. From innovation perspective, however, the development may allow for more risk-taking in product development, moving legal supervision from *ex ante* to *ex post*.

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Introduction

Richard Pipes has described the birth of parliamentary democracy from geographical perspective.¹ His explanation to why different legal structures of government exist is largely geographical. England chose parliamentary democracy mainly because the short geographical distances in England allowed the aristocracy to participate in parliamentary meetings. Relatively short distance also allowed the local governors a possibility to coordinate policies among themselves to counterbalance king's power and avoid excesses in taxation. The first parliamentary meetings were called in by the king as a plot to gather the aristocracy together and have some of the rivaling governors beheaded – which lead to the institution of the legal and corporeal immunity of a member of parliament. Russia developed into a feudalistic state because there was no way aristocracy could arrange and participate to meetings due to enormous distances. The tsar had to send someone he trusted to see over.

Let us imagine what happens to legal institutions when – all of a sudden – large parts of transactional costs, limitations of the physical (analogue) world and physical distance disappear from the world. This is the case with the internet and broadly speaking the digital ICT (Information and Communications Technology) -industry. What happens to law, legal institutions, national states, jobs or government? We don't know exactly, but we see some of it already. The change is sudden in historical perspective but on the other hand slow for one individual to understand completely during his lifetime.²

ICT brings, as the General Electric's slogan goes, 'good things to life'. ICT is one of the most promising sectors of potential economic growth.³ The 'creative destruction' may however bring a sudden death to many industries based on old technology.⁴ I call these phenomena 'ICT excesses'; the public sector will in the future have a central societal task in managing these excesses.

Geographical mindset seems especially strong in Europe. It seems that there has never been a real shift away from the village-type of mindset. The old village-based institutional structures are still a part of everyday living. A famous example is the Brussels municipality system with 19 communities. Europe is still a craftsmen's guild of 27 which creates additional challenges to businesses trying to operate in the single market. The French national IPR-strategy starts from the fact in France there is 36.000 villages whose production needs protection⁵. The prime example of this is the protection of geographical indications – cognac is only cognac if made in the area

of Cognac, the same goes for calvados, the ham of Parma, the Feta-cheese etc.

Copyright as a legal institution seems to have worked only as long as geography allowed it to work. In the internet the function copyright originally had – the protection of a production asset – seems to wear off. There are claims made for the cultural purpose and meaning of copyright but this is shallow as copyright economy is based on demand – not on the work done but results sold. National states also stick to their legal obligation of maintaining control of the geographically organized legal rule regarding personal data – but people tatter about their lives not really minding in which part of the world the server that collects their thoughts is situated in. Should we not ask, is the personal data the state's property or the individual's?

The first four decades of the technological development of the ICT –sector were mostly confined within the 'hard-core' ICT-technology. Computers became better and faster, user interface was developed, telecommunications became better and faster, pictures and moving images started to move electronically.

The decade we live in marks the era of ICT's societal impact. This may even change the role of national states. Nationals are individuals who connect and relate to different institutions out of which the institutions of national states are important but not the only ones. The information concerning an individual – the person's Life Data, consisting of personal data and content uploaded in the internet – becomes a production asset. The business companies suddenly find it relatively easy to establish their operations, IP's or pay taxes almost wherever they find it strategically beneficial.

Many open issues call for the re-evaluation of the role and legal institutions in the era of quick/moving ICT. The institutional legal framework we operate with is very old, based on local or village mindset, and impossible to be kept in pace as such with the ICT-development. Do we in fact have any other way forward but a *principles*-based approach and the amplified role of the court system, as any technology specific or business model based legislation is bound to be obsolete before the institutional organizations can agree on the contents?

Be prepared for the excesses of *per se* positive ICT-development. The rupture of the geography based legal institutions may well be one of them – that is at least the main question of this article.

¹ Richard Pipes, 'Property and Freedom', 1999.

² In the words of Philippe Herzog, 'Is there any future for Europe?' Inaugural lesson Ecole des Ponts ParisTech, 31st August 2011', p. 17: 'The fact is that with the globalisation revolution comes a feeling of helplessness; the nation state has lost control of its OWN territory. This feeling of helplessness may dissipate with the creation of political communities, where populations pool their efforts and transcend the exclusive 'national sovereignties' of old. Internet and globalisation call for a new type of (participatory, MH) democracy (...)' - Further on territorial control of economy, Herzog: 'Travelling Hopefully', Editions le Manuscrit 2006, p. 23.

³ European Commission's Vice-President Neelie Kroes 4.10.2011: "The statistics for the economic power of ICT are little short of amazing. The sector represents one half of Europe's productivity growth; SMEs using web technology export and grow twice as much. Over just ten years, the right broadband development could give Europe over one trillion euros in extra economic activity, and millions of extra jobs."

⁴ Schumpeter, Joseph A., 'Capitalism, Socialism and Democracy', London 1959, 'creative destruction' p. 84.

⁵ TV-channel France24 on the 7th Jan 2012, 'France Inc.: Making the Most of Public Property' by Markus Karlsson, available at <http://www.france24.com/en/2012-01-07-1014-state%20property-cinema-university-business>

User's Right to Life Data

The Deloitte Background document in support of the Digital Agenda for Europe concluded that there is a pressing need to strengthen further the user's role in the Information Society in Europe. The report makes reference to European Parliament saying:⁶

'Europe will only reap the benefits of this digital revolution if all EU citizens are mobilized and empowered to participate fully in the new digital society and the person is placed at the core of the policy action'.

A shift in emphasis needs to take place away from simply creating the conditions for market-based competition to empowering and enabling consumers to become informed, competent, and critical users of converging technologies. In other words, Deloitte report suggests that not only is legal protection necessary, but also the awareness of the user that the internet is never a 100% safe environment.

Life Data is a term coined for two kinds of personal information, the 'traditional' information relating to personal identification, and information uploaded by the individual, at his or her consent, to different kinds of services. As legal issues, these both are consequences of the ICT-development, which follows, on rough terms, constant exponential growth often referred to as 'Moore's law'.

The development of the ICT sector has been, and still is, under the influence of the 'Moore's law'. The law - in fact a theorem - states that data processing capacity doubles every 18 months.⁷ Whether such a law actually exists or not the development of computer technology (or information and communication technology, ICT) has meant a continuing technology-related change in the society. The development has also demanded new legal instruments to enable the businesses to operate in a transparent and secure environment.

This moving target is a challenge for legal development. To reap the benefits, legal instruments should enhance a 'non-friction' environment, where legal and administrative obstacles are being kept to the minimum. The core of legal system is however the protection of those unable to do it for themselves, which requires some level of protection against the excesses of ICT. At the moment, the development is most intense in content-related information, which is used and also largely created by individual citizens.

Moore's Law: Creative Destruction

Historically, Moore's law at first affected fundamentally the computer technology itself, leading to a series of innovations such as the user interface and the internet. However, from the 1990's onwards we have seen the slow but steady expansion of ICT to other fields of communication and data processing.

Telecommunications were digitalized during the 1990's in parallel with major legislative initiatives such as the European Union's telecom package in the year 2000. Internet made the distribution of text-based information possible in the early 1990's. Music files started to move in the network also in the 1990's. Today, audiovisual information dominates the networks - YouTube service alone occupies 30% of the capacity of all European telecommunication networks.⁸

This very rapid development has meant countless new opportunities but also perished many old business models. Moore's law is a prime example of 'creative destruction' in operation.⁹ We could also see a pattern in which the production tools for information goods become cheaper and cheaper and finally affordable to the end-users themselves.

This development is far from over. New areas of information intensive human action will be taken over by ICT. Social media invites individuals to share their life with their friends in the network or even make their life completely public. Almost all non-personal information collected by the public organisations is bound sooner or later to be released to public and business use. Such private and sensitive data as medical records, records of individuals' commercial behaviour and preferences, even genetic information, in the internet are collected by various kinds of public and private institutions and businesses. Much of the collecting takes place the users knowing about it - much of it doesn't.

Moore's law gives us an idea of the pace of the technological 'perennial gale'.¹⁰ From societal and economic point of view it is however much more important to see, how societal institutions can adapt to and, if necessary, guide or control the technological development. We could argue that technology itself is less of a challenge as ICT has made nearly anything possible - the future challenges and obstacles may well lie on the side of human institutions - the monitoring and understanding of 'the Gap' between ICT and institutions.

⁶ The Deloitte Background Document in Support of the Digital Agenda for Europe, Final Report, Brussels, March 2010.

⁷ Gordon E. Moore, 'Cramming more components onto integrated circuits', Electronics, Volume 38, Number 8, April 19, 1965. The main line of argument is that with unit costs falling as the number of components per circuit rises, an exponential growth will follow. - Moore spoke of 12 months but some empirical evidence has suggested 18 months. - On the broad and sometimes controversial debate on Moore's law, see e.g. Ilkka Tuomi, 'The Lives and Death of Moore's Law', and the literature references.

⁸ Financial Times 29.4.2011, p. 15, Paul Betts: 'Rapprochement leads to hopes for regulatory holiday'.

⁹ Schumpeter, Joseph A., 'Capitalism, Socialism and Democracy', London 1959, p. 84.

¹⁰ A metaphor used by Schumpeter, see earlier reference.



Regulation of new technologies

The past experience on the regulatory efforts regarding technological change is not always successful. Often ICT is seen by the legislator merely as a tool for incremental change, i.e. an aid in making current and existing business models more efficient. Foreseeing a fundamental change of business paradigm is too challenging.

The main question of this chapter is whether there is a tendency in legislation to reserve new business areas for the incumbents rather than opening the market for new innovations.

Prima facie, the incumbents have a voice in lobbying, whereas new rising businesses usually don't. But secondly and maybe much more importantly: lawmakers have a mindset based on existing structures. Thirdly, large companies may usually not be the first ones to disseminate new production methods, but are more interested in having their investments in old technology written off first, before the application of new technologies. An important example of business-model –based legislation is the Copyright in the Information Society Directive 2001. Based on the WIPO Treaties 1996, the directive merely set the rules for adapting analogue business models to the digital environment. The copyright directive was created under the notion that Digital Rights Manage-

ment (DRM) was to be the dominant business model – largely overlooking search engines, social media or even streaming. This influence of innovative new business models came from elsewhere, from the United States.

