

Copyright, Democratic Discourse and Platform Governance

The Need for a **Paradigm Shift**

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Structure



facebook



- Why should online social media platforms be governed in a manner that promotes **democratic discourse**?
- How can the **EU legal framework on online copyright enforcement**, undermine democratic discourse on online platforms?
- How can the **social planning theory (communicational theory)** of copyright law be used as a normative basis for achieving a **paradigm shift** in the EU legal framework on online copyright enforcement to promote democratic discourse?

I.

Why should online social media platforms be governed in a manner that promotes democratic discourse?



Online social media platforms as a core component of the (digital) public sphere

Digital spaces that provide infrastructure and tools to enable and facilitate **interaction, discourse and information exchange** by a geographically **dispersed public**.

- Openness to public
- High number of users (Facebook has 2.93 billion)
- Discourse on platforms has powerful capacity to influence and direct public opinion and will formation.



Social Media platforms as a core component of the (digital) public sphere

#GoHome
Gota2022



A key function in promoting **democratic discourse**

Habermas' notion of the public sphere

A forum for dialogue and debate on multiple levels within society, where individuals gather to participate in open discussion in a way that **leads to the formation of free public opinion and thereby promotes participatory democracy.**

- Social media platforms as “**Essential infrastructures for civic engagement** and social participation [which] create the foundations of ‘sociality’ on the Internet. (Dolata, 2019, 195).
- **Indispensable for the formation of public opinion** and political decision-making in modern democracies. (Busch, 2021,9)

Private ownership but public function

Governance should be aimed at promoting the common good



Democratic discourse

What is democratic discourse?

“Rational-critical citizen discourse that is autonomous from state and corporate [...] for privately-oriented individuals to become publicly-oriented citizens and for public opinion to develop that can rationally guide democratic decision-making” (Dahlgren 2001).

Some core values:

- **Autonomy and self-determination:** moral independence to reflect, critique, deliberate and form opinions free of manipulation or suppression.
- **Pluralism:** equal opportunity to participate in public discourse & representation of diverse viewpoints that can be subject to open, inclusive debate.
- **Creative freedom:** space for intellectual experimentation, critique, creative thought.

Democratic discourse on social media platforms

User-Generated-Content that involve the **re-use and re-interpretation** (transformative use) of **existing content** in creative ways for **purposes of commentary and critique and to create ‘new-meaning’**, typically for non-commercial purposes.

E.g. Remix, mashups, memes (GIFs)

“A powerful form of expression for critiquing power structures, deconstructing social myths and challenging dominating media messages”. (Conti, 2019, 346)



Enter copyright law

- The area of law concerned with the recognition and protection of rights in respect of original literary, scientific and artistic expression.
- Grants copyright owner the power to exclude others from *inter alia* reproduction (copying), communicating/making available that content to the public without authorization for a substantial duration (70 p.m.a for authors).



Which is why you end up with this....

← Matching content notice

Your video was partially muted because it may contain music that belongs to someone else.

Your video matches 35 seconds of music owned by UMG.

Applied: 249 countries

HOW TO DECIDE

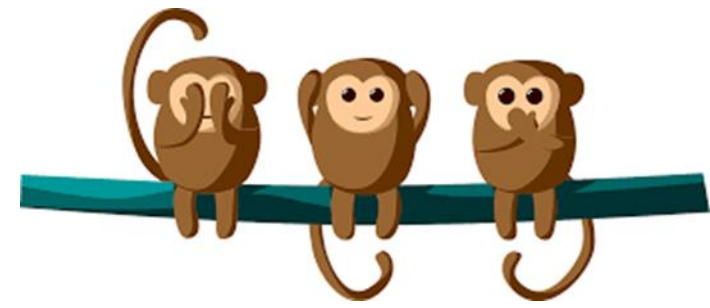
Post partially muted if you do not have permission to use this music. Your video will be muted during any segments that contain this music.

Delete this video if you don't have permission to use all of the content in it.

