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Chapter 3: Market, culture, and open access.

European copyright and the renewal of a historical clash of values in the digital age

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Introduction

What is the common point between the GATT (General Agreement on Tariffs and Trade), the TTIP (Transatlantic Trade and Investment Partnership) and the 2019 copyright directive? Their negotiations were all characterised at some point by the opposition between “culture” and “economy/trade/market”. As Burri-Nenova (2008) points out, the “culture vs. trade” debate has been institutionalised within the different international organisations dealing with cultural goods (i.e. World Trade Organisation; UNESCO). The relationship between market and culture is highly complex, as it bears a tension between a potential specificity of cultural goods that would justify their protection from the free-market rules and the will to maintain free competition. This debate was particularly strong in the 1990s, with the GATT rounds (Neuwirth 2004) as well as the first European copyright directive (Littoz-Monnet 2006). It was brought back under the spotlight in the last decade with the rise of digital technologies (Vlassis et al. 2020) and the build-up of power of the “digital giants”, the GAFAN (Google, Apple, Facebook, Amazon and Netflix). As such, the copyright directive adopted by the European Union (EU) in April 2019 constitutes a key moment in the renewal of this debate in the digital age.

The text proposed by the European Commission aimed at regulating digital platforms’ activities related to copyright issues. The debates in the European Parliament (EP) were highly polarised and mobilised a wide range of actors. In July 2018, a majority within the EP rejected the mandate of the Committee on Legal Affairs (JURI) to engage with the interinstitutional negotiations, asking for a debate on the report in the plenary session. A communication campaign was launched by the detractors as well as supporters of the directive proposal, and members of the EP (MEPs) found themselves in the eye of a lobbying cyclone. Demonstrations – largely against it – were organised, mainly in Germany and in Poland. The debates in the plenary session were particularly lively. Interestingly, pro-directive MEPs invoked the protection of culture to justify their position, a missing argument in the original political framing. Indeed, the initial incentive to reform European copyright legislation was to adapt it to the digital environment, to facilitate the circulation of digital goods and information. It was a key part of the Juncker Commission’s strategy to build a “digital single market”. Yet, the

directive adopted in April 2019 shows a far more nuanced approach to European copyright. If it consecrates four exceptions to copyright, it also creates a new related right for press publishers (Article 15), it enforces a responsibility of digital platforms to ensure that the content they provide respects copyright (Article 17), and it proclaims a principle of fair remuneration for creators (Article 18). Despite disagreements between peculiar sectors (music, book, cinema, etc.) and/or professions (authors, editors, libraries, etc.) in the early stages of the process, when the directive was finally adopted, the “yes” camp, embodied by the cultural sector, claimed that Europe finally said “yes to the future of creation”.¹ It seems that in the market vs. culture war, culture won this battle. But besides the “who is the winner?” question lies the “who were the fighters?” one. Indeed, in a digital age, when social practices are subject to radical change, with the erasure of material frontiers, can we assume that the debate still opposes market and culture?

Before tackling this central question, we have to deal with a definitional issue: what do the “culture” and “market” labels stand for? The concept of *value* appears as a heuristic tool to understand what is exactly behind this recurrent debate. Foret and Calligaro define it as

a cultural representation invested of a normative authority likely to diverge according to the socio-historical context. It is more than a mere representation as it conveys a moral and prescriptive connotation in terms of good and bad, and frequently also an emotional charge.