The directive also established a new instrument – platform levies – originally with the intention to keep it as a short time transitional solution before entering the expected DRM era. This however did not happen. The institutional development has therefore taken a new direction which nobody planned or could foresee. Technology went the other way.¹¹

Another example regarding adaptation to new technology is the contractual creativity of new service providers such as Facebook. Facebook establishes its agreements within EU, in Ireland. In the Facebook Statement of Rights and Responsibilities, a reservation is made that nothing in their end-user agreement prevents them from applying any different law if required. The example of Facebook indicates that there are ways to organise service provisioning regardless the European '27-issue'.¹²

Past experience seems to suggest that legislators should avoid '*business-capture*' of the old business models. There are clear indications that '*business-capture*' has taken its toll both on the copyright business models.

¹¹ See next chapter for more on this theme.

¹² Facebook 'Statement of Rights and Responsibilities', 'Other'.

Challenges of Life Data – User Generated Content

The exponential growth of user created or user initiated content requires a new type of regulatory approach. At the moment, new business models approach a virgin ground, since there are no established business models seeking protection. There would be room and demand for legislative approach trying to keep a new market open from the very start. The risk of 'businessmodel-capture' is lower, although it may loom in the fact that this area of business activity is not organized for and may not have a clear voice in lobbying.

At the same time, the opportunity to create businesses utilizing individual's 'life data' in almost whatever way must be balanced with a set of preconditions on the legal nature of this life data. These preconditions stem from societal values that link these to the new societal fabric. – The term used by Facebook in some presentations is 'the story of my life'.

Life data means in this context a composition of several elements. First of all, life data includes all person-related factual information, i.e. personal data. This is protected by the Charter of the Fundamental Rights of the European Union, and regulated in more detail in the directives on personal data management.

The user's rights to life data are *prima facie* composed of several elements.¹³ The rights are also closely related to the Charter of Fundamental Rights of the European Union (2010/C 83/02, see chapter IV). Below are listed some of the aspects discussed (the 'web' of rights - the classification here is not necessarily the only possible one, let alone perfect with overlapping areas)¹⁴:

Participation

- right to association
- right to hold and express opinions
- right to privacy

Communication

- rights as a user of telecommunications services
- right to consent to communication
- right to free speech, including the right to receive information

Personal data

- right to control and consent to the use of one's personal data by other people or organizations, including e.g. health, location sensitive data and other sensitive information

Content

- right to use information and content that is publicly or legally available

- copyright aspects¹⁵ (right to copy a work, distribute it to the public, translate it, perform it in public, to communicate it to the public, the right to make an adaptation of the work), other proprietary aspects (trademark, design)
- 'fair use' –type or legal limitations that often translate into the rights of the users

The web of rights is complex. At the same token, for the participatory internet to work, having rights means also obligations of moral nature. A major obligation in the social media practice regards openness; if you participate, you should allow others use your information to the same extent.

Life data contains all the information an individual uploads interactively into the internet when participating in social media, i.e. the information shared by the individual in the participative internet. This could be artistic or political expression, opinions, blogs, chats, photos – any content whatsoever that is uploaded by the individual into the internet. Life data does not contain material that has proprietary interests of others.¹⁶

The legal starting point of all personal data legislation is the consent of the user/citizen.¹⁷ This is broadly speaking the basic rule of life data protection. However, releasing information of oneself to others voluntarily – rather than merely exploring information created by others – usually requires active participation of the individual. Active uploading implies consent to allow others to use the information.

This is why the consent to participate in social media should well be suggested as a legal presumption through an 'implied license' in the following version of the participatory media's educated consent-test:

If a person is able to use the computer, operate in the internet, and participate in the social media by uploading and downloading information, it is a fair assumption, that he or she is aware of the possible consequences with the uploaded information, i.e. that others may use it, copy it, post it and send or send links to others. - If you know how to do it, you probably know what you are doing.

I would like to refer to this as the 'IKEA-model' of responsibility: *you do your part and we do ours*. There are however more problematic areas of information, where the behaviour of the user creates data records often without the user's awareness. This may happen e.g. using telecommunications services or in relation to recording individuals' commercial behaviour (customer/loyalty cards collecting record of buying habits etc.). Medical devices may collect information that is not at all in the control

¹³ On especially the relation between individual's rights as user of telecommunications services, see e.g. The Deloitte Background Document in Support of the Digital Agenda for Europe, Final Report, Brussels, March 2010, pp. 69-104.

¹⁴ In comparison, Facebook Principles, 1, in the form of a declaration: 'People should have the freedom to share whatever information they want, in any medium and any format, and have the right to connect online with anyone – any person, organization or service – as long as they both consent to the connection'. Principles 2: 'People should own their information. They should have the freedom to share it with anyone they want and take it with them anywhere they want, including removing it from the Facebook Service. People should have the freedom to decide with whom they will share their information, and to set privacy controls to protect those choices.(...)'

¹⁵ Jacqueline Vallat, 'Intellectual Property and Legal Issues in Open Innovation in Services', European Communities 2009, p. 23.

¹⁶ OECD's recent survey ('Participative Web and User-created Content. Web 2.0, Wikis and Social Networking', OECD 2007), written by Sacha Wunsch-Vincent and Graham Vickery, lists characteristics of user-created content as follows: publication requirement (the work is published in some context, e.g. limited access social networking site), creative effort (copying and posting is not sufficient) and creation outside of professional routines and practices (OECD 2007, p. 18). Although this is an accurate description, this is probably not directly applicable as a starting point for legal considerations.

¹⁷ Proposal for a Regulation of the European Parliament and of the Council, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, Brussels, 25.1.2012, COM (2012) 11 final), art 6(1)(a). Several other conditions (6(1)(b-f)) may allow the processing of personal data. These are mainly related to fulfilling contractual obligations or public duties.

of the patient.

In conclusion, life data means a totality of complex information composed of many elements: personal data including medical and location on one hand, and contents created in social media or telecommunications on the other. These two elements are protected in different ways. Personal data is protected more stringently on the level of law, but the issue of ownership of content is much more open.

Ownership of Content

An individual creates a complex set of life data on purpose to countless public and private web-services (chats, blogs, social media) records and registers. This is largely about personal information i.e. facts – but also the amount of content created is immense. The protection of personal data is largely regulated, but the ownership of such data and the additional issue of user created content is much more diffuse and complicated.

First of all, this calls for the question, can the information or content be owned in any meaningful way, and if so, who finally owns it. Or is it a new type of legal subject, to which traditional language on ownership is simply not proper or delicate enough to reveal the many aspects and relations involved?¹⁸

There are several viewpoints to this. First of all I would like to rule out any 'natural law' –type justifications of the ownership. Rights on ownership – if any – are always decisions by the society and the lawmaker. They do not have independent existence due to some moral principle or idea.¹⁹

A traditional exclusion applied in all intellectual property rights regimes is that information as such – facts – are not protected by proprietary rights. Even the protection of databases has this exclusion regarding single or insubstantial parts of data. Broadening the ownership category to one's own life data would mean a major change in this old paradigm. The question however must be asked, whether this could be a possible or justified standpoint.²⁰

Secondly, ownership in its many forms is usually a concept demonstrating exclusive power to decide over an object, i.e. the power to exclude all others from the use of the object. It may be difficult to approach social media from this perspective. Let's say you participate in an event and you report about it in a social media service. You may own copyright (if any) to your textual or other creation. In IPR, ownership is granted as an incentive to (commercial) use of the IPR. Content that is uploaded and distributed for sheer fun or 'look-at-me' –type of incentive, is not as clearly in need of additional incentives.²¹

However, if you merely report facts, in ways that do

not merit copyright, how can you justify, that you in some manner *own* the report let alone facts? Do I own what I did or what happened to me? Do I own the uploaded report on what I did, thought, and what happened to me? To whom belongs the asset that is composed of my information? – I would definitely hesitate to argue that ownership in a traditional sense would be a proper legal institution to be applied here. However, this is the approach in many social media services.

From copyright perspective the expressions in social media may not pass the so-called intellectual creativity test, or as applied in the Nordic countries, the test of 'independence and originality'. The expressions in social media are made by individuals and are therefore original, but may well fall below 'independence' –criteria as elementary or only statements of facts or very simple opinions or utterances.²²

This is however far from crystal clear – it may well be that writing or photograph overcomes the copyright threshold. At least in some national regimes, photographs enjoy independent and parallel protection not dependable on copyright. However, it is clear that the expressions in social media hardly were of the kind that e.g. Victor Hugo had in mind when leading the creation of the Berne Convention 1886 – the institutional basis of copyright is still very much based on the ideology and economic conditions of book publishing industry which is a remote activity in relation to modern network communications.

The obvious strength of copyright – being obtainable 'automatically' without registering or other administrative effort – may turn into nuisance in social media, as copyright pops up suddenly and surprisingly when and where you as an author do not expect it or even want it.

From a purely theoretical point of view, it is nearly impossible to see, how strict ownership of pieces of information could work in practice. Different social media have applied contractual terms and clauses transferring all proprietary rights – if any – to the service operator. This seems to imply, that the parties engaged in such contracts agree, that underneath, there is an object of ownership of consequently some value. We should however not draw far-reaching conclusions from these relatively new practices.

These terms of transfer are however merely 'disclaimers' in conditions of grave uncertainty of the internet. The parties – who seldom have ownership or know where it belongs to – want to settle the matter in some form that will not stop the use and provision of the service. They want to keep the jack in the box. If anything short of this was established as a legal rule, the whole emerging industry would have to organize itself very differently from its pre-

18 This was suggested by several youthful commentators in many conversations and e-mail chats during the writing of this report.

19 In the realm of legal philosophy, a distinguished opinion to the contrary was recently expressed, as Ronald Dworkin ('Justice for the Hedgehogs', 2011) advocated for a value-based justification for legal issues, i.e. the fundamental justifications of right and wrong. The idea of placing human dignity in the centre of the discussion would be tempting, since the European instrument for Fundamental Rights is built on non-negotiable human rights and freedoms. I shall however leave this discussion to scholars of these traits.

20 Facebook Principles 2: Ownership and Control of Information, applies a proprietary approach towards information or content: 'People should own their information. (...) This may prima facie however be read in many ways, only one of which is a 'declaration of right'. This may also suggest that people should only distribute information they actually own. In 'Statement of Rights and Responsibilities', paragraph 'Sharing Your Content and Information': 'You own all the content and information you post on Facebook'. The question is of course, 'what if you don't', but this contractual clause is probably intended as a soft disclaimer against claims of illegal conduct being posted, i.e. it is the user's responsibility to own the content.