Submit a Dispute if you think that this is a mistake and you're sure that you have permission to use all of the music in your video. To unmute your video, you must confirm that you have permission to use this music everywhere. You might have to successfully dispute other claims of ownership.



How is **copyright enforced** on social media platforms?



- **Content moderation by online content sharing service providers (OCSSPs) [i.e. platform owners]**

Monitoring/filtering content posted by users to **remove/block copyright infringing content** and to **block/suspend accounts of users** who engage in infringing behavior.

- **Grants OCSSPs capacity to direct and influence public discourse:**

- **Enabling function:** Shaping behavior and perceptions through norm-setting (what is infringing and non-infringing use).
- **Restricting function:** Inhibiting behavior or access through removal/blocking content or user accounts (denial of access to participate in public discourse).



OCSSPs as curators of online discourse & arbiters of communicative freedoms in the online sphere.

II.

How can the **EU legal framework on online copyright enforcement** undermine democratic discourse on online platforms?



Example 1: Socially awkward penguin

In 2015, Getty images threatened a lawsuit for copyright infringement against a German blog for using an image of a penguin (in which they held copyright) in an Internet meme.

The blog ended up paying Getty €785 damages for the copyright violation.

Getty demanded that the blog delete the images and stay quiet about the entire affair.

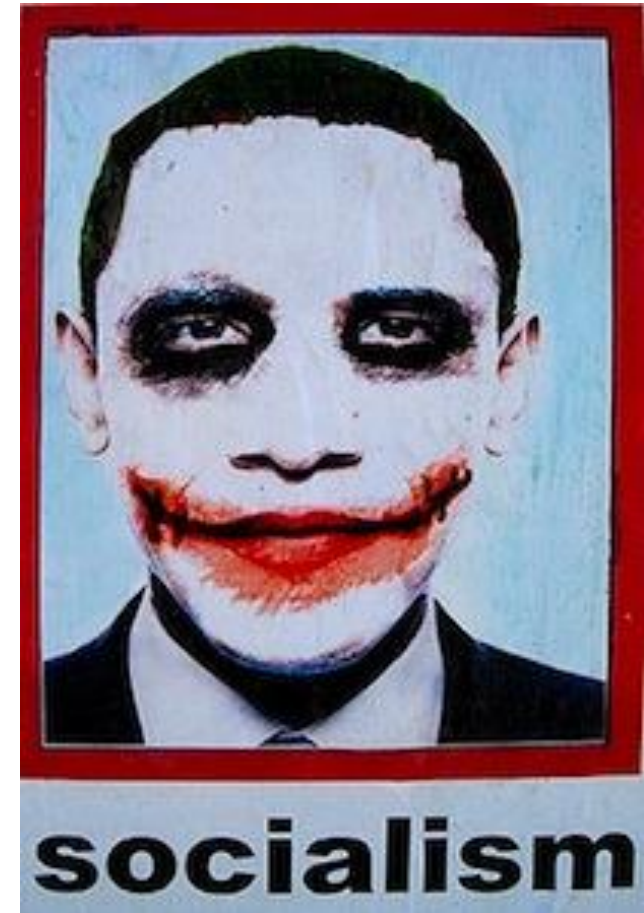


Example 2: Joker Obama

In 2009 a college student photoshopped a photograph of Obama taken from the 'Time' magazine cover, to make him look like the Joker.

The image was uploaded to Flickr and became a viral phenomenon sparking a widespread discussion on art, racism and the acceptable bounds of political commentary etc.

Flickr removed the image and deleted forum threads discussing the image **citing copyright infringement** of the original image.



Example 3: Buffy vs. Edward: Twilight remixed

“In this re-imagined narrative, Edward Cullen from the Twilight Series meets Buffy the Vampire Slayer. It's an example of transformative storytelling serving as a pro-feminist visual critique of Edward's character through Buffy's eyes. Some of the more sexist gender roles and patriarchal Hollywood themes embedded in the Twilight saga are exposed - in hilarious ways.”