(2018)

Looking at values invites us to go beyond the rational arguments mobilised by each actor. From a Weberian perspective, it allows seizing the *Weltanschauung* (world’s vision) that sustains each argumentation: which values serve as a premise for actors’ stances. Regarding the culture vs. market debate, we use the notion of a *set of values*. It can be defined as a *repertoire* of values, narrower though than Jabko’s *repertoire of ideas* (2006). In the latter, competitive ideas are performed according to a common repertoire. A set of values gathers compatible values referring to the same general idea and functions as a specific symbolic repertoire. For example, the *market set of values* would gather values like *free competition* and *innovation*. In line with Jabko’s strategic constructivism, the idea is that those sets of values not only *constitute* actors’ *Weltanschauung* but also are *performed* by the agents to sustain and justify their stances. Values play at different levels in EU politics. As constitutive of *Weltanschauung*, they structure actors’ positions and commitments within a given field of activity, and thus they structure political conflicts. As sets of values, they constitute, within these political conflicts, a repertoire of possible justifications, strategically mobilised, for actors’ stances on a given policy solution.

Thus, we suggest, following Neuwirth (2004), that the culture vs. market debate is a *clash of sets of values*, deriving from structural logics of differentiated spheres of activities – artistic fields and the economic market. It raises the question: what shape does this debate take in the digital era? The copyright directive is a timely

case to try to answer it. Indeed, copyright as an instrument of both cultural policy and economic regulation constitutes an ideal ground for the culture vs. market clash. The main thesis of this chapter is that the digital age brings in a new set of values, from the involvement of a third sphere of activities – the digital – that complexifies the debate: the open access set of values. We are now dealing with a tripartite clash.

In the first part of this chapter, we adopt a socio-historical perspective to specify the identified sets of values – market, culture, and open access – and how they have shaped copyright policies. We go through the different aspects of the culture vs. market debate over time, with a special look at the EU arena. We look at how digital technologies reshape it, especially regarding copyright, and at what the open access values cover. In the second part, we look at the 2018–2019 debates on copyright within the EP, to seize the three sets of values’ interplay in MEPs’ interventions.

Culture, market, and open access through the copyright prism

This first part aims at understanding what values are at stake and why. First, we review the broad debate opposing culture and market that led to different narratives: the cultural industries, the creative industries, and the creative economy. Secondly, we examine the EU’s cultural action and the specific form of a clash of values opposing cultural diversity to the internal market, and we tackle the specificity of this clash when occurring around copyright. Finally, we show how digital technologies bring in a new set of values.

From the “cultural industries” oxymoron to the “creative economy” framing

The commodification of culture was characterised by Adorno and Horkheimer through the concept of *Kulturindustrie* (“cultural industries”) (2015 [1947]), as fundamentally contradictory to the very idea of arts. According to them, the mass production and consumption of cultural goods allowed by the capitalist system and the market economy work against the substance of artistic work that ought to be unique. The notion has been largely discussed and documented already (Lee 2017; Nijzink et al. 2017; Schlesinger 2019). The literature underlines that the notion of “cultural industries” is an oxymoron, taking “the form of a conflict between commercial (or economic) values and interests” (Neuwirth 2004: 6).

The socio-history of fields of cultural production as developed by Bourdieu (1991, 1992) helps in understanding this fundamental clash of values. A field of cultural production (literature, cinema, fine arts, etc.) is an autonomous space marked by different institutions (publishing houses, production companies, prizes, etc.) where the agents (creators) follow a logic that distinguishes this social space from others. The logic of a field of cultural production is that of *l’art pour l’art* (“art for art”), which implies total independence of artistic creation from the pursuit of economic profits. Fields of cultural production have the striking

particularity of operating in a reverse economy: those with the most symbolic capital are not necessarily those with the highest economic capital. Thus, the most autonomous pole of the field, the *avant-garde*, is characterised by a high degree of symbolic capital and a low degree of economic capital. The logic of cultural production fields conveys a set of values that we label as *cultural values* that would be negatively defined as non- and even anti-economic values. From that perspective, one can say that it bears a moral connotation implying that commodification of art and culture is dangerous as it corrupts its fundamental principle: art for art becomes art for profit. As for what we label *market values*, they see the latter as a threat to the free circulation of goods, capitals, and persons as well as to free competition. This clash appeared clearly in the vivid debates that peppered negotiations on trade agreements within the WTO, the NATO, and the EU since the late eighties eventually leading to the cultural exception and cultural diversity's narratives (Neuwirth 2004).