21 On the complexity of copyright incentives system, see e.g. Ruth Towse, 'Creativity, Incentive and Reward; An Economic Analysis of Copyright and Culture in the Information Age'. Edvard Elgar UK 2001.

22 On the problem of copyright in social media see e.g. OECD 2007 p. 77-.

sent openness.

Finally, there are also arguments on behalf of creating some sort of proprietary elements to social media. First of all, the Facebook vote in April 2009 over the 'Principles' indicated a broad acceptance of the idea of actually 'owning' the information. From a more traditional perspective, it is clear that large amounts of data may require such investment that could enjoy legal protection as databases. Therefore, it would make, after all, sense to say, that although it is not clear that pieces of participative data as such enjoy protection, the collection of one's life data – as databases – almost certainly enjoys protection already.

The user, while uploading information to a social media service, is simultaneously licensing the use of his or her life data. The use of this life data by other people creates value in many ways – traffic in the telecommunications network, value as a marketing channel for the service provider – and it is not at all out of question, that part of this value should benefit even the licensor of life data.

However, the implication surely is that the data is not uploaded with a commercial interest and no such claim can follow on the basis of uploading personal information. – If you assume your personal information to be of commercial value, do not upload it for others to copy or use commercially for free. People are well able to technically use social media – an element of mutual responsibility for both the service operator and the end-user may therefore well exist.

Another thing is, should you have a right to decide on the use of your life data, like where they should be physically operated, which services attached and under which terms. At least in principle, the database protection seems to allow this possibility.

Some sort of financial incentives to create interesting content in social media have already appeared in the form of advertising. Interesting content develops value. It might become an issue, how some part of this value could also benefit the creator of content of special value. Data processing for this is easily available. Users could have electronic accounts.

This might however be a self-repairing concern – there must already be sufficient incentives in place to produce and upload life data simply because it is done every second in enormous quantities. This would be the self-explanatory 'look at me' -incentive that is sometimes referred to in copyright debate.²³

Conclusions on User's Participatory Rights

As long as personal data is in question, no changes to the present regime would apparently be needed, although this may well be a subject to future review. As far as the question concerns participatory life data, an educated consent (implied licence) could be presumed. Database protection may also be relevant regarding the totality (file) of personal information.

Why is it important to see user's participatory consent ('the IKEA-model') as a legal presumption? I have already covered the legal side and practicality arguments. However, there is an industry policy argument involved. Especially the SMEs are hurt by complicated legal environment and overly protective legislation of the participatory internet services. The main concern of a typical SME entrepreneur is 'do I have time for lunch today', rather than exquisite nuances of legal positions of those involved. And yet, they may be able to offer valuable services even globally an important instrument of economic growth. This innovative force should not be unleashed for the benefit of all European citizens, and should not create an advocacy heaven out of social media.

Users' participatory rights are also relevant from a broader European point of view. Individual citizen's rights may be more forceful than sector-specific legislation against regulatory obstacles in the digital internal market. Every EU citizen must have broad rights to participate in the internet via the media or method of his choice. The consent presumption opens up the social media for individuals as companies do not have to operate to reserve potential legal rights.



Questions for further discussion

- What is the required set of principles that are non-negotiable?
- How to arrange and monitor the balance between protection and innovative freedom of the individual?
- Protection of Life Data is important, but who exactly owns it and in which sense it can be owned?

²³ Mikko Huuskonen: 'Copyright, Mass Use and Exclusivity' (Helsinki 2006), p. 79, commenting Ruth Towse.

On Business-Model Based Copyright Regulation

Harmonization of legal environment in the European Union is a vital precondition for creating a single market. It is not the only precondition: many other factors are important for the development of the markets. Administrative practices vary from country to country even though the law and legal positions of citizens are basically similar. There are different technological platforms and systems applied by public authorities and other stakeholders that reduce transparency. Law matters, however.

ICT is a moving target. A problem with making laws to hit a moving target is that the mindsets of those who make decisions are very much tied with what they have come to know already; old regimes and established business models. In this part I shall analyse the Directive 2001/29/EC,²⁴ asking what follows when regulation is based on fixed business models. I shall not go into the depths of copyright and cultural implications – copyright economy seems to be ‘superstar economy’ by nature and therefore less relevant in the well-being of other than very successful artists.²⁵

The Infosoc directive may be outdated to some extent, and my question is, is this due to the legislation being written to suit the old business models in a digital context, rather than opening way to unseen business models. On the other hand, the directive had a ground-breaking obligatory copyright exemption regarding interim copies in the internet, which has proven successful – at least if success is measured by the dissemination of the internet and the success of the telecommunications industry. The liberalization of the copyright regime in this respect has enabled the internet to grow and produce new, innovative business models, whereas there is less success with the exclusivity regime – the industry has suffered from piracy and the whole regime may need to be re-evaluated.²⁶

Mutual Beliefs as the Basis of Law

I shall shortly introduce a general idea from contemporary legal philosophy – mutual beliefs as the basis of law – and then continue to analyze the beliefs behind an important piece of European legislation, the so-called Infosoc Directive. Studying especially the preamble of the directive I intend to show how beliefs work in law-making.

In his essay ‘Opposite Mirrors’ Erik Lagerspetz built an interesting theory on ‘mutual beliefs’.²⁷ Mutual beliefs form the basis of conventional facts.²⁸ Our knowledge about the beliefs and actions of others is always subject to substantial uncertainty. The role of conventions in life is to diminish this uncertainty. Mutual beliefs enable the development of cooperative strategies in societal action.

Legislation is based on beliefs of things to come and the best choices for the society. Beliefs are often amplified by those who want to influence in lawmaking – lobbyists of various organizations and stakeholders. More often than not, the act of lobbying requires certain amount of resources and therefore economic power. Lobbying – the amplification of beliefs – is not possible for those who have no voice in the system.

Beliefs are dominated by existing business models

In order to illustrate the difficulties of business model based legislation, I shall analyze the background beliefs of the so-called Infosoc directive. It is apparent that the business models that were originally discussed during law-making were not those that later developed from the technological possibilities of the internet. It also seems that confusion already existed on whether to believe in the benefits of exclusive rights or their limitations.

The primary aim of this section is to study the background beliefs of the Infosoc directive 2001 in light of the institutional theory of law. Towards the end, I will examine Infosoc directive and in particular its preamble.

The purpose of the directive is to promote and support the development of European information society through harmonisation of copyright legislation. As stated in the preamble of the directive itself:

This [purpose] requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content. (Directive 2001/29/EC, preamble, para. 2.)

²⁴ 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, a.k.a. the ‘Infosoc’ –directive.

²⁵ The term ‘superstar economy’ has been used by e.g. Ruth Towse.

²⁶ The Deloitte Background Document in Support of the Digital Agenda for Europe, Final Report, Brussels, March 2010, p. 106: ‘One of the main challenges for the sector lies in the music industry with its losses on CD sales over the last years. In this respect, the music industry blames the illegal P2P networks for the losses they are experiencing (their estimations of losses are in the order of 300 billion in Europe)’.

²⁷ Erik Lagerspetz, ‘The Opposite Mirrors; An Essay on the Conventionalist Theory of Institutions, Kluwer Academic Publishers 1999’, p. 10. The standard definition of mutual belief includes a series of reiterated beliefs ascending to infinity. Lagerspetz’s reformulation of the notion goes as follows:

‘It is mutually believed in a population S that p iff (if and only if)

1. Everyone in S believes that p ,
2. Everyone in S believes that everyone in S believes that p

And so on ad infinitum.’

²⁸ Lagerspetz p. 13.

I want to show that the preamble of the Infosoc directive not only embodies a strong belief in a rights-based approach to copyright law, but at the same time offers broad arguments in favour of limitations to copyright. This contradictory groundwork laid forth in the preamble is not quantified in any manner and thus leaves room for interpretation in both the analysis and the implementation of the document.

This may have been an indication of the legal instrument becoming a battlefield of aging business models. The discussion was dominated by the representatives of the established industries leaving other possibilities untouched. This finally resulted in legislation that quite soon has started to show signs of premature aging.

InfoSoc directive: Rights or limitations?

The public discussion concerning copyright seems to indicate a belief that copyright law is in essence about price regulation or organisation of the market structure – which it clearly is only in rare occasions. In the first place, what copyright law offers legal protection for the negotiation positions of the parties – right holders, commercial and end-users. However, many other commercial elements such as demand may affect the negotiation position, which may make analysis on the level of economy treacherous. Some may have more market power, demand or commercial appeal, and negotiation skills than others.

Concerning copyright law as a vehicle for policy making, there are basically three modes of copyright protection: copyright exclusivity, limitations to that exclusivity, and total exemption from liability.²⁹ These correspond to the essential elements of copyright which can be classified as follows:³⁰

- exclusivity (property right)
- economic compensation (liability rule)
- moral rights: paternity, respect (inalienability)

The Copyright Belief

The Infosoc directive's opening statement in its preamble reflects the four freedoms framework of the European Union (free movement of goods, services, labour, and capital). The harmonisation of laws between the member states on copyright and related rights contributes to the achievement of non-distorted internal market (Directive 2001/29/EC, preamble, para. 1). The European Council has stressed the need to create a general and flexible legal framework at community level in order to foster the development of the information society in Europe (ibid., para. 2).



Further down in the preamble, one encounters an actual statement of belief regarding the relation between copyright and economic activity:

A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation. (Ibid., para. 4.)

The core of this belief can thus be said to be the assumption that *increased legal certainty and a high level of protection of intellectual property will foster investment*. The first part of this should be rather obvious from an economic point of view: clear market conditions enhance market activities. On the second point, the stronger the right holders position is, the more likely the protected property can be used for example as collateral to help finance further investment. In other words, the lower the legal risk, the better the chances to attract investment. I will, however, not go further into the economic logic in this respect, given the statement's general concordance with common sense.³¹

The nature of copyright, however, is somewhat more complex. Copyright may well protect property that has no economic value at all, as it may also cover assets of significant financial value. A comparison to other forms of property law may illustrate the point. Consider, for instance, two pieces of real estate property, one in a remote area in Lapland, the other in the centre of Helsinki, of roughly the same size; these may drastically differ in financial value while remaining subject to the exact same real estate registra-

²⁹ Without going into detail as to how the international instruments regulate exclusivity and its limitations, here I simply rely on the definition formulated by Martin Senftleben, 'Copyright Limitations and the Three-Step-Test', Kluwer Law International 2004, pp. 22: limitation of copyright means permission to use a work without payment ("fair use") or via a statutory or compulsory license (against payment). In what follows, I will also not discuss separately statutory (or legal) and compulsory license but instead use the term 'compulsory license' when discussing non-voluntary licensing.

