

Consumer Behaviour Online – Implications for copyright and the Digital Single Market

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The impact of digital technologies on the economics of content creation and distribution lies at the heart of the Digital Single Market strategy. *Inter alia*, the released plan of the Commission to reform EU copyright rules intends to create a well-functioning and pan-European marketplace for copyrighted content. However, the proposed framework has attracted many critics, with some pointing to a lack of overall ambition, and others decrying a potentially dangerous legal ambiguity. Against this background, CEPS organised a [seminar](#) at CEPS on October 5, chaired by Colin Blackman, gathering various stakeholders to tackle some issues arising from the proposed legislation.

OTT Streaming Services: Consumer behaviour and policy implications

Although not entirely surpassed, traditional media are progressively giving way to digital content, and increasingly to streaming services and online press. In presenting a recent study, René Arnold (WIK Consult) highlighted that music and video streaming accounted for a fast-growing part of [media consumption](#) in Germany, especially from younger generations. Trends are also progressively shifting from freemium business models to paid subscriptions: 49% of German consumers would be willing to pay for online quality video content. Arnold also presented evidence on emerging patterns of consumption, e.g. multi-screens, multi-devices, multi-users, making data traffic and particularly video streaming the largest share of data transferred via communication networks. While data transport remains relatively stable for fixed networks, with costs for each Mbps progressively decreasing, he stressed that the exponential volume of data flowing through mobile networks poses a real challenge in terms of costs.

Arnold highlighted a strong correlation between the usage intensity of streaming services and broadband penetration, making online services an important driver for high-speed broadband access. He also stressed that the market for streaming services was particularly dynamic and competitive, favouring diversity and enhancing the availability



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internet players, national regulators and European institutions to enable a constructive discussion on how to achieve a successful transition to a balanced and inclusive information society and exploring more broadly the implications of an hyperconnected society. For more information, please click [here](#).

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of online content. Therefore, he saw in these new services an opportunity to drive consumers away from piracy to access quality content, and to level the playing field for new emerging players. New challenges are arising, however, such as the difficulty to capture consumers' attention in the age of abundant information, and the necessity to quickly develop a strong brand to thrive and succeed in the digital ecosystem. These trends have numerous policy implications, not least regarding the need for copyright law to reflect the realities of the Internet age, but also the need for next-generation networks that could match the increasing demand for online services.

Consumer use of copyrighted materials

While technological developments are facilitating content supply, consumers are nonetheless facing more restrictions to access and use content, as observed by Agustin Reyna (BEUC). He notably drew the audience's attention to a [survey](#) conducted by BEUC's members, asking copyright experts in various member states to clear legality in different consumption scenarios. The results show the extent to which legal experts across the EU have different interpretations on a particular case, while most users do not know what is legal or not. Without an ambitious reform providing more clarity and harmonisation, they point to a real risk of criminalising innocent users' habits, and of reversing all the efforts made to develop a European single market. The voice of consumers calls for a modern copyright framework able to balance the incentive to create with better access to content, triggering both economic and cultural benefits. More critically, Reyna saw a missed opportunity to explicitly clarify the use of hyperlinks in light of recent CJEU case law (e.g. the GS Media case), which in his view questions the very architecture of the Internet.

Likewise, Reyna also fulminated over the more stringent rules requiring online platforms to use effective content recognition technologies (i.e. proposed Article 13(1)) in order to prevent copyright infringements. This provision would imply a systematic traffic monitoring and filtering from intermediaries, which contradict the safe harbours provided by the E-commerce Directive. In turn, this would place online intermediaries in great legal uncertainty and impinge on providers' freedom to conduct a business, as enshrined in the Charter of Fundamental Rights of the EU. At odds with the Commission's objectives, this would reinforce big players and could significantly hamper competition in the digital ecosystem. He also pointed out problems regarding the accuracy and reliability of such automated content [removal](#) systems, explaining the difficulty to analyse content precisely and to distinguish derivative uses from actual copyright infringements.

What press publishers need to better serve consumers in a digital age?

Patterns in consumer behaviour show that digital platforms have become a major entry point for news consumption. However, Catherine Starkie (EMMA) expressed concerns for the future of quality press. She notably underlined the important role of publishers' investment in journalism to increase the value of publications and therefore safeguard citizens' access to quality information. EMMA welcomed the proposed solution to improve the so-called "value-gap" issue and the recognition of a press publisher's right to better manage how its content is made available. She considered the proposal as an

important incentive to revitalise journalism and support Europe's press sector to remain pluralistic, independent and sustainable. She stressed the need to put publishers on an equal footing, and endowed with similar related rights as owned by broadcasters and music or film producers. This would apply a voluntary basis and give more control to publishers. For instance, she pointed at specific uses of snippets by social media, giving too much information on the content of the article, therefore discouraging readers from clicking and preventing publishers from recovering advertising revenues.

