Anonymity and Surveillance, Creativity and Copyright

Disrupting the Balance Between Users, Authors, Exploiters, and Platforms

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18.03.2025 doi: 10.59704/b1c3ab625c95e51c

It is almost too trite to state that the emergence of digital networks over the past decades has presented a problem for copyright exploiters. Enforcement of copyright against intermediaries was and is arduous. The legal landscape remains complex due to different rules on liability in national laws and the existence of safe harbour provisions. Copyright exploiters thus resorted to adopting strategic enforcement targeting individual users. These, however, would often remain anonymous due to the lack of access to traffic data revealing their identity.

Things changed in 2019 with the coming into force of Article 17 of the Directive on Copyright in the Digital Single Market (DSMD), which imposes certain obligations on platforms to remove infringing content and to employ filtering technologies for certain larger platforms. Article 17 DSMD – a fervently debated provision – requires certain large platforms to remove content infringing copyright under certain circumstances by using upload filters. That legislative move clashes with communicative freedoms because it cannot be said for certain at the very moment of the upload whether content that makes use of other works (memes, remixes etc) is infringing, or whether such use is covered by an exception to copyright.

In Germany, the clear legislative objective under the (complex) new UrhDAG, which transposes Article 17 DSMD, was to safeguard the collective expectation to communicative freedoms and to maintain creativity on platforms. But the decision in *La Quadrature du Net II* – broadly permitting retention of traffic data for minor offences and their disclosure for the purpose of litigation – has the adverse effect: it incentivises and reinforces broad enforcement strategies targeting users and requiring platforms to hand over such data. Evidently, no user would risk becoming the subject of litigation instigated by powerful copyright exploiters.

The Matrix Reloaded

The decision in *La Quadrature du Net II* is a disfavour to creativity. It permits a renaissance of strategic copyright enforcement that is at odds with the specific German transposition of the Copyright Directive (Article 17 DSMD) in the UrhDAG and is hardly in line with the requirements under the EU Charter of Fundamental Rights.

In Germany, the legislator opted for a model that does not require immediate removal of potentially infringing content but allows users to "flag" transformative or referential uses as falling under the caricature, parody and pastiche exception. Authors (not exploiters) will receive fair compensation for such uses and, in consequence, the content "stays up". The copyright owner can then make a complaint to the platform seeking removal or pursue litigation.

The approach differs very much from solutions that are simply based on requiring platforms to install upload filters that immediately remove any content that could potentially be infringing. Indeed, from a fundamental rights perspective, the German transposition focussed on balancing the interests of authors and (usually anonymous) users and their respective claims to freedom of communication and art, rather than pitting the commercial interests of the copyright and the platform industries (in particular, their respective claims to property and freedom of business) against each other. The decision in *La Quadrature du Net II* likely has the opposite effect: the copyright industries will have access to traffic data, which in turn allows fortified strategic enforcement and litigation against users. That effect is inconsistent with the EU Charter

and the very jurisprudence of the Court of Justice concerning user rights under copyright and fundamental rights law.

Copyright enforcement and anonymity

The Court of Justice confirmed that data retention is permissible even though the crime in question is not serious. The decision centrally concerns copyright law. A most critical effect of the decision is that platform or social media users relying on copyright exceptions and therefore exercising their rights may lose anonymity. Now, the copyright industries can enforce the right to obtain user data based on traffic data much more easily.

The decision is arguably inconsistent with previous case law on data retention and causes frictions with the overall balance that has been achieved in copyright law over the last decade. This applies at the EU level, but to a much more critical degree to Germany.

The Court of Justice has early on affirmed in its *Promusicae* decision that copyright enforcement – which today rests upon Article 8 of the Enforcement Directive – is subject to balancing with privacy and data protection concerns under the EU Charter. Later, the Court of Justice (in *Funke Medien* and *Spiegel Online)* conceded that written copyright exceptions (such as for purposes of quotation or media uses) must be construed in light of the EU Charter – and that, importantly, these exceptions give users rights rather than mere privileges. This was a compromise between secondary EU copyright law (Article 5 of the InfoSoc Directive (ISD)), and the position taken by the German Constitutional Court in the *Pelham* case, according to which freedom of art should be recognised as a balancing factor under the pre-existing "free use" clause (previously § 24 (1) of the Authors Rights Act, now repealed and replaced in § 51a UrhG with the "caricature, parody and pastiche" exception in Article 5(3)(k) ISD). In *Pelham,* the Court of Justice indeed refused to allow domestic law to apply fundamental rights as external limitations to copyright infringement, unless a written exception is in place.

The copyright industry would usually claim that any use in such way prima facie constitutes an infringement. For example, an alleged pastiche may constitute, following conventional copyright doctrine, a criminal offence if found to be, in fact, a reproduction. But the assessment is utterly convoluted. Opinions on what constitutes pastiche vary considerably. "Pastiche" (in the sense of some transformative or referential use) also comes close not only to notions of non-literal reproductions, but also to the distinction between idea and expression, to the minimum requirement that a substantial part of the author's expression has been taken, and to the dividing line to be set between reproduction and adaptation, to name but few.

The matrix of interests

The presence of surveillance and the potential loss of anonymity now following from the *La Quadrature du Net II* decision has the capacity to render the right to pastiche (and communicative freedoms by and large) obsolete. Anonymity is an indispensable condition to exercise fundamental rights including the right to freedom of expression and art on social media and sharing platforms. Unavoidably – and especially concerning large platforms such as Google's YouTube service – copyright exploiters consider the presence of such platforms as a threat to their market and irritating competition. That collision between big platforms and the copyright industry has ultimately led to Article 17 DSMD (previously (draft) Article 13). On the one hand, Article 17 imposes extended direct liability standards for platform operators for anything potentially infringing uploaded content by users. On the other hand (and after much tribals and tribulations in the legislative process), it is introducing a mandatory provision: Member States must ensure that users can effectively exercise their fundamental rights and rely, in particular, on pastiche. But how?

The matrix of interests that national legislators face when transposing these conflicting principles is multifarious. Platforms may rely on the freedom to conduct their business. Exploiters would point out that they enjoy property rights and benefit from a principle

of a high level of protection under secondary law. Users engaging in memes and mashups will refer to communicative freedoms and, additionally, may rely on the rights to data protection and privacy should they be targeted by the industry.

Authors versus exploiters

And authors? Authors can indeed claim rather diverse legitimate interests that legislators must recognise. Of course, authors would like to see fair remuneration (not necessarily derived from agreements with their exploiters, as the case may be, but also via a new statutory licensing scheme), but also, and more importantly, need rights of access to preexisting works if the purpose of copyright is indeed to foster creativity. To complicate things, many authors will be platform users – and, of course, vice versa.

For exploiters, the legal landscape that should, ideally, be unfolding appears straightforward. To them, necessarily, the proliferation of sharing platforms constitutes direct competition with their own business models, i.e. streaming or download services. Of course, any content resembling a work or a producer right (even snippets taken from a broadcast or sound recording) constitutes, prima facie, an infringement, a position fully aligned with copyright doctrine. Hence, platforms must immediately remove any protectable content – it is their obligation to install upload filters. Users would still have a right to rely on pastiche, but must enforce it against the platform after their content had been taken down. Indeed, this may also be the preferred solution from the perspective of the platform operator. Technical solutions mean less expenditure compared to laborious and elaborate content moderation schemes.

And even if such moderation scheme is in place, exploiters may still employ a strategy to dissuade users from transformative uses. The threat of costly litigation to the individual user is real (and a protected right under Article 47 EU Charter) – provided, of course, the platform has information on the offending user's identity. This may be so or not. Whether a duty to disclose such data to the potential claimant exists is, first and foremost, a matter of secondary law and may depend on further conditions such as a court order. The effect is, overall, to disincentive creative expression that may potentially be covered by freedom of art.

From a constitutional perspective, the "stay down" scheme follows from a particular framing of the legislative proportionality exercise. The assessment is essentially based on balancing economic interests – the right to property enjoyed by copyright exploiters versus the right to business enjoyed by platform operators. It is no coincidence that, around 2018, when lobbying for direct liability began, the main and most prominent argument put forward by copyright exploiters was the alleged "value gap." In essence, they claimed numerous instances of unjust enrichment at the expense of both traditional and modern markets, including streaming and download services.

The Court of Justice subsequently noted, in the *Poland* decision (following the opinion by AG Saugmandsgaard Øe), that the use of upload filters is compliant with the EU Charter *only* in case of "manifest infringements", though it did not define that term. However, the Court also clearly conceded the need for user creativity. There is one example that may be used to illustrate an approach that manages to reduce complexity convincingly, much in line with the assertions in the *Poland* decision: The German UrhDAG transposes Article 17 DSMD in certainly a unique manner. The German government had made it clear, immediately following the adoption of the DSMD, that it would not accept widespread filtering in the interests of communicative freedom. The central mechanism is, in short, that users may flag uploaded content as pastiche or parody, and if so, the platform must not remove that content unless the right holder objects and refers the matter to content moderation, or indeed to a court. Yet the real "trick" is that the new law employs a mechanism not known in any other jurisdiction. Authors receive, for every flagged use, remuneration from the platform and thereby have, mostly, no incentive to prevent or object to such uses. Because of that prospect of a new source of income, the new law also absolves the operator from making decisions concerning the meaning of the notoriously opaque terms of pastiche or parody – and therefore also, on

balance, averting the thorny problem of platform staff elaborating on the scope of fundamental rights. The mechanism adopted may, as a more distant yet powerful effect, also incentivise more established artists to welcome platform uses in general – and thus to exert pressure on exploiters to license any platform use (to ensure that income is generated for their benefit to achieve the ultimate objective underpinning the new law).

In consequence, the "medium of money" ensures creative freedom. In a subtle and almost perfidious way, the German legislator (unconsciously, probably) marginalised the respective economic rights and interests of both platforms and exploiters, turning the rights to property and business into what may be termed as trans-subjective rights to be exercised in the interest of authors and users much in the sense of an "agency" right.

Exploiters therefore lose out twice: they cannot fully control relevant flagged uses, and in the future, new statutory licensing models might emerge, requiring platforms to make payments to authors. This marginalisation of exploiter interests creates further issues – that is, to strategically target individual users, a prospect that the decision in *La Quadrature du Net II* now reinforces by giving access to traffic data held by providers. It is easy to see why: a user flags their content as pastiche, the content stays up, which results in a payment to the author. The marginalised exploiter, however, either as a licensee or as an owner of a neighbouring right, may well wish to instigate a complaint with the platform, or indeed take immediate legal action through courts. User knowledge on such strategy will spread fast. In addition, adopting such strategies will work against the interests of authors – no payment is due where the work in question is ultimately removed.

Yet, the UrhDAG is silent on user anonymity. The traditional right to information (§ 101 UrhG) still applies, a right that has been construed by German courts in a manner very favourably to right owners. Data protection laws play no role in such scenario, as I have outlined here in more detail.

Takeaway

At this juncture, *La Quadrature du Net II* decision creates an enormous friction between the delicate balance achieved under the UrhDAG and the broad permission for data retention following from the ruling. In fact, following an economic logic, strategic enforcement targeting individual users is now the only means for the copyright industries to protect their own existing or future markets and thus to avoid unwanted competition. It is easy to imagine how such strategy could be rolled out. A user flags, and money is paid to the author. But the right owner can always instigate legal proceedings, and for that they will need to know the personal details of the alleged offender. Previously, this was restricted to static data, and a claim to disclose such data, of course, depends on whether the operator held such data in the first palace. Now, exploiters can effectively instil fear of litigation on the platform through access to traffic data, making widespread litigation much more effortless. At the EU level, such effect obviously collides with the relevance of pastiche as asserted in the decision in the *Poland* case. For Germany, the decision – more critically – eradicates the incentive for the industry to licenses uses on platforms in general. To put it bluntly: the decision, primarily concerning copyright, disrupts the legislative decision in a Member State that adopted a solution centrally emphasising creativity.

What is most mischievous is that the Court of Justice saw itself unable to cast an eye on its own decision in *Poland* and accordingly to elaborate on its own stance which places emphasis on user creativity. It did not consider the effects the ruling will have on user anonymity as a central condition for the exercise of fundamental rights under the DSMD. It can easily be predicted that the matter will become another bone of contention yet again between the German Constitutional Court and the Court of Justice on the relevance and status of communicative freedoms in a copyright context – and, ultimately, whether it is the former who will have the last word on such constitutional matters. It is certainly not a coincidence that German courts in 2007 asked the Court of Justice what is the appropriate

methodological approach to construing communicative freedoms protected under constitutional law in copyright matters. As mentioned, the Court of Justice had – very likely to avoid frictions with the German Constitutional Court – to make concessions. It had to abandon the conventional principle that copyright exceptions must be "interpreted narrowly" in the interest of rights holders and also had to broadly relativize the "high level of protection" tenet under secondary law. The *La Quadrature du Net II* decision now gives the copyright industry leverage to undermine the delicate balance of interests, particularly in the German UrhDAG. A disservice indeed.

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SUGGESTED CITATION

Westkamp, Guido: Anonymity and Surveillance, Creativity and Copyright: Disrupting the Balance Between Users, Authors, Exploiters, and Platforms , Verfassungsblog, 18.03.2025, doi: 10.59704/b1c3ab625c95e51c.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250319-001056-0.