³⁰ With corresponding rights components as suggested by Guido Calabresi – A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', Harvard Law Review Vol. 85/6, April 1972, pp. 1089-1128.

³¹ We could advance a 'high risk, high profit' argument to support a claim that higher level of opportunity invites more investment, but in general the assumption of money's being conservative seems correct.

tion system and its attendant rights framework. The relation of supply to demand behind the difference, forming the basis of all market behaviour in general, is not controlled by the property right system. Moreover, as all competitors enjoy the same rights, neither differentiation can be based on the rights system.

What this means is that even though copyright protection serves as a framework for legal protection, it is by no means the maker, let alone the guarantor, of the value of the property. The question remains: does the end result, the product itself, satisfy the needs or desires of the individual potentially interested in it? Or, to put it differently, is there someone prepared to exchange money for it?

Paragraph 4 of the Infosoc preamble addresses both content provision and information technology (IT); yet, these would appear to be at least partly competing areas of investment. Some companies, to be sure, may operate on both markets, but in general the two remain distinct businesses from one another. There is also a buyer-seller –relation between the businesses, i.e. content is distributed to customers via telecommunications networks and with the help of necessary IT-equipment. Emphasizing copyright would make the content providers' negotiation position stronger, and emphasizing limitations would enhance the negotiation position of the IT-technology companies.

The Infosoc directive rather surprisingly endorses both theories.

What is then considered to be the proper business to protect? To the extent that investment in content is encouraged, the rights holder's position rises to the forefront. In talking about 'business' in this context, one needs to remain consistent and realise that higher copyright protection creates a better negotiation position for the copyright and related rights holders, or their business.

The Limitations Belief

It may, however, appear that temporary or initial low levels of copyright protection provide a boost for certain business areas such as equipment sales and decrease the time-to-market for new products, through decreased transaction time – and may even decrease the transaction costs. On the other hand, if high levels of protection lead to overly difficult transaction mechanisms (in Europe, the '27 issue'), a disincentive for investment is created.

Providers of information technology may well profit from low levels of copyright protection for the content, whereas high levels of protection may

worsen the negotiation position of the equipment manufacturers at the low end of the chain.

Paragraph 5 of the preamble to the Infosoc directive pays attention to the role of technology: 'Technological development has multiplied and diversified the vectors for creation, production and exploitation' (Directive 2001/29/EC, preamble, para. 5.) Paragraph 9 stresses the need for high levels of copyright protection:

Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property. (Ibid., para. 9.)

This emphasis on rights is repeated in paragraphs 10 through 12, and again in paragraphs 21 through 25. But the tone is slightly confusing in between:

"This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching" (ibid., para. 14).

Reading this very literally would indicate, with a possibility to confusion, that learning and culture require protection of copyright while the needs of education and teaching seem to call for its opposite?

A major exception of copyright liabilities is the 'interim copies' exception of article 5(1). Relating to this article, recital 27 stipulates:

'The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.'

Article 5(1), with the backing of recital 27 of the directive, ensures that the telecommunications industry will not be a part of the copyright liability chain. In this regard, at least, we can then recognise a limitation of the main copyright exclusivity rule, moreover one that certainly had and will have broad consequences for the organisation of the telecommunications industry.

Without the exception, the telecommunications operators would have found themselves in a position trying to agree on licensing with regard to devastating amount of network traffic. We could



see this as a clear indication of the legislators' belief that no good follows from subjecting telecommunications networks to copyright obligations. Mass use and exclusivity cannot co-exist.

Paragraph 31 of the preamble tries to explain the reasons behind the *prima facie* contradictory approach to regulating the rights-versus-limitations relation:

A fair balance of rights and interests between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment.

There is a similarity between the structure of the preamble and the articles: definitions of various rights are given in Articles 2 through 4, with a relatively long and exhaustive list of exceptions and limitations following in Article 5. This is surely based on a careful analysis and evaluation of the economic and societal impact of the rights as well as the exceptions and limitations, but at some points it may be difficult to find the logic of the compromise. Furthermore, the chosen legislative technique is not flexible or dynamic – we cannot say what the future businesses will look like and we are certainly in for surprises like search engines and streaming technologies.

The initial conclusion remains that we do not yet know nearly enough about the actual effects that rights, exceptions, and limitations will have among different industries.

Does copyright benefit or hamper business?

The history of copyright legislation shows that this is not at all the first time in the history of technological breakthroughs that the rights versus limitations issue is discussed. The early stages of the voice recording industry may serve as an example.

In the early 20th century, the impact of the Second Industrial Revolution was beginning to show in full force as the development of new media forms was rapid. Should new forms of media be arranged on the basis of strict exclusive copyright or should the new media be somehow arranged differently in order to encourage its development?

The arguments in favour of the benefits of new technology emerged as an important factor in the adaptation of compulsory licensing in the early 20th century. The compulsory licensing model applied in the patent system of e.g. German legislation allowed for the use of patented material against compensation under certain circumstances. Adapting this idea to the copyright system meant that it would not be illegal to make a voice recording of someone else's material, but the author of that material had a right to compensation. This required balancing measures within the copyright system.³² As an overall statement, the technological development gave rise to a new media economy, which in turn required new institutional balancing of interests.

According to Brennan, the new industry was initially able to flourish untroubled by the Berne Convention copyright obligations.³³ Copyright owners perceived

³² For a discussion of the period between Rome to Brussels as an era of important technological impact on copyright, see Sam Ricketson, 'The Berne Convention for the Protection of Literary and artistic Works: 1886-1986', London 1987. According to Mogens Koktvedgaard 'Immaterialrettspositioner', Copenhagen 1965, pp. 440-441, the artistic skill of an inventive genius had to give way to modern and more impersonal protection during the 20th century, with the modern immaterial rights tendency resulting in the inventions' being protected as products of impersonal rather than personal effort.

³³ David J. Brennan, 'Retransmission and the US Compliance with TRIPS', The Hague 2003, p. 11. - Berne Convention for the Protection of Artistic and Literary Works, Paris Act 1971.

this to be doubly unfair: the popularity of the new technology meant that their sales of printed music began to decrease, while they continued to receive no share of the profits generated by the widespread use of copyrighted materials in the applications of new technology (ibid.). Given the tendency in economic and institutional theory to stress the role of legal framework as 'the rules of the game', seen by many as facilitating the spread of market economy, Brennan claims that the rapid development of the recording industry could take place only because of the lack of legal norms.

The well-known Berne Convention specialist Sam Ricketson argues along the same lines, pointing out as one of the factors contributing to the rapid growth of the recording industry *the lack of enforceable rights* by copyright owners. Copyright owners had initiated campaigns on both national and international levels to gain recognition for their rights, arguing that phonographic recordings were just another form of reproduction (Ricketson, 1987, p. 94).

In response, the argument of the recording industry representatives was that the recognition of these rights would mean financial ruin for their field, which moreover had been built in good faith and in the absence of any legal restrictions to begin with (ibid.).

It may be amusing, that for a century ago the recording industry lobbied for copyright limitations, and without those limitations, the whole industry might not have developed as quickly as it did. This also begs more understanding on the complex relation between copyright and innovation policy.

Ricketson's illustrates an interesting shift in the way arguments are advanced regarding the relationship between copyright regulation and economic development. Traditionally, copyright has been seen as a vehicle for encouraging creativity. In a closer examination of Ricketson's argument, it becomes clear that he, like Brennan, attributes the rapid growth of the phonogram industry to the *lack of enforceable rights*. The argument could even be turned upside down, posing the question whether, if the development of a technological phenomenon is to be encouraged, instead of granting copyright it might be better not to provide such protection at all, at least in the initial stage of the business.

Stretching Ricketson's argument a little, one might draw the conclusion that had the exclusive right of control over the recording of a work been established early on, the development of the industry might not have been as fast and pervasive as it now turned out to be.³⁴ Yet, it would be pushing the point too far to claim that for Ricketson, the development of the recording industry demonstrated a negative trend; rather, his point was to illustrate the position of the

industrial entrepreneur who seizes an opportunity knowing that legislation lags behind.

Looking at Infosoc from this perspective, in retrospect, the limitation concerning interim copies seems to have worked in favour of the dissemination of the internet, whereas all other parts of the legislation have proven more or less technology-dependent and thus running the risk of being outdated.

We could also see the evolution of latest technology innovators such as Google and YouTube as examples of the same approach: from early on, the companies adapted an operating mode of realising their mission first and worrying about national copyright regimes later.

Copyright protection may then either benefit or hamper business, with the question being simply *whose* business we are talking about. From incentives' perspective, it is clear that copyright is good for the authors and composers – and their representatives for sure. But is the economic incentive truly the main motive in artistic expression? A great artist may bring the audience a profound experience. I believe that there is much more to it than only pursuing a monetary incentive – in fact, thinking about economic issues in relation to something as highly spirited as great art may feel blasphemous. I believe that artistically inclined person of great talent first and foremost wants to express him- or herself to communicate important ideas to his public. Economy is important but still secondary to this greater cause. And there is no better instrument for keeping contacts with beloved artists than the internet.³⁵

Examples on Discussion on Alternative Perspectives to Copyright

The issue of limitations was debated to a greater extent when cable television started to spread and developed an economically significant outcome for copyright holders. I shall end this part with a look at some of those themes which in my opinion may have relevance even today.

1. A right to compensation as a surrogate for the rights to exclude

In the United States, during the enactment of the cable television compulsory licensing provision, key questions arose regarding the juridical grounds for doing so. The main issue was, owing to the constitutional power of the Congress to grant authors the exclusive right to their writings, were it not unconstitutional to create compulsory licenses which render the author's copyright less than exclusive, by taking away from authors the right to deny potential users

³⁴ While this may represent a not entirely legitimate extension of Ricketson's argument, it helps to illustrate the "mutual beliefs" that observers have in assessing the effects of rights on an economic activity.

³⁵ For example, the writer follows the career and news concerning jazz-guitarist Mike Stern via his homepages and also in Facebook.

access to their copyrighted works? The issue, however, was never settled in court.