In 2013 YouTube removed this video citing infringement of Lionsgate's copyright. But in the face of significant Internet protests, Lionsgate conceded fair use and the video was re-posted.



Copyright exceptions and limitations

Copyright recognizes the importance of protecting **users' communicative freedoms** to engage with and to respond to creative and cultural content in ways that reasonably require the use of those works.

E.g. Article 5 of the EU Copyright in the Information Society Directive [2001] recognizes exceptions for :

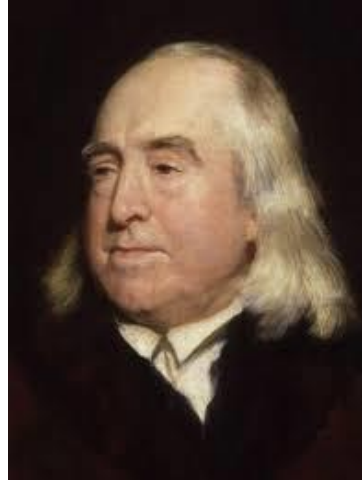
- Commentary, critique and review
- Parody, pastiche and caricature



Remix
Mashup

So why are these user freedoms not adequately protected on social media platforms?

Dominance of Utilitarian theory in EU Copyright law



Utilitarian (incentive) theory of copyright law

Copyright law's function is to **prevent market failure** by ensuring adequate incentives for creators to make intellectual/entrepreneurial investments in the **production and dissemination** of creative content leading to the maximization of social welfare.

Recital 9 of the EU Copyright in the Information Society Directive (2001):
“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**.”

- EU copyright law has a predominantly economic goal focusing on the production and dissemination of content and the growth of European industry.

Narrow utilitarian focus of EU legal framework on copyright enforcement on social media platforms

Seminal provision: Article 17 of the EU Copyright in the Digital Single Market Directive (CDSM) [2019]

Article 17 of the CDSM [2019]

- Policy rationale: Bridging the ‘value gap’

Alleged under compensation of copyright owners for copyright protected content shared by users over online content sharing platforms (heavily advocated by the music industry).

- Goal: Protect the economic interests of copyright owners by ensuring their ability to obtain appropriate remuneration for the use of their content on these platforms (Recital 16).

- How does it seek to achieve this goal?

1. Co-opting OCSSPs as content distributors who are required to obtain licenses for content shared on their platforms by users. [Article 17(4)(a)].

2. Where such licenses cannot be obtained, co-ercing OCSSPs to prevent the sharing of copyright infringing content on their platforms (Internet Police) [Article 17(4)(b) and (c)].



Risk of undermining democratic discourse in the (digital) public sphere.

Article 17 Enhances risk of collateral censorship and chilling effects on speech

- OCSSPs are made **directly liable** for infringing content shared by users (high degree of liability in comparison with other online service providers).
- To avoid liability, OCSSPs are imputed **positive obligations** make their 'best efforts' to engage in '**preventive monitoring**' of content shared by users (**ex ante enforcement, prior review and filtering**).
 - Focus is on preventing infringing content from being shared NOT on enabling legitimate content to be shared.

Consequences:

- ✓ Incentivizes blocking/removal of **potentially infringing content** (as per cost-benefit analysis, less costly to remove questionable content than risk liability).
- ✓ Incentivizes adoption of **automated content moderation**: Greater levels of inaccuracy, less transparency and greater risk of collateral censorship.

Article 17 renders user freedoms peripheral to core economic aim

Article 17(7) underscores the importance of ensuring that users are able to rely on existing copyright exceptions and limitations for **quotation, criticism, review, parody, caricature and pastiche**.

