Intellectual Property Rights of online content & Whistleblowers

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Introduction

Nowadays, given the continuous evolution of technology and of social platforms, the discussion about data protection has been gathering momentum. According to Article 4 of the General Data Protection Regulation, "personal data" means any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

The General Data Protection Regulation entered into force on 25th May 2018 in all Members States of the European Union. The paramount importance of the regulation, which sets a new, reinforced ground for the protection of personal data, is undoubtful. Given the plentiful studies and research papers that exist on the specific topic, this paper will not analyse the new field of data protection. Contrariwise, the aim of this paper is to present the questions of the protection of intellectual property of online content, as well as the whistleblowers' disclosures of sensitive information.

Protection of the intellectual property of online content

Everyday most of us are creating user-generated content. That is to say that we produce and share digital content as users of an online service. When one writes a post on Facebook, for example, one becomes an author of a content, and thus possesses copyrights, while when one

uploads someone else's material, one becomes a user of the content, and thus needs to fulfill all rules regarding the distribution of material protected by the original author's rights. The connection between the authors and the users is maintained by the internet intermediaries, which facilitate transactions between third parties on the Internet. For example, such internet intermediaries could be not only internet service providers, but also social media platforms or search engine providers.

As mentioned before, authors of online content have copyrights on it. The legal term copyright refers to the exclusive rights of authors over the use and distribution of their literary and artistic works. The legal framework behind copyrights defines the scope of the author's rights and the rules of the distribution of the content, which varies according its use. For example, the users of the content have different rights when it is distributed for a cause of public interest, such as research and education, than that for private causes. The question at hand is the legal consequences when a user of an internet intermediary uploads a piece of work, for whose content one lacks distributional rights. One can identify two different legislative approaches regarding the liability of the users or/and the internet intermediaries.

On the one hand, in countries like the United Kingdom or the United States of America, one can distinguish that liability is established in a different way, depending on the specific act entailed. For instance, the Digital Millennium Copyright Act[1], which is a United States copyright law that implements two treaties of the World Intellectual Property Organisation, excludes from the liability of internet intermediaries the violation of authors' copyrights when activities such as storage of information, system caching or transfer of information are concerned. On the contrary, when the content is supplied by a third party, then its liability is justified, according to the Communication Decency Act.[2] This approach is often referred to as the "Vertical Approach".

On the other hand, under the "Horizontal Approach", one can discern limits of liability which can lead up to the immunity of internet intermediaries, should their activity be limited to operating and distributing information, given that they do not have knowledge or control over the information that is distributed or stored by their services. This approach is met in Member States of the European Union and primarily, in the European Union Directive on electronic commerce.

Yet, the horizontal approach of the directive on electronic commerce has not remained absolute. Lately, the European Commission has introduced vertical regulations as part of its

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[1] https://www.copyright.gov/legislation/dmca.pdf

[2] Pavic V., "Comparative analysis of online intermediary liability regimes in US and EU", 2012, p.10

digital single market strategy. On 6th of June 2018 the European Parliament, the Council and the Commission confirmed their preliminary political agreement of 26th April 2018, which revised the Audiovisual Media Services Directive, which asks platforms to facilitate the protection of minors from harmful content and everyone from incentive to hatred.

The revision of the directive and the enhanced protection guaranteed by its provisions was a vital need, given the evolution of digital technologies, which has altered the creation, the production, the distribution and the exploitation of online content. The difficulties of licensing authors' rights for the distribution of their works would menace the development of the production of creativity content in the European Union. In addition, the absence of an effective framework would jeopardise the citizen's access to information, should one consider the difficulties of press publishers, when the licensing of their publications is concerned.

The Draft Directive on copyright in the Digital Single Market encompassed the liability of users and the establishment of "censorship machines", which would hinder copyright infringement for file uploads. Article 13 of the Draft Directive has raised concern over violations of the right to freedom of expression, since it is uncertain whether such machines would be able to discern between legal and illegal uses when certain acts of web culture are concerned. Characteristically, one of the public reactions against the provision of the "censorship machines" of the Draft Directive was the "#SaveTheMeme campaign. Other debates on the Draft Directive were sparked due to Article 11, which concerns news sites, and raises concerns due to the potential creation of a framework, where the use of journalistic content online would require, without any distinctions, a licence.[3]

The new Directive on copyright in the digital single market was agreed between the Council of the European Union, the European Parliament and the Commission on 13th February 2019 and the approved by the European Parliament on 26th March 2019. The Directive was adopted on 15th April 2019 by the Council[4]. It adapts copyright exceptions and limitations to the digital and corss-border environment, so that text and data mining, online teaching activities and the preservation and online dissemination of cultural heritage are safeguarded. In addition, in order to ensure wider access to creative content, it improves the licensing practices by promoting the exploitation of "out-of-commerce works", providing rules for the issuing of collective licenses with extended effect and by facilitating the rights clearance for

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[3]https://juliareda.eu/eu-copyright-reform/

[4]https://www.consilium.europa.eu/en/press/press-releases/2019/04/15/eu-adjusts-copyright-rules-to-the-digital-age/

films by video-on-demand platforms. It also introduces a new right for press publishers for the online use of their publications, entitling authors of works which are included in the press publication to a share of the publishers' revenue which derives from their new right.

The newly adopted Directive sets a thorogh framework, within which the online content sharing platforms, which are based on the "user-uploaded-content", shall operate. Unless specific conditions are met, these platforms will need to acquire a license for copyright protected works that are uploaded by their users. In this way holders of copyrights will be able to negotiate better the conditions of the exploitation of their online work and be compensated accordingly. At the same time, important exceptions are introduced: for purposed of quotation, criticism, review, caricature, parody and pastiche the users can generate and upload content freely.

Last, but not least, the Directive introduces a transparency obligation when exploitation of works is concerned, it preserves the appropriate and proportionate compensation of authors and performers upon the licensing or the transfer of their rights, and it includes a remuneration adjustment mechanism and an alternative dispute resolution mechanism. From this last area of regulations, software developers are excluded.

What remains is the transfer of the new rules of the Directive into the national law od the EU Member States, within 24 months after the singature and the publication of the Directive in the Official Journal of the EU.

Whistleblowers’ disclosures of sensitive information

The term “whistleblowing” refers to the unauthorised disclosure of information or activity, which is considered incorrect, unethical or illegal within an organisation. “Internal whistleblowing” refers to the disclosure of information to the people within an organisation, usually to the superiors, while “external whistleblowing” refers to the disclosure of information to third parties, outside of an organisation, such as a law enforcement body, the government or even the media.

Vital to the understanding of the question at hand is the distinction of information from sensitive information. The latter refers to the proprietary or privileged information, which is not accessible to everyone but certain people are allowed to see, thanks to their status within one organisation. Should sensitive information be revealed, there is a high potential of severe damage to the people and the organisation concerned.

The growing importance of whistleblowers has gained momentum across the European Union, thanks to the increased media coverage for the recent activities of whistleblowers, from Luxleaks to the Panama Papers. The gap between the legislation of many Member States of the European Union regarding the protection of the whistleblowers is evident, should one consider the conviction of Antoine Deltour (Luxleaks scandal), and the continued pursuit of Edward Snowden.

Due to the lack of a comprehensive, pan-European framework for the protection of whistleblowers, it remains at the discretion of Member States to decide whether they should adopt legislation to protect whistleblowers, or even enhance their actions. On the one hand, whistleblowing might be catalytic for preventing or revealing wrongful acts such as illegal activities or corruption, which have negative consequences for the community. On the other hand, large corporations are concerned more and more, when the revelation of their greatest secrets might be revealed at any time, while the professional secrecy between their employees might be lifted without any consequence. For instance, in countries like Greece, the United Kingdom and the Netherlands, the national legislation includes comprehensive provisions and procedures for whistleblowers, while in countries like Bulgaria, Germany and Portugal, the national legislation either does not include or includes in a limited way any such provisions or procedures.[5] Currently only 10 counries provide comprehensive legal protection

[5] http://journalism.cmpf.eui.eu/maps/whistleblowing/

t whistleblowers, France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden and the United Kingdom[6].

The issue of a comprehensive approach to whistleblowers is a very complicated one, due to the many stakeholders involved. To begin with, the European Commission appears hesitant to call for a legislation on the matter, arguing that the European Union does not have the competence to establish such a system of protection. Insisting on this approach it has in the past rejected various requests of Members of the European Parliament to introduce whistleblower protection laws.[7] The European Parliament, lacking the power to initiate a new legislation, is tied due to the European Commission's approach, while there does not exist a unanimous approach by all its Members. As far as the whistleblowers are concerned, it remains to their discretion whether to disclose their findings or not to third parties, given the great legal risks that they face and their vast projection by the media. The media plays a great role in the sequence of events as well, given that it brings to light the majorities of such scandals, creating the question of whether it is the final actor which decides on the information that is ultimately revealed in the public. Last, but certainly not least, employers want to be reassured as to the protection of their trade secrets from corporate espionage.

On 23rd April 2018 the European Commission issued a proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, in order to enhance the protection of the persons who disclose information acquired in a work-related context, on illegal or harmful activities. Almost one year later, on 16th April 2019 the European Parliament adopted with 591 votes in favor, 29 against and 33 abstentions the new rules, which have already been agreed with the EU ministers[8].

The new rules provide whistle-blowers safe reporting channels and safeguards against retaliation[9]. First, they allow the disclosure of information either internally, to the legal entity concerned, or directly to competent national authorities, relevant EU institutions, bodies, offices and agencies. In addition, the people who disclose information will be protected if they choose to disclose it publicly, provided that no appropriate action has been taken with regards to their initial report or provided that there exists an imminent danger to the public interest or a risk of retaliation. The new rules explicitly prohibit retaliation and enshrine

[6]Factsheet on Whistleblower Protection, European Commission, April 2018
[7]https://euobserver.com/justice/121873
[8]https://www.consilium.europa.eu/en/press/press-releases/2019/01/25/better-protection-of-whistleblowers-council-adopts-its-position/
[9]http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved

protections to hinder the whistle-blowers from suspension, demotion, intimidation or any other form of reprisals. This protection also covers persons providing assistance to whistle-blowers, such as colleagues, relatives or facilitators. Furthermore, an obligation is foreseen for Member States to ensure to people that disclose information access to comprehensive and independent information and advice on available procedures and remedies free-of-charge, as well as legal aid during the proceedings. Lastly, it is suggested that the people who report receive financial and psychological support during the legal proceedings.

After the EU ministers approve the law, the Member States will gave two years to abide by it.

Conclusion

On the eve of European elections, the Parliament has adopted the new Directive on copyright in the digital market, which is expected to be transfered in the national legislation of the Member States so that breaches of intellectual property rights on online content will be effectively suspended. With regard to the protection of whistleblowers, the EU still needs to work together so that the regulations discussed can enter into force. This situation is alarming, taking into consideration that it is estimated that the loss of potential benefits due to the lack of the protection of whistleblowers is, in public procurement alone, in the range of €5.8 to €9.6 billion each year for the EU as a whole[10].

"The European Commission support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein."

Funded by the
Erasmus+ Programme
of the European Union

[10]Estimating the economic benefits of whistleblower protection in public procurement, Directorate-General for Internatal Market, Industry, Entrepreneurship and SMEs (Euroepan Commission), 2017.