She also highlighted figures from [Eurobarometer](#), which spelled the growing importance of digital media for press content, with most of the respondents accessing press content mainly through newspapers and magazines' websites or apps (42%), online social media (22%) and search engines (21%). A lower proportion (14%) mentioned online news aggregators. Starkie notably encouraged innovation in the media sector, with consumers at the heart of their strategy to reach new audiences and to design new revenue models. Starkie also described how news publishers were now increasingly combining subscription and ad-based revenue streams, while new business models were emerging such as online news platforms applying transaction prices in determined in advance with publishers (e.g. Bandle). In copyright reform, she saw the opportunity to enhance legal certainty for publishers, which ultimately would result in bringing benefits to consumers. She finally pushed for more actions on other policy streams to support the press industry for instance in areas like VAT, AVMS, net neutrality and data protection.

Discrimination against consumers in the Digital Single Market

Felice Simonelli (CEPS) presented his recent [study](#) conducted for the European Parliament, entitled "Combating consumer discrimination in the digital single market: Preventing geo-blocking and other forms of geo-discrimination". He notably started by recalling the economics of a fully integrated digital single market, and demonstrated how far the goal still was from the current situation, with for instance less than 40% of EU merchants allowing cross-border purchases online and 90% of consumers having experienced some types of geo-blocking. Figures show that the market for copyrighted content is the largest e-commerce sector in the EU, with 33% of online trade by individuals in 2014, and likely the most promising given the very low delivery costs involved. However, Simonelli saw a missed opportunity to reap the benefits stemming from such features considering all the legal and commercial restrictions, with 70% of providers applying blockage based on location and 72% limiting portability. In his view, numerous untapped market pockets represent foregone opportunities for providers and not only raise questions of market efficiencies but also of individual rights (e.g. linguistic minorities, short-term travellers and long-term migrants, language-skilled inhabitants).

Simonelli then commented on the proposed regulation for cross-border portability, which could solve some minor aspects of the issue, once the many unsettled questions were solved (e.g. terms of residence and temporary presence, verification mechanisms). In a more risky vein, he saw a potential backlash effect in creating a clear distinction between the domestic market and the (temporally) foreign market, which goes against the principle of market integration. Besides, the formal antitrust investigation and statement of objection against a major European broadcaster and six major US film studios reflected

the intention of the Commission to prevent contractual limitations on passive sales and to mitigate absolute territorial exclusivity constraining cross-border competition between pay-TV broadcasters and partitioning the single market along national borders. Regarding the copyright reform, Simonelli saw a very limited attempt to encourage the creation of a vibrant DSM, favouring facilitating measures such as reducing transaction costs by providing assistance for rights-holders to negotiate and reach an agreement with VoD (video on demand) platforms through an impartial entity. He finally pointed to the “cost of slow Europe” as illustrated by an unambitious proposed legal reform, which would in the end contribute to postponing further market integration.

The place of consumers within the Copyright package

Jaime de Mendoza Fernández (European Commission) recalled the objectives of reforming copyright rules at the EU level and the challenge of designing a balanced proposal able to pass the Council. The first goal is to facilitate cross-border access to copyright protected content online by facilitating the clearance of rights for broadcasters’ online services (live TV, catch-up) and retransmission service providers (IPTV, satellite, mobile) that will help broadcasters to make their programmes available online across the EU, and retransmission services to offer more foreign channels in their packages. Then, the legal framework would help cultural heritage institutions to digitalise and make available across borders ‘out-of-commerce’ works. By modernising the EU rules on key exceptions and limitations in the areas of research, education and preservation of cultural heritage, the Commission intended to strike the right balance between market considerations and non-commercial purposes. Finally, legislators were driven by the aim of introducing fairer rules for a better functioning copyright marketplace, in particular to ensure increased transparency for authors and performers on the exploitation and remuneration of their works.

During a lively Q&A session, participants raised many unanswered questions and deplored some of the unclear legal wording used in the text, for instance when talking about platforms providing access “to large amounts of content”. Other concerns were expressed about the risk of giving a right to publishers without safeguards for authors of press publications, or how the Commission could provide greater legal certainty for rights-holders, intermediaries and end-users in the current fragmented European intermediary liability landscape. Most participants criticised the lack of a market-driven approach, with issues of geoblocking left out of the Copyright proposal, and copyright-related issues kept out of the regulation tackling geoblocking. One might think that policymaking should focus on solving the core problems that cause market failure in the first place, and then leave the market to resolve minor issues. Participants warned that owing to the lack of confidence in the EU, it was particularly important that European legislators commit to cogent policymaking that takes due consideration of both economic realities and end-users’ fundamental rights.