The “cultural industries” progressively let the room to the “creative industries” framing, notably within the British cultural policy (Gray 2000; Schlesinger 2019). The oxymoron faded away, favouring an economic perspective (Schlesinger 2019): where the “cultural industries” still bore an explicit expression of an inner contradiction between culture and market, “creative industries” define culture as economic sectors (music, cinema, fine arts, etc.). This discourse frames cultural policies through economic values and incentives: culture is not important as such (*art pour l'art*) but because it generates tangible economic value (growth, jobs, etc.). Following Schlesinger's analysis, we see that it evolved into the “creative economy” narrative (2019), where intellectual property is the core of culture's economic value. Popularised by Howkins (2001), this model is based on human capital with individuals as idea providers. As such, it favours a highly individualised and thus precarious job market (Coles 2016). It seems to have been fully embraced by the EU, where cultural values have historically been dominated by market imperatives.

The EU's cultural action: cultural diversity vs. internal market

The EU, even though it enjoys an unrivalled level of economic and political integration, has a relatively low cultural competence (Audet et al. 2010). The latter, established by the Maastricht Treaty, is provided for in Article 167 of the Treaty on the Functioning of the European Union (TFUE) as a supporting competence. The EU's action in this area is therefore limited to support for the actions of member states and cannot aim at legislative harmonisation. However, Section 4 of Article 167 provides that culture must be taken into account in each of its other policies.

As such, cultural considerations are subject, at the European level, to a market imperative. Dubois (2001) qualifies European cultural action as a “sub-market” that would integrate into the single market. Community intervention in culture is the subject of a struggle. On the one hand, some MEPs seek to propose a different vision of Europe, along with strong national cultural ministries (notably France

and Greece), that encourages such action. On the other hand, some member states (e.g. the UK and the Netherlands), certain directorates-general of the Commission, and the EU Court of Justice (CJEU) seek to limit EU action in the field of culture. The latter consistently defends the idea that cultural goods should not benefit from the derogatory treatment of free trade.² For instance, the establishment of a single price for books is the subject of regular conflicts between member states and the Commission before the CJEU, as it is a cultural policy provision, not falling within the competence of the EU, but affecting the free movement of goods.³

Neuwirth (2008) offers a more nuanced reading and distinguishes three phases in the history of the integration of culture into EU policies. First, from 1958 to 1974, cultural concerns are absent. Action is done sector by sector, from a purely economic perspective.⁴ From 1975 to 1991, in the absence of explicit competence, everything is done either based on the flexibility clause (Article 352 of the TFUE)⁵ or through intergovernmental cooperation. The Commission defines its cultural action from a “cultural sector” perspective, defined as the “whole socio-economic formed by persons and undertakings dedicated to the production and distribution of cultural goods and services” (Neuwirth 2008: 247). The pressure for recognition of the cultural dimension of European integration is being felt, particularly in the EP. There is *de facto* recognition but still no *de jure*. More and more cases involving the cultural sector go before the CJEU, which can thus only judge the economic aspects. The third phase identified by Neuwirth begins in 1992 with the entry into force of the Maastricht Treaty and corresponds to the *de jure* recognition of the Union’s cultural action, but also a conception of culture and trade as inseparable elements of cultural industries (Neuwirth 2008).

The cultural action of the EU has been torn apart between two narratives that eventually became two legal notions (Romainville 2014): the preservation of cultural diversity and the building of the internal market. The first exists in both international and European law. If it is clearly defined in the UNESCO convention, it remains a blurry concept at the EU level. One can argue that it is here to maintain the cultural policy as a nation-state instrument and to enforce subsidiarity (Schlesinger 2019). But it is important to note that if the status of cultural diversity as a fundamental law is subject to controversy among lawyers, it is, however, clearly recognised as a value of the EU (Romainville 2014). Leaving aside the controversial legal status of cultural diversity and internal market, we can argue that they both work at the EU level as sets of values and ideas that set the ground for actors to sustain their stance. The internal market has been the winner so far, but the tension remains.