On the other hand, in 1909, when the principle of compulsory licensing was first enacted, the songwriters affected feared that if they successfully challenged the new copyright act, they might be left with no protection whatsoever against mechanical reproduction of their songs, in which case the issue would fall under the fair use regime.³⁶ So, the only feasible alternative for compulsory licensing was not in fact exclusivity but fair use.

Brennan (2003) has compared the compulsory licensing of retransmissions to the classic example of the lighthouse in economics as presented by R.H. Coase. In Brennan's estimation, the two are comparable in the sense that in both cases actual exclusion of outsiders from the use of the service is difficult or impossible. A right to remuneration therefore serves as a surrogate for the right to actually exclude (*ibid.*, p. 103).

2. Impracticality Argument

Mass use of copyright-protected works makes the problems of exclusivity-based copyright fairly clear. Consider a cable television system with a capacity for, say, 200 television channels. Each channel provides programming 24 hours a day seven days a week at the rate of approximately two programs an hour.

Each of the programs involves at least ten to twenty rights holders, and in the case of major productions may even number in hundreds or even thousands, including co-operators claiming at least some degree of authorship of the creative elements of the program. We can assume the average number of such rights holders to be one hundred per production. Let us further assume that the licenses for cable retransmissions were to be negotiated individually with an average of 100 rights holders per a 30 minute programme. A simple calculation then reveals that for only one TV channel, the total licenses to be negotiated and agreed upon will amount to $24 \times 2 \times 100 = 4,800$ per day. In the case of the 200 channel cable operator, this would mean 200×4800 licenses per day, i.e. 960.000 licenses. This is clearly not only impractical, but impossible. And it is obvious that the complexity involved in the internet is very much greater than in cable-TV.

The impracticality argument was used in the Congress during the preparation of the United States 1976 Copyright Act, underlining the impracticality and undue burden in the requirement that every cable system operator negotiate separately with every copyright owner whose work was to be retransmitted over the system.³⁷

3. Innovation policy - The need to subsidize an infant industry

The argument focusing on the support needs of a new and innovative industry has been raised several times in copyright history. The perspective was also brought up in the discussions concerning the amendment of the Berne Convention to include the compulsory licensing exemption for phonorecords (The Berne Convention, 1986, p. 156).

In the United States, the 'emerging industry' argument was widely used especially in relation to cable television. The argument has been put forward in a way that a developing industry needs the protection of a reliable and reasonable compulsory license to make planned growth possible (Cassler, 1990, p. 246).

From innovation policy point of view, the encouraging of entrepreneurship, including the activities of individuals in creating new content and even new services, is of course an important leverage of this argument.

Conclusion

It is important to recognise that legal debate is about beliefs that are rarely quantified. Such beliefs reflect important values and ideologies but may also be to some extent misleading in their actual effect. It looks like the limitation element of the Infosoc directive has enabled new businesses to grow and has brought successes, whereas the more traditional notion of copyright being the main incentive to creativity has started to seem more doubtful. The Gap has widened in this sense.

Good legislation requires sound statistical material and quantified claims supporting it. Lawmaking is of course not only about cold economic statistics but of value and moral arguments, too. But, if basic understanding of the economic effects is not available, not much can be expected from the result. The effects of laws should be followed and monitored critically also to see if the markets actually function the way the parties said they would.

Meanwhile, the rights-limitations dilemma should be approached in a constructive fashion, for example by analysing more closely the complex and rather comprehensive issues now only briefly touched upon above. No perfect solution can be expected to be attained from such work, but at least the common ground for further discussion may thereby become broadened.³⁸

Questions for further review

- How to approach/adjust the Rights/Limitation balance correctly?
- Is our knowledge of the economic and technological impact of copyright sufficient?
- Is there a way to approach moral issues relating to copyright in a way that does not require trade-offs in the market?

³⁶ Robert Cassler, 'Copyright Compulsory Licenses - Are They Coming or Going?', *Journal of the Copyright Society of the USA*, Vol. 37, no. 2, January 1990, pp. 231-261, p. 237.

³⁷ Fred H. Cate, 'Cable Television and the Compulsory Copyright License', *Federal Communications Law Journal*, Vol. 42, No: 2 April 1990, pp. 191-238, p. 202-203.

³⁸ For a broader review of the issues related to mass use of copyrighted material, see Mikko Huuskonen 'Copyright, Mass Use and Exclusivity', Helsinki 2006.

III The Facebook Principles

As mentioned earlier, the Gap means that legislative institutions' lag behind ICT development. The Gap seems to be wider every year. This means, among other, that contractual practices become an important source of law. Present, rising contractual practices may well indicate the direction of the future internet institutions.

The 'Facebook Principles' (later: Principles) and the accompanying 'Statement of Rights and Responsibilities' (later: SRR) represent an interesting case on a service based on social media. The case presents also a new type of business idea, where a close and refined contractual risk-sharing relationship is established.

In the chapter following this, I shall also make some comparison of the Principles to the relevant sections of the Charter of Fundamental Rights of the European Union (2010 C 83/02). The Principles may well represent a new form of business behaviour with a strong societal element, and as there is always the possibility, that this is the direction future business is going to develop in a broader sense. Therefore, as an example, it may well be worth while to pay attention to the contractual structure of Facebook.

Especially in the European context, it is interesting to study a business that apparently seems to manage in rather complicated circumstances of operating in 27 EU member countries with 27 different legal regimes. The question is simply, 'how do they do it'?

Brief History of the Principles

In February 2009, Facebook ran into some difficulties trying to amend their then current 'Facebook Terms of Service'. The company had tried to shorten its 15 page legal document down to 5 pages, but some errors apparently occurred. Facebook was alleged to claim ownership of the users' photos, videos and other content posted to the site. According to company officials, the controversy showed how much of a sense of ownership users have over Facebook and that they wanted a sense of participation in its governing.³⁹

On the 16th April 2009 Mark Zuckerberg announced in his Facebook-blog, that Facebook was opening their site governance to everyone who uses Facebook with the company's first user vote. The vote was concerning a choice between the Facebook Principles and SRR or, alternatively, the Terms of Use.

Users of Facebook had the possibility to comment the SRR during a preceding 30-day commenting period, whereas the Terms of Use were created by Facebook without preceding comment period. During the commenting period, Facebook received over 3000 comments from a group of 10.000 members who had joined for groups of discussion. The voting time went on for about a week.

Zuckerberg explained:

'If these new documents are approved, all future changes to the Statements of Rights and Responsibilities will go through the same process of notice and comment, and may be put to a vote if enough people comment (...).'

The results of 'the Inaugural Facebook Site Governance Vote' were published on the 24th April by Ted Ulyot in the Facebook blog-site:

'There were 665,654 votes cast and users supported the Statement of Rights and Responsibilities and Principles by an overwhelming margin – 74.37 percent. We will adopt these documents and post them to Facebook and the Site Governance Page in the coming weeks.'

In Simon Axten's Facebook-blog on the 4th April 2009 the process of revising the term policy is discussed. Especially the volunteer law students from the University of California Hastings, the University of San Francisco and Santa Clara University were credited for participating to the commenting. Some of the key critics of Facebook policies had participated, and also experts from areas of privacy, internet and copyright law along with several photography trade groups. Axten says,

'(...) we will also be sharing a written response to the main concerns people have expressed. This will explain in clear language why we did – or did not – make certain changes. This is similar to how US federal agencies create regulations.'

By using or accessing Facebook, I as a user become bound by the SRR. The SRR point 2 in 'Other' says that 'this statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreement'. The link between Principles and SRR is in the opening statement of SRR, where it is stated that SRR derives from the Principles.

³⁹ Marshall Kirkpatrick, 'Facebook Management Has Lost Its Grip on Reality', ReadWriteWeb 26th Feb 2009. Kirkpatrick however argues, that the users were upset about the ownership of the content rather than governance of Facebook.

elements of law regarding criminal content in general. Technological challenges would – *prima facie* – seem lesser issues in comparison, judging from wide array of solutions operating in the Facebook service apparently with a high technical standard.

The principle of sharing is legally part of the traditional freedom of speech or freedom to express opinions, but it also contains elements of freedom of association. It is probably a new kind of legal animal altogether, but as a legal right, it has roots in the fundamental human rights tradition.

The principle of connecting is two-sided, conditional to mutual consent to connecting. It says that a person also has a right to be left alone by someone or anyone, i.e. not to be communicated to or with. This would be paramount to principles of privacy.

Principle 2: Ownership and Control of Information

Facebook principle 2 states, that people should own their information. They should have the freedom to share it with anyone they want and take it with them anywhere they want, including removing it from the Facebook Service.⁴³

This was probably the most important single reason for the Facebook vote. This reflects the ‘mutual belief’ among the users of Facebook (or any other service with similar features) that some kind of ownership exists or should exist (i.e. be recognized by the authorities) to these content. If we put this request in the context of the earlier criticism, it may also seem justified to say, that the main worry is not necessarily the ownership of individual pieces of data, but the totality (life data) of the user.

According to Principle 2, second sentence, people should have the freedom to decide with whom they will share their information, and to set privacy controls to protect those choices. This brings an element of privacy to the picture. However, there is a broad limitation to this in the next sentence: ‘Those controls, however, are not capable of limiting how those who have received information may use it, particularly outside the Facebook Service.’ This brings to the picture an interesting additional feature: the rights are not only an issue between the service and the user, but also among users, who use the content of other users.

To what extent should the service provider be responsible for the rights of users on what other users do to the material? This requires an element of shared responsibility, otherwise building a commercial operation on the basis of social media would be an impossible exercise. From user’s perspective, this

requires an evaluation of one’s own preferences and risk-taking, placing material in the hands of ‘friends’ that may well be perfect strangers.

Content Ownership in SRR

The ‘Statement of Rights and Responsibilities’ (SRR) derives from the Principles, and governs the relationship with users and others who interact with Facebook. By using or accessing Facebook, you agree to this Statement. Therefore, legally speaking, this is the document, not the Principles, that actually is the binding document in the relation between the user and Facebook.

In the paragraph ‘Sharing Your Content and Information’, the statement of ownership is represented in the following manner:

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP license). This IP License ends when you delete your IP content or your account, unless your content has been shared with others, and they have not deleted it.

This is a more ‘legal’ approach to the issue of content ownership. The contractual strategy is based on a statement of the content ownership of the user, but in a slightly different context than with ‘Principles’. Here, the role of the statement is that of a ‘guarantee’ for Facebook, that the user only downloads material that is owned by him or her; if not, technically speaking, there is a breach of contract and the culpable is the user.

Furthermore, a worldwide, royalty-free license is given to Facebook to use any content posted on Facebook or in connection with Facebook.⁴⁴ The license is non-exclusive, which may withstand other licenses. Facebook may transfer or sub-license the content without consent or knowledge of the user. No system of compensation exists in cases of Facebook benefiting substantially from such sub-licenses or transfers.

The last sentence (*‘This IP-license...’*) provides protection to the user, but this might turn out illusory: it is quite clear that information may be used and downloaded by others, in which case there is no real possibility to leave Facebook altogether. This is emphasized in the second and third paragraphs:

‘2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed

⁴³ Kirkpatrick, *ibid.*, refers to the issue of the users’ ability to move their content in and out of Facebook (not merely a deletion, but the transportation to somewhere else). According to Kirkpatrick, this principle would mean a change to the (then) current negative standpoint Facebook had on data removal.

⁴⁴ The ‘connection’ is not explained, so the reference is uncertain. It would probably be unfair to think, however, that the ‘connection’ is something created without the user’s consent or at least knowledge.

content may persist in backup copies for a reasonable period of time (but will not be available to others).

3. When you use an application, your content and information is shared with the application. We require applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information.'

The responsibility therefore does not lie with Facebook. The responsibility issues could easily ruin much of the business case for social media. Therefore Facebook applies elements we might call the 'IKEA-model' of responsibility ('you do your part, we do ours').

SRR further gives guidance to limiting the scope of publication (par 4):

'When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to access and use that information, and to associate it with you (i.e. your name and your profile picture).'

SRR is pretty strict on the 'Protecting Other People's Rights', according to which, you will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law. On the second paragraph Facebook retains the right to remove any content or information posted on Facebook, if Facebook believes that it violates the SRR.

On 'Disputes', the language becomes very 'plain English' and besides, is printed with capital letters (which usually in the internet chat-ethics is thought to be equal to shouting...):

'WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK. (...) WE DO NOT GUARANTEE THAT FACEBOOK WILL BE SAFE OR SECURE. FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES (...).'

Although this is quite standard for general terms, especially for any ICT-service provider, the tone is of course different and more exact than in the politically more correct Principles.

Principle 3: Free flow of Information

According to the 3rd principle, people should have the freedom to access all of the information made available to them by others. People should also have practical tools that make it easy, quick, and efficient to share and access this information.



This principle has two sides: on the other hand, the first sentence is a claim on the level of institutions, i.e. legal rights. The second claim is on the level of infrastructure and availability of actual devices. The latter is therefore an issue of the level of leverage of new technology, and more an economic or policy issue and finally, a matter for the state budget.⁴⁵ This addresses the traditional issue regarding fundamental rights in general: the right itself may only be a formality unless there are means to exercise it (enforce).

Principle 4: Fundamental Equality

Every person – whether individual, advertiser, developer, organization, or other entity – should have representation and access to distribution and information within the Facebook Service, regardless of the Person's primary activity. - The first sentence seems a bit misplaced under the heading, since 'fundamental equality' is usually the cornerstone of legal system of the western tradition, and fundamental equality actually means something a little more profound than the possibilities of different companies to operate within the service.

The second sentence states, that there should be a single set of principles, rights, and responsibilities that should apply to all People using the Facebook service, which is more or less the role of the SRR.

Facebook tries to manage with a very simple basic set of rules of legal nature. The attempt is very ambitious – looking at the tradition of social media or interactive web services, the legal tradition has been of great complexity and legal uncertainty for the user.⁴⁶

This point is complemented especially by the 'Special Provisions Applicable to Developers/Operators of

⁴⁵ For example, the Digital Agenda for Europe has a series of action points ('Very fast Internet', 42-49) that mostly concern the leverage of high-speed broadband.

⁴⁶ A corporate lawyer's response to the writer's question regarding the 'general terms' of the company (not Facebook) was in its all honestly very simple: 'The idea of 'general terms' is that we have no responsibility whatsoever and the customer has no clue, what he has bought'. - The same attitude is still alive and kicking in the copyright circles – try asking a collective organization, what the individual user can do with the work, e.g., what is the legal scope of private use limitation.

Applications and Websites' of SRR. Among many terms, Facebook requires a privacy policy from application or website operators.⁴⁷ Data must be deleted upon request. User data must not be sold.

In general, Facebook applies both C-B (customer - business) and B-B terms (business - business) set of reciprocal rights and obligations. Facebook contractual structure at this point seems very complicated and '3-dimensional' as there are relations between Facebook and the users, Facebook and the commercial users, but also between users themselves (both private and commercial users) in less than a clear way.

5: Other

According to the 5th Principle, people should have the freedom to build trust and reputation through their identity and connections, and should not have their presence on the Facebook Service removed for reasons other than those described in the SRR.

SRR says (Protecting Other People's Rights, point 2) that 'we (Facebook) can remove any content or information you post on Facebook if we believe that it violates this Statement'. This is probably not to suggest that Principle 5 would be without value, but looking at this from a strictly legal point of view, it may not take much effort from Facebook to evoke this rule.

Still, we must remember that Facebook's business case is an extremely frail and demanding one, and there is no question about it, that it has succeeded in offering value to hundreds of millions globally – despite the legal question marks, understanding Facebook should be based on this fact.

People should have programmatic interfaces for sharing and accessing the information available to them. The specifications for these interfaces should be published and made available and accessible to everyone.

This principle bears some reminiscence to the ECJ's and DG Competition's famous Microsoft case⁴⁸. Creating open interfaces may serve as a pre-empting device for competition concerns. However, this is still somewhat distant to the idea of the user to control his life data and decide where and in which service to use it – the transparency issues of that vision are huge.

People should be able to use Facebook for free to establish a presence, connect with others, and share information with them. Every person should be able to use the Facebook Service regardless of his or her level of participation or contribution.

Lawrence Lessig's famous statement 'Code is Law' seems a prophecy since the ICT-elements of a service on one hand and the fundamental rights relating to

expression and information form together the 'societal fabric' where individuals share their lives. ICT is essential in this respect for empowering people to use and benefit from their rights.

The rights and responsibilities of Facebook and the people that use it should be described in the SRR, which should not be inconsistent with these Principles. Why this Principle is called 'common welfare' seems a bit distant – maybe a reminiscence of some old version or debate?

According to these principles Facebook should make publicly available information about its purpose, plans, policies and operations. Facebook should have a town hall process of notice and comment and a system of voting to encourage input and discourse on amendments to these Principles or to the SRR.

The last high-spirited Principle 'One World' states that Facebook Service should transcend geographic and national boundaries and be available to everyone in the world. As this seems to be true to a large extent – with some arguable exceptions on the world map – there is also resemblance, maybe less accidental, to the principles of the European Union seeking completion of the digital single market. The difference is – Facebook seems to have managed to create a business case in the European Union, while the union itself is still struggling to find efficient ways to encourage businesses to develop union-wide and even global businesses. This gives new meaning to Lessig's famous quote 'code is law'; sometimes it may be much more efficient to harmonize service structures than rely on legal harmonization. This would be 'filling the Gap' from a different perspective.

Models of Life Data Protection: A Look on Database Protection, Creative Commons

The protection of databases in European legislation is based on directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. The reason for passing legislation on databases was the assumption that creating a separate *sui generis* database protection rule (in parallel with copyright protection of databases) would enhance and encourage creation of European database businesses.⁴⁹ Most of the cases regarding the database directive concern exactly this *sui generis* right – not databases protected by copyright, where the criteria are somewhat different.⁵⁰

Database definition

The directive concerns the legal protection of databases in any form (art 1 'Scope'). Database means a

⁴⁷ SRR, 'Special Provisions Applicable to Developers/Operators of Applications and Websites', par 2.2.: You will have a privacy policy that tells users what user data you are going to use and how you will use, display, share, or transfer that data and you will include your privacy policy URL in the Developer Application.

⁴⁸ Case T-201/04, Court of First Instance 17.9.2007.

⁴⁹ An evaluation of the directive was carried out in 2006. The evaluation pointed that the creation of the *sui generis* had not proven its usefulness in encouraging the expansion of database businesses.

⁵⁰ ECJ cases C-46/02 (Fixtures Marketing Ltd v. Oy Veikkaus Ab), C-203/02 (The British Horseracing Board Ltd and Others v William Hill Organization Ltd), C-338/02 (Fixtures Marketing Ltd v. Svenska Spel AB), C-442/02 (Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE (OPAP)).

collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means (art 1 (2)).

There seems to be no *prima facie* objection to this being applicable to some social media services. Users are often creating and collecting large amounts of data under their own accounts. The data is consisting of text, pictures (photos), maybe short video clips, and links to other materials (life data). The data may be self created or collected from other sources, but the origin of the material is not part of the criteria. The data is individually accessible by electronic means.

The question is, whether they are arranged in a systematic or methodical way in the sense of the directive. There is however very little lead or additional information; recital 17 only gives an example of what is not copyrightable as a database: a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of the Directive. This does not seem like a definition of self-evidence and clear logic, but rather a common understanding or compromise received in some negotiation.

On the basis of this material the only conclusion available seems to be, that the test for systematic or methodical arrangement cannot be very high, bearing in mind the aforementioned exception. So even this criteria is not likely to block the legal application of the database directive to social media. – Art 1(3) rules out the protection of computer programs used in the making or operation of databases accessible by electronic means.

Copyright protection of the database

Chapter II deals with copyright protection of a database. Databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation, shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

There is however a slightly narrower definition (which leads to broader interpretation of copyright) of the criteria in recital 16: no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied.

It has sometimes been suggested that this means a lowered criteria with regard to the 'threshold' of applying copyright protection on databases, putting emphasis only to originality (i.e. the computer program is the original creation of programmer).⁵¹ It has been a source of debate, whether this means

actually forbidding any other criteria other than originality.

Still, even this definition contains the term 'intellectual creation' which may suggest some criteria or threshold, as not any creation is an intellectual creation.⁵²

According to recital 15, the copyright protection should be 'defined to the fact' that the *selection or the arrangement* of the contents of the database is the author's own creation, whereas such protection should cover the structure of the database. – Such contents are not protected by the database right.

Applicability of the Database Protection to Social Media Services

I shall look at the Database Directive in relation to the Facebook Principles (FP) and Statements of Rights and Responsibilities (SRR). As noted before, the SRR becomes the actual agreement when the user starts to use the Facebook service.

The SRR article 'Sharing Your Content and Information' states the rights related to content: '*You own all of the content and information you post on Facebook (...)*'. This is not always the case in the practice of Facebook or any other social media service. People post links to music and videos without having the ownership in any sense. This is however a problem discussed already earlier and not directly linked to the database issue. Database may contain material that is not owned in any sense by the creator of the database.

For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free worldwide license to use any IP content that you post on or in connection with Facebook (IP License).

The text says '*any IP content*' but does not say '*any and all IP content*' or refer explicitly to the totality of the content, i.e. the database. But is database IP content? Broadly speaking, it may prove difficult to see database right as a 'non-IP –right' in this relation. The IP license ends when '*you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.*' The wording (and the following par 2 with more on deleting) does not say anything about the transferability of the content – although it does not block it either. This would suggest that the content is transferable to another service but to end Facebook's license it must be deleted from the Facebook service.

⁵¹ 'A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection' Art 1(3), Directive 2009/24/EC of the Council of 23 April 2009 on the legal protection of computer programs (codified version), originally Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

⁵² Finnish Copyright Council case 2006:12.

The 'Social Contract' of Social Media Services

On the basis of this very brief and initial analysis, it seems possible that database protection may serve as an applicable model for social media. It will protect the totality of the file (individual's Life Data) and at the same time it offers flexibility in the protection of pieces of content – not everything is copyrightable, by far, but some elements of individual creativity may be. The right of an individual would remain broad. Database right would allow a look at the protection of material in totality without the necessity to evaluate the content in any way – the sheer amount of it qualifying for a database. But this would be solved in the legal praxis.

This would also add an element to the 'life data' protection, which would be composed from a large number of legal elements relating to privacy, data protection, copyright and the database right. But this is not of course the complete picture, but only a starting point for the proprietary ownership question. Other issues like the right to be forgotten will stay on the agenda.

Creative Commons

Creative Commons (CC) was originally based on the idea of, among others, Lawrence Lessig. Instead of 'all-rights reserved', the creative commons slogan was 'some rights reserved'. In practice, the CC license allows the licensor to tick the rights he wants to reserve – very often the right to commercial use in its various forms is the right reserved, whereas the right for non-commercial use – reading, listening, studying, private use etc. may be licensed for the users.⁵³

Facebook has not gone down this road, but it might well prove an interesting alternative for the reciprocal licensing arrangement upon which the Facebook structure is built upon. However, CC is based on the notion of copyright ownership, which may be doubtful as a starting point for social media content. Still, the Facebook Principles have as a starting point the ownership of material, which might also help facilitate the use of CC.⁵⁴

53 Source: en.wikipedia.org/wiki/Creative_Commons (22.12.2011).
– Today, there exists a great deal of literature on creative commons and even doctoral theses. See e.g. Herkko Hietanen, *The Pursuit of Efficient Copyright Licensing - How Some Rights Reserved Attempts to Solve the Problem of All Rights Reserved* (Lappeenranta University of Technology 2008).
54 It has to be remembered that CC in fact is not a legal novelty – it is based on the present law and notion of copyright, and on the other hand, copyright does not oblige anyone to uphold it. However, CC has merits in making the controlled use of copyright – including free use – practical and easy.
55 In sum, the challenges of the social media services in the US are breach control, the protection of teenagers and the right to be forgotten. Seminar presentation 1.2.2012 by David Vladeck, Director, Federal Trade Commission's bureau of consumer protection, hosted by European Internet Foundation, Brussels.

Conclusions

SRR or 'Statement of Rights and Responsibilities' is written in language that is more legally oriented and contains statements that might be seen if not straightforward deviations from Principles, at least disclaimers. The headlines sometimes promise more than the actual legal content seems to offer.

Still, the Principles represent an interesting attempt at 'shareholder' emphasis in its general terms, where certain balance of rights is agreed leaving also some elements of legal claim in order to create trust. Social media builds on trust, easy access and effortless functionality – not much else. The customer-loyalty in social media may be shallow as the experience with MySpace has shown.

The users may also have sensitivity towards the owners of the service making huge profits with information that is actually created by the users. Social media service has an element of co-operativity about it. When the first social media services become publicly listed, it will be interesting to see, whether such companies will adapt incentive policies based on content creativity or amount of 'eyeballs'.

Some commentators are of the opinion, that genie is out of the bottle for good. Kevin Kelleher writes for Reuters online (19th Oct 2011):

Managing who sees what data about you online is becoming an increasingly impossible task. The first 20 years of the web were about users expressing themselves, deciding what parts of their lives they published online. Increasingly your online identity belongs to a company like Facebook or Google. You either deal with that creepy fact, or you just don't exist online.

The legal creativity of Facebook is admirable – it may well put to shame many of its European competitors. It may however be that Moore's law will soon take us to yet another dimension of ICT, and the impressive but in many senses fragile composition of Facebook may become challenged.⁵⁵

Questions for further review

- 'Principles' are sound but is the actual implementation on the same level?
- Who, finally, owns the material?
- Is the ownership clause actually only a disclaimer without a more profound meaning?
- The right to be forgotten – what is that in the practical level, what ICT-tools are needed?

IV Life Data and the Fundamental Rights

Filling 'The Gap' requires principles of fundamental level that are not and may not be brought to a lower and more precise legislative level due to reasons explained in the introductory chapter – the institutional lag.⁵⁶

Life Data has many elements relating to the fundamental rights of citizens. In the following I shall go through some of them in a more or less 'prima facie' fashion. The fundamental rights are taken as they are stated in the Charter of Fundamental Rights of the European Union (2010/C 83/02). Some of the rights may have an indirect bearing to Life Data, but this part concentrates on those with direct impact.

It must be clearly stated that the principles, although universal and with wide applicability, were formulated before the digital internet era. Therefore the texts themselves might well benefit from an update to suit the information technology of today.

Life Data, as previously suggested, is composed of two main categories: personal data including medical data and contents created in social media or telecommunications. These two elements are protected in different ways.

The preamble states that the instrument ensures free movement of persons, services, goods and capital, and the freedom of establishment. It is sometimes debated, whether an inclusion of some sort of information related expression should be added.

Art 1: Human Dignity

Human dignity is inviolable. It must be respected and protected.

Respecting human dignity is an essential element of the functioning social media, especially in relation to controversial and sensitive issues such as racism or hatred against a group of people. However, as a legal tool this right is far from being a precise instrument. The actual content of dignity may only be defined in future court practice.

Art 7: protection of personal data

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some*

other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

This is the basic set of data protection rules on the fundamental rights' level. First is an abstract clause on right to protection of personal data. It is interesting that the data is not expressly the property of the individual, but it is material that 'concerns' him or her and enjoys protection. If there indeed would be ownership or the life data, this may lead to very different evaluations. The question remains, 'who owns the data' or 'whose asset is it', from the viewpoint of the Fundamental Rights.

Secondly, there are general requirements for processing the data. It must be for specified purposes and based on consent of the person concerned. According to the same sentence, there may also be 'some other legitimate basis laid down by law'. There might be personal data regarding e.g. one's criminal behaviour the use of which cannot be only based on consent. Some medical data may also have similar elements and concerns – in medical situations, consent may not always be possible to obtain due to e.g. patients condition. The medical data is often composed and written by a medical doctor, who may claim proprietary rights or authorship to his work.

Access to one's personal data and the right to correct it is stated without reservations.

Art 10: Freedom of thought, conscience and religion

1. *Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observan*



⁵⁶ The Deloitte Background Document in Support of the Digital Agenda for Europe, Final Report, Brussels, March 2010, p. 282, suggests adoption of an EU charter for digital rights, touching especially net neutrality, digital consumer protection including children, universal service and data privacy.



This protects the participatory rights, the right to hold or cease to hold ideas, opinions and religious beliefs and associate in the net.

Art 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The freedom of expression is protected from both receiving and imparting perspectives. It is worth noticing that this protection is traditionally directed against governmental organizations and national borders rather than between individuals. As it states, to oblige an individual to respect freedom of expression of other individual is not a fundamental right as such.

Art 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

The text has certain similarity to the issues regarding participation in the internet, but it is clearly targeted to traditional assembly.

Articles 15 and 16 deal with rights to working and conducting business across the borders. Their wording as such takes no standing on the applicability to the internet but this should of course be possible.

Art 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

As discussed before, it is doubtful, whether content in social media merits to intellectual property in the sense of the present legal regimes. The originality and independence criteria applied in certain jurisdictions are not met except in rare circumstances.

However, photographs, videos, music and large compositions of text may well enjoy copyright.

The right to dispose of is particularly interesting, as perhaps for the first time in history, it may well be very difficult if not impossible to dispose of one's property out of technical reasons. The material may loom somewhere in the global internet and may never be removed permanently.

2. Intellectual property shall be protected.

The internet piracy may well put forward the question, whether society is capable to guarantee an ownership in the internet. There are concerns of widely spread piracy voiced by the recording industry – still, it is debatable whether the core issue at stake is much more profound, relating to the technical possibilities for seamless and costless copying rather than shortcomings of the legal system.

The Creative Commons licensing in a way maintains the idea of control and ownership but is based on licensing only a limited set of rights, if that is the author's choice and desire.

Further, under title III Equality of the Fundamental Rights are certain aspects that may be of relevance if the ability to use information technology becomes a factor in societal segregation. Article 38 on consumer protection is closely related to the commercial aspects of the user's rights, i.e. when the user is using a service or purchasing items: union policies shall ensure a high level of consumer protection.

Article 41 reserves a right to good administration. The right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Furthermore, article 42 concerns the right to access to documents. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

Questions for further review

- Is the framework sufficient as it is or is updating of the Fundamental Rights to the internet era necessary?
- How should the use of personal data be allowed for service development purposes?
- Should we have an ex post rather than ex ante legal protection?
- Is the protection of Fundamental Rights unconditional in relation to the development of technology?

V Scenario: Role of Legal Institutions in Big Data Society

The two case studies discussed here – copyright and social media – are examples of the institutional consequences of the internet. Another set of examples of legal structures challenged by the internet could be taken from e.g. VAT or customs regulations. The internet-assisted bypassing of legal institutions and traditional value-chains is a rapid phenomenon with potentially far-reaching consequences.

The big picture of the technology-related changes to our institutional structures is missing.

The commission with all its related DG's is in an excellent position to create a holistic view of what's going on in our society and economy relating to the rapid development of ICT-technologies.

