Editorial

by **Lucie Guibault and Karin Sein**

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1 In the wake of the recent *Cambridge Analytica* scandal and in the midst of the controversy around the European copyright reform, our fresh Spring number will delight readers for its varied and in-depth coverage of many of the hot topics in the contemporary digital legal discourse. Variety is also present in relation to scientific methods, as several articles use inter-disciplinary approach, combining traditional legal analysis with the application of empirical methods, behavioral economics and psychology.

2 What the 2013 *Snowden* affair was to the covert massive online surveillance of citizens by secret government services, are the 2018 *Cambridge Analytica* revelations to the manipulation of social media profiles for political campaigning purposes. Both represent a major breakdown in the way governments and private entities ought to deal with personal data. The consequences of Cambridge Analytica's operations are enormous: Trump and Brexit! The fact that the data consulting firm was located on UK territory while engaging in dubious activities is all the more disconcerting, as one would think that the firm was bound by the European norms of protection of personal data. Or is it that these norms, including the newly implemented General Data Protection Regulation (GDPR), are incapable of preventing this type of malicious activities? Probably. In reality, the citizen's naivety and trust are blatantly misused on all sides. The *Snowden* and *Cambridge Analytica* affairs show once more that a regulatory system based on the notion of consent to the collection and processing of an individual's personal data leaves gaping holes in the protection.

3 The two first articles in this issue propose other ways to look at the problem of data protection, i.e. through an increase in transparency of the algorithmic decision-making process and through greater empowerment of data subjects before disclosure of personal data. On the first point, *Guido Noto La Diega* speaks against the exclusive automated decision-making and presents three legal routes – intellectual property law, data protection law and the access right under the freedom of information regime – that would help to 'open up' the algorithms. From these three routes the GDPR rules seem to be the most promising for the affected persons, although much is still depending on the national implementation measures. He concludes that only an integrated approach combining elements of all these three routes would be able to provide the affected person with an effective remedy.

4 On the second point, *Santiago Ramírez López* explores the possibilities to learn from the behavioral economics and Kahneman's theory on thinking fast and slow in order to empower the data subjects. He proceeds from the assumption that while Western traditions embrace the concept of control of the data subjects as the main guideline of data protection, the reality of the online world has shown that the informed content model has failed to provide such control. He analyzes alternative methods of providing user-friendly information online, mainly using the example of the Human Readable layer of the Creative Commons license and also considers it necessary to establish guidelines for such icon-based information model.

5 Data protection is not the only controversial topic these days in Europe. The *Proposal for a Directive on Copyright in the Digital Single Market* (DSM), published in September 2016 and expected to be adopted by 2019, is turning into an arm-wrestling match. The top three most disputed provisions in the Proposal are the Commission's push for the adoption of a new press publishers' right (article 11), an obligation on online platforms to put upload content filters (article 13), and a narrow exception for text and data mining (article 3). All three proposed provisions risk severely encroaching upon Europe's principles of open science and freedom of expression. The opposition to the press publisher's right and the content filter obligation is so strong and the perceived weakness of the remaining provisions in the Proposal so great that more than a hundred legal scholars and a plethora of organizations, including associations of European public institutions, companies and start-ups, journalists and libraries, news publishers and civil society organizations, have let their voices heard in different open letters to Member of Parliament Voss, to express their deep concerns about the DSM Proposal.[1]

6 With respect to research data in particular, open-research advocates argue that limiting the beneficiaries of the proposed text and data mining exception only to research organisations and only for purposes of scientific research would effectively undermine the European Union's commitment to the 3 O's: Open Innovation, Open Science and Open to the World.[2] As in the case of data protection, it might be useful to examine other possible legal avenues than copyright law for the use of publicly funded research. One such avenue could be the inclusion of public research and educational establishments within the scope of the Directive regulating the re-use of public sector information ('PSI Directive'), as presented in *Heiko Richter*'s article. The paper evaluates the legal consequences of such an inclusion. As the PSI Directive is characterized by considerable legal uncertainty, it is difficult to derive robust assumptions that can form the basis for predicting the effects of extending the PSI Directive's scope to research information. Richter concludes that a potential revision of the PSI Directive aiming to include research organizations and educational establishments should reduce this uncertainty.

7 In the context of the European copyright reform controversy, the strongest argument that can be made against the Commission's ill-conceived plans is by putting facts forward. *Kristofer Erickson* and *Martin Kretschmer* do just that in their article entitled '"This Video is Unavailable" Analyzing Copyright Takedown of User-Generated Content on Youtube'. Using empirical methods, their analysis of right holder behavior complements and offers a new perspective on recent empirical work assessing the appropriateness of notice-and-takedown procedures as a means of balancing the interests of right holders, innovative services and citizens. More specifically, they investigate the factors that motivate takedown of user-generated content by copyright owners. The main finding is that policy concerns frequently raised by right holders are not associated with statistically significant patterns of action. They suggest that evolving policy on intermediary liability - for example with respect to imposing filtering systems (automatically ensuring "stay-down" of potentially infringing content) - should be carefully evaluated against evidence of actual behavior, which this study shows may differ materially from stated policy positions. In other words, a measure such as that proposed in article 13 of the DSM Proposal would, in line with these findings, not necessarily address the true concerns of right holders, while bearing the risk of creating disproportionately high obstacles to user-generated content as to have a chilling effect on users' exercise of their freedom of expression. This should be the nail in article 13 DSM's coffin!

8 The last document in this issue takes the discussion full circle on the topic of data protection and citizen empowerment. The Weizenbaum Institute research group led by *Axel Metzger* discusses the Proposal of Digital Content Contracts Directive that is currently in the final stage of trilogues. The authors concentrate, inter alia, on the concept of data-as-counterperformance claiming that the notion should be explicitly kept in the operative text of the directive and that its scope of application should be opened irrespective of whether the consumer provides personal data actively or passively. They also encourage to regulate the multi-party scenarios in the context of supplying smart goods at the EU level – questions that under the current version of the proposal are left to the national law. Indeed, even if it is too late for the Digital Content Directive to take up new regulatory issues, problems arising from the so-called unbundling could still be dealt with during the ongoing discussions and 'digitisation' of the amended Proposal of Consumer Sales Directive.

Enjoy the reading!

Lucie Guibault and Karin Sein

1 Open Letter in Light of the 27 April 2018 COREPER I Meeting, Brussels, 26 April 2018, available at: <http://copybuzz.com/wp-content/uploads/2018/04/Open_Letter_on_Copyright_Reform_27_April_COREPER_Meeting.pdf>; Statement from EU Academics on Proposed Press Publishers' Right, 24 April 2018, available at: <https://www.ivir.nl/academics-against-press-publishers-right/>; Letter to MEP Axel Voss, Brussels, 24 April 2018, <https://www.communia-association.org/wp-content/uploads/2018/04/OpenLetter_AxelVoss_DeleteArticle11_English.pdf>.

2 European Commission, Research and Innovation, Brussels, <https://ec.europa.eu/research/openvision/index.cfm>.