The clash of values between culture and market is historically situated, and the EU is no exception. Thus, one can still expect the rise of those contradictory values when new legislation having an impact on cultural actors is to be discussed, especially when it comes to copyright.

Copyright: the keystone of the market vs. culture debate

Along with state subsidies, copyright is one of the main legal instruments of regulation of cultural markets. Through a quick socio-history, we see that it is deeply

anchored in the market vs. culture debate, and sophisticates the balance between market and cultural values.

Until the eighteenth century, arts remained largely subject to market laws and state censorship. For several centuries, artists were entirely dependent on either patrons or personal fortunes without any special status being recognised. Dedicated to the world of books, the first legislation attributing a right to the author on his work is the *Statute of Anne* or *Copyright Act*, set up in Great Britain in 1709 (Neeman et al. 2012). The latter assigns to the author an exclusive right of printing on their work, hitherto held by the publishers, members of the *company of Stationers*, a powerful monopoly. In France, the pioneer state in terms of a literary property based on the moral rights of authors (see infra), the first judgments on copyright regulations were taken in 1777 following the quarrel of the booksellers – from the province against the monopoly of the Parisian booksellers. In these two emblematic cases, copyright was set up by the State, to regulate the book market by ending the monopolies of booksellers and publishers. The liberalisation of the market allowed the authors to be granted a genuine legal status, which nourishes their symbolic status and participates in the empowerment of the figure of the author (Foucault 1969). Copyright allowed writers to perceive and directly manage the incomes of their publications and to become real entrepreneurs (Bouchet 2009).

But copyright also became a means of protecting the authors, and thus cultural production, from the vicissitudes of the book market. Indeed,

while the market helped literary activity to free itself from the supervision of the state, the state can also become an instrument for saving the rights and freedom of creation from the merciless sanction of the market and the risks of the cultural producers of being exploited.

(Sapiro 2003: 457)

Thus, the twentieth century was marked, particularly in France, by the establishment of state instruments aimed at protecting the authors from the hazards of the market. These different mechanisms were grouped under a common policy: the cultural policy. Its two main branches are the support for artistic creation and copyright. From the French perspective, copyright is a means of protecting its beneficiaries from market logic, in the name of the general interest and the preservation of culture. This vision of copyright has influenced the diffusion of literary property to the rest of the European continent.

Sociology of arts and literature has demonstrated the importance of this legal instrument in the identity formation of authors and the autonomisation of national artistic fields (Viala 1985; Walter 1990; Bourdieu 1992; Sapiro 2014). With copyright, the cultural value of *art pour l'art* takes a very peculiar form, as it is individualised and focused on the producer of this art: the author. Copyright thus adds a new shade in the value sets we are trying to identify: the importance of authorship. It refers to the symbolic status of the author and provides a piece of work with artistic recognition. As such, for example, the opposition made between cinema *d'auteur*, on the one hand, perceived as artistic, pursuing an aesthetic goal, and

blockbuster cinema, perceived as commercial, pursuing economic profit, is an illustration of this opposition between culture and market values. When copyright is thought of through the prism of the “culture” set of values, it is seen as derived directly from authorship.

To sum up, following Sapiro (2003), copyright appears as a strong indicator of the balance between the state or “public good” logic and a market logic, always stretched between two different sets of values: a cultural one – copyright as a way to protect culture from the market pressure through the protection of authors – and an economic one – copyright as a way to regulate the market and ensure a fair competition. This balance is fragile, and the increasing digitalisation of technologies disturbs this equilibrium in copyright regulation. Indeed, the individual property spirit of copyright is challenged by the open access philosophy of the Internet, which reactivates debates on the very nature of copyright.