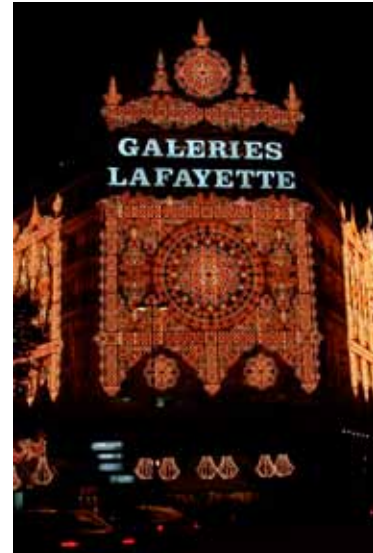
European institutional framework has for centuries been based on national (geographical) conditions. These institutions based on national circumstances experience difficulties trying to support the instant dissemination of EU-wide electronic services. Successful internet service providers like Facebook have solved this problem by adapting global choice of law –policies. This challenges the European system in a new way: we may have to ask, is the gradual harmonization strategy sufficient or is technological development pushing us towards completely new institutional approaches. The new and most successful internet-related service providers seem to have chosen a strategy to simply ignore the '27-problem'.

Despite the challenges to the legal institutions, the European tradition of strong protection of basic human rights should not be compromised. As suggested in the Deloitte Report, strong EU action to empower users would involve the adoption of an EU Charter for digital rights as a starting point for courts. The application in each individual case remains, as today, the responsibility of the court. Rights would be related to net neutrality, digital consumer protection, universal service and data privacy.⁵⁷ – In the terminology used here, the right to Life Data should also be an essential part of human rights protection. This 'picture-building' of the what's going on in Europe from institutional point of view could well be started as a DG CONNECT debate combining other relevant DG's such as DG Justice, DG Competition, DG Enterprise, DG Market and DG Research and Innovation. The debate should also involve the 'diginatives' point of view.

The analysis should be based on a description of essential service trends, including law-shopping. Building on this, it should adapt some main scenarios for future development – how to preserve European foothold. This debate on 'internet-institutions' is not something we should put on a long waiting-list. The rising new generation of digital natives accept to a lesser degree any borders or limitations to their self-expression in the internet and require a legal framework to match.

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Questions for debate

Human Rights perspective

- How should the Charter of Fundamental Rights be revised from a diginative's perspective?
- Who owns my Life Data?
- What are the internet-age non-negotiable principles of human rights?
- Will the European Court of Justice have a new elevated role in defining the legal principles of internet?

Innovation perspective

- Could the change from ex ante to ex post legal protection encourage innovation?
- Are there ways to utilize the growth potential of European 'knowledge of the village' in building global businesses?
- What should be a European response to the 'choice of law' –strategies aiming at avoiding the 27 –problem?
- Is the framework sufficient as it is or is updating of the Fundamental Rights to the internet era necessary?
- How should the use of personal data be allowed for service development purposes?
- Should we have an ex post rather than ex ante legal protection?
- Is the protection of Fundamental Rights unconditional in relation to the development of technology?

⁵⁷ The Deloitte Background Document in Support of the Digital Agenda for Europe, Final Report, Brussels, March 2010, p. 282.

Annex I

What Should the Policymaker Know about Open Innovation?

'The Gap' is largely a negative but unavoidable phenomenon. On the other hand it opens a window of opportunity to alternative business models, many of which are and will be based on open structures and societal innovation. Therefore it is important to look at certain elements of open innovation as a possible new model for growth in ICT and especially social media applications⁵⁸.

Open innovation is a broad concept encompassing fundamental philosophical issues of human behaviour and incentive systems, but also very practical elements of corporate and organizational behaviour. In the following, I shall briefly touch some major elements of open innovation and illustrate a brief intellectual history of open innovation, concluding with the state-of-the-art concept of open innovation.

Phase I: Chesbrough

The initialization of discussion on open innovation and open modes of business operation has largely been credited to H. Chesbrough, whose 'Open Innovation: Theory, Framework and Profiting from Technology' (Harvard Business School Press, 2003) has defined the basic concept of open innovation.

The underlying philosophy behind open innovation is, put simply, that innovation can be made quicker, easier and more effective by exchange of ideas fostered by collaborative environments. Chesbrough's core message is that corporate reality was changing from the traditional proprietary innovation model (starting from the patenting successes of Thomas Alva Edison) to a more open exchange of ideas and a more complex use of intellectual property.

Chesbrough's main message can be encapsulated to the following main points:

1. Networking allows the use of, not only internal but also external ideas in the company's innovation process, thus also enabling more efficient commercialisation.
2. Collaboration in innovation is extended to partners, competitors, universities and users.
3. Corporate entrepreneurship means creating and endorsing entrepreneurial spirit and modes of action within the corporate structure, enabling

alternative ways of marketing ideas, especially through corporate venturing, start-ups and spin-offs.

4. Proactive intellectual property management extends the 'tool-box' of effective use of IPR beyond traditional defensive use. Proactive IP management also ensures researchers the freedom to work on a technology. Proactive IP management also allows expanding the business scope of the company to buying and selling IP.
5. The concept of R&D is broadened to encompass not only efforts to creating competitive advantages for the company, but also tools and potential to assimilate and use new knowledge.

On the level of corporate research, this development identified by Chesbrough, has meant a new approach in studies of corporate behaviour. On the level of actual corporate reality these strategic elements were already widely deployed by 2003, as Chesbrough based his analysis on the studies of actual company behaviour. Today, open innovation – as defined by Chesbrough – is rapidly becoming the new mainstream method of innovation.

Phase II: Societal Innovation

The Open Innovation Strategy and Policy Group (OISPG), operating within the European Commission, DG Information Society and Media, has identified certain elements indicating a further need to develop the open innovation paradigm. OISPG wants to push open innovation paradigm to another level, develop its core elements, and redefine openness. In the following, I shall compare some key points of Chesbrough and OISPG thinking to illustrate this change.

The evolving views may be divided into three major points: extensive networking, user centricity, open functional platforms.

Extensive Networking

Chesbrough sees open innovation as a means of improving the marketing of ideas, to the advantage of the companies involved. Chesbrough therefore operates strictly in the corporate environment with a business perspective.

OISPG sees the rewards of networking from a broader perspective as a way for firms to improve their innovation base. The firms will thus make optimal

⁵⁸ The descriptions of Chesbrough's model and OISPG's model are based on the report 'Intellectual Property and Legal Issues in Open Innovation in Services', written by Jacqueline Vallat (publication of the European Commission, DG Information Society and Media 2009).

use of the societal capital and 'creative commons' at their disposal. All actors of the innovation ecosystem involved, including end-users and end-user communities, brought together to share experience, information and best practices, build strategic 'ad-hoc' alliances and cross-disciplinary collaboration. A common pool of knowledge and experience is created allowing and enabling 'Valley dynamics'.

This broadening of the concept has sometimes been referred to as the PPPP model (public-private-people partnership).⁵⁹

User Centricity

Chesbrough concentrates on an exclusively organisational perspective being therefore first and foremost a 'business-model' for open innovation. Chesbrough has lately developed his argumentation from product to services 'mind-sets'.⁶⁰

OISPG stresses the development and efficient use of societal capital, creative commons and creative communities. Communities and the individuals, acting in the multiple facets of their life⁶¹, create a common pool of knowledge and experience.

In the OISPG view, the importance of technical innovation is matched with that of societal innovation. Modern ICT technology has rapidly allowed new forms of 'co-creation' to blossom. Service convergence places the user at the centre of business concern, as highly personalized and context-sensitive services become the key driver of modern business.

Open Functional Platforms

Chesbrough introduced the concept of openness in the business environment.

The OISPG calls for a more comprehensive definition of Open Innovation based on a broader understanding of openness. Openness means several things on different levels. In the ICT environment of 2011, openness means unlimited access without legal or technical restrictions. On the level of individuals, open participative action requires certain behavioural qualities, as being frank and communicative, being receptive and accessible to new ideas.

Initial conclusions from policy and legal perspective

From a legal point of view, we must consider a legal framework that is rather a risk-sharing mechanism than overly risk-averse for the user. Otherwise the companies may have serious difficulties in trying to build a completely risk-free environment in the internet – which it never is or will be.

There are several reasons for suggesting this approach: the users are fairly well equipped to operate in the digital services and especially social media. Since they can do it, they probably know what they are doing. Creative Commons –licensing is gaining ground as a 'voluntary limitation' to copyright. Therefore it may not be a justified assumption that the users would not know what they are doing, or not being aware that something might go wrong. We might call this the 'IKEA' model of shared responsibility: 'we do our part, you do your part'.

Secondly, concerning the actual operation of the emerging market, we all should learn from the best – that is, the likes of Facebook, which aren't many. Therefore the public structure of user agreements, user rights and privacy documents widely applied by leading and successful services should be carefully studied as indicators of best practices and possibly efficient ways to solve problems and tackle the so-called '27-issue'.

Thirdly, we might be witnessing a new kind of incentives system emerging, where the traditional homo economicus –behaviour emphasizing self-interest may not be the only explanation for incentive. The expansion of the participative web has meant that people who do not make their living out of creating participatory services in the network are doing it driven by different kinds of motives: self-expression, self-appreciation, fame, and a reasonable degree of control allowing my use as well as my friend's use of the shared material.

⁵⁹ Bror Salmelin, 'Open Innovation Supporting the Digital Agenda', in Service Innovation Yearbook 2010-2011, European Union 2011, pp. 14-21.

⁶⁰ Henry Chesbrough, 'Open Services Innovation – a New Mindset to Find New Sources of Growth', in Service Innovation Yearbook 2010-2011, European Union 2011, pp. 9-13.

⁶¹ Several studies prepared for the Commission apply a life cycle model, where different roles of an individual are pictured in a life-cycle: birth, education, professional role, personal role, consumer role and community/society role etc. See e.g. Myriam Corral and Bror Salmelin: 'Path Toward User-Centric Services', in Service Innovation Yearbook 2010-2011, European Union 2011, pp. 38-44. 'User Expectations of a Life Events Approach for Designing e-Government Services, Final Report' (European Commission, DG Information Society and Media, prepared by Deloitte, 2010), 'Put user in the Centre for Services; a Reference Model' (European Communities 2010), p. 13 in particular.

Questions for further review

- How should we create concrete practical policy measures to promote Open Innovation?
- Can we make the copyright system function smoother and easier with the help of Creative Commons?

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