But,

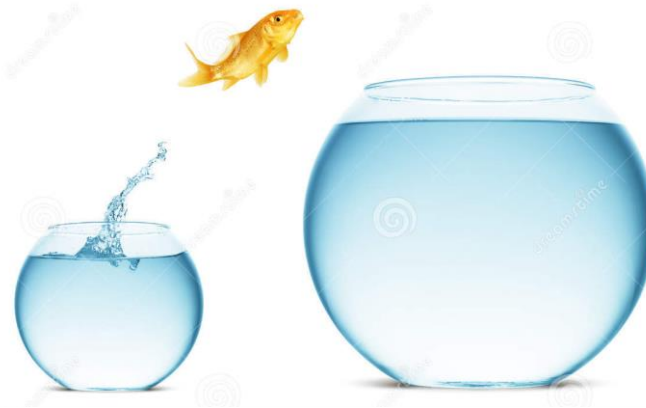
- ✗ No explicit liability imposed on OCSSPs for wrongful suppression of legitimate uses of copyright protected content.
- ✗ No enforceable obligations/duties on OCSSPs to safeguard user freedoms.



Article 17 is unfairly skewed in favour of protecting the interests of copyright owners

III.

How can the **social planning theory** of copyright law be used as a normative basis for achieving a **paradigm shift**?



A theory that affirms copyright's **communicative (expressive) function**.



Affirms **democratic function** of copyright law in promoting the discursive foundations for democratic culture and civic association by facilitating a '**dialogue between creators and users**' (Drassinower, 2019).

- Copyright should be sufficiently robust to support production and dissemination of creative content but **protecting the interests of copyright owners must be tempered by the overarching aspiration of sustaining a participatory culture and fostering robust democratic discourse.**



Places rightholder and user interests on equal footing within broader purpose of fulfilling copyright's communicative function.

I. Users' communicative freedoms as endogenous to copyright

Current EU approach: Users' ability to benefit from user freedoms provided by exceptions and limitations are protected under fundamental right to Freedom of Expression (FoE) [*Deckmyn* [2014] ; *Funke Medien NRW* [2019] ; *Spiegel Online* [2019]

Limitations of this approach:

- User freedoms framed as something **exogenous/antithetical to copyright's purpose**.
- **OCSSPs not bound by positive obligations to protect FR** (Possible exception: *Mittelbare Drittwirkung* in German law) so not possible hold them liable for violations of FoE by suppressing legitimate speech through content moderation.

Social planning theory allows for communicative freedoms provided by E&L to be interpreted **as being endogenous (or central to) copyright's communicative purpose**.

- Permits broader teleological interpretation of exceptions and limitations that are central to fostering democratic discourse (e.g. commentary, critique and review, parody, pastiche and caricature).

II. A normative basis for “fair-balance” test

IP rights (and copyright) are protected within the fundamental right (FR) to property under Article 17(2) of the EU Charter of Fundamental Rights (CFR).

When a conflict arises between the fundamental right to copyright and some other FR (e.g. Freedom of Expression) the **proportionality test** is applied **to achieve a fair balance** [Article 52(1) CFR].

Case C-401/19: In balancing the FR to IP rights with freedom of expression CJEU focused on the need to protect copyright in such a way that contributes to the achievement of a well-functioning and fair marketplace for copyright. **“However, in the context of online content-sharing services, copyright protection must necessarily be accompanied, to a certain extent, by a limitation on the exercise of the right of users to freedom of expression and information.”**



Need for a paradigm shift

III. Re-imagining OCSSPs as facilitators and enablers of democratic discourse

Taking into account:

- Role as providers and administrators of a digital infrastructures open to the public
 - Potential to direct and influence public discourse.
 - Engagement in a copyright relevant act [Article 17(1) CDSM - a channel by means of which copyright protected content is communicated to the public].
- Granted a **broader role** in ensuring that online social media platforms can flourish as digital spaces for robust democratic discourse (not just, ‘content distributors’ and ‘Internet police’).
- **Should be imposed with positive enforceable duties** to ensure that that content moderation is designed and implemented in a manner that promotes copyright’s communicative function and fosters democratic discourse on social media platforms.

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