A renewal of the debate upon the arrival of the digital economy: culture, market . . . and open access

Cinema and music are probably the cultural fields where the impact of digital technologies is the most visible. The book sector, as one of the eldest cultural markets, is nevertheless a good indicator of the effect of these “new” technologies. According to Chartier (2006), the digital revolution calls into question three orders historically established: the order of discourse, the order of reasons, and the order of properties. The break of the latter is twofold. First, digital technologies allow readers to intervene directly in the text; the author fades and potentially gives way to collective writing (e.g. Wikipedia). Second, by defying the singularity of texts, they make it more difficult to assign a clear intellectual property link. There would be a fundamental contradiction between the freedom of writing offered by digital technologies and the current form of copyright which implies an established singularity of the author of a text.

The advent of digital technologies questions the relevance of the legal framework of literary and artistic property. It sets the ground for the opposition between two legal regimes – related to different values – that are *open access* and *intellectual property*, challenging the protection of culture through the protection of identified authors. Intellectual property is a particular legal regime as it deals with the property of the immaterial. Still, in the analogic word, ideas would, in the end, take a material form (e.g. book, CD, DVD, etc.), making it suitable for a classic market of competitive and exclusive goods. But with digital technologies, the immateriality of arts and culture paradoxically becomes a tangible reality, as a concrete medium is no longer necessary. Digital cultural goods are non-competitive and non-exclusive, and as such, challenge the classical regime of property and the very possibility of their commodification (Courmont and Galimberti 2018). Digitalisation brings into the picture a new set of values that comes along the Internet culture, which is *open access*, symbolised by the free software and open source movements, the practices of pirating copyright-protected content, and hacking (Broca 2012, 2016), and as such, deeply opposed to commodification.

As Courmont and Galimberti (2018) explain, with digital technologies we move from an *economy of ownership* to an *economy of access*. It thus questions the copyright model as an instrument of balance between the protection of culture and market regulation.

The development of digital technology reactivates the debates on the legitimacy of copyright as a property right. Depending on the form it takes, copyright implies different definitions of authorship. Is it simply a heritage right or does it cover a moral dimension? Is it a right of ownership or a right to compensation for work? These legal issues fuelled debates around copyright in Europe. With the development of digital technology, the question of the legitimacy of copyright as intellectual property became a topic of debate at the turn of the twenty-first century in Europe and the United States (Pfister 2004). The arguments mobilised are based on the same foundations as those of the nineteenth century, with two central positions: copyright as a social contract against copyright as a property right. In the first case, the writer is seen as an intellectual worker who provides a service of general interest and is therefore entitled to remuneration. From this perspective, literary ideas and creations belong to the community and are akin to a common good. Copyright as salary is in line with the open access values. Intellectual property advocates argue, on the contrary, following Kant and Filche (Larochelle 1998), that ideas derived from literary creation are emanations of the author's person, who is, therefore, the sole legitimate owner.

The debate gave rise to the two conceptions that dominate today in Europe and the United States: a conception of civil law that equates copyright with the *literary and artistic property* including a patrimonial right *and* a moral right, inalienable and directly related to the person of the author; a common-law conception, *copyright*, an economic right (monopoly right) that can be transferred almost entirely to a third party (publisher, producer, etc.). These legal systems are both based on the philosophy of copyright as capital and not as income. Nevertheless, contemporary copyright remains marked by this tension between private property and public interest, between owner and worker, especially in French law (Sapiro and Gobbille 2006).

The rise of digital technologies brings new values in the debate that we labelled as open access values. They reopen a debate on the very nature of copyright and the values it should be based upon. The EP's debates on copyright in 2018–2019 illustrate this shift from a two-dimensional to a three-dimensional value conflict.

Case study: values' conflict in the EP's debates on copyright

In this second part, we analyse how the three identified sets of values interplayed into the EP's debates on the 2019 copyright directive. We analysed the debates of the plenary session that took place on the 11th (debate) and on the 12th (vote explanation) of September 2018, to adopt the mandate of the Parliament and launch the trilogues, and on the 26th of March 2019 (debate and vote explanation), to approve the final text. In total, we gathered 144 MEPs' interventions, from 96 individuals, excluding the blue card questions, but keeping the

interventions of the Commissioners (Andrus Ansip and Mariya Gabriel). We first conducted a lexical analysis using the IraMuteq software (Smyrnaio and Ratin- and 2017) to identify keywords used by the MEPs. We classified the speeches using three independent variables: political group, the nationality of the speaker, and position (pro/against). On that basis, we conducted a qualitative analysis to identify the different arguments and values mobilised. The analysis shows that the main explicative variable of one's argument is one's position on the directive (pro/against), rather than one's political group or nationality.⁶ A limit to our analysis is the question of language. Indeed, most of the MEPs intervened in their mother tongue, thus, we translated every intervention into English to harmonise the corpus. That is why we used the lexical analysis carefully, as a first step, before conducting an in-depth analysis that allowed us to seize the context in which each occurrence was used.

The analysis allowed us to identify five important features regarding the use of values in the European copyright debate: (1) open access values were mainly used by the opposition, through what we called a *fundamental rights' rhetoric*; (2) the supporters of the directive largely mobilised a culture set of values and explicitly referred to "European culture and values"; (3) however, the figure of the "creator" was used by a large number of MEPs from both sides, showing the symbolic power of authors; (4) market values were defended through a common "David vs. Goliath" narrative based on *free competition*, opposing a small competitor (the authors and/or European small and medium enterprises – SMEs) to a giant one (the GAFAN and/or the European press publishers); (5) all in all, the three different sets of values are all mobilised as ultimately compatible with a market framework, following a dynamic of *discursive commodification*. That is, the combination of values historically detached from, if not opposed to, economic concerns (here, culture and open access) with market values, economic by their very essence, to justify a policy solution. The debate remains, in the end, a classic market regulation dilemma.

The rise of the free Internet: open access values and the fundamental rights' rhetoric

Some MEPs mobilised what we called a *fundamental rights' rhetoric*. They framed the copyright debate as an issue of protecting one specific type of fundamental right.

The lexical analysis shows that the word "freedom" was one of the most frequently used, usually associated with the word "expression", "censorship", and "filter".⁷ The qualitative analysis shows that a majority of MEPs, from all political groups, speaking against the directive invoked the protection of the *freedom of expression* to sustain their position. This argument targeted a specific but highly salient aspect of the text: Article 13 (now 17) on the responsibility of digital platforms. This article implied that platforms shall implement algorithms making sure that the hosted content respected copyright. The argument was to demonstrate that these algorithms – framed as potential filters – would possibly serve as tools of

ensorship threatening the freedom of expression. Invoking fundamental rights – which is not new – works as an argument of both legal and moral authority. Legal, because it refers to the hierarchy of norms, directly referring to the Charter of Fundamental Rights, which has the same legal value as the treaties (i.e. the highest). Moral, because it conveys a normative argument, in terms of right and wrong: one cannot argue against the defence of fundamental rights. It plays as a “trump card, that is, as the end of all argument” (MacMillan 2008: 73). As an illustration of this type of argumentation, we can quote the intervention of Yana Toom, Estonian MEP from the Alliance of Liberals and Democrats for Europe (ALDE) group, during the last debate:

The impact of this Directive on human rights is drastic . . . in particular when it comes to the Universal Declaration of Human Rights, which clearly states that everyone has the right to seek, receive and impart information and ideas through any media and regardless of frontiers. This is exactly what Articles 11 and 13 will breach by creating obstacles in the way we seek, receive, and impart information. It is clear that the rights of creators need to be protected, but creators and rightsholders are not the same and we need to consider that this proposal is not balanced. The damage to our fundamental rights will simply be too high.

(26/03/2019)

This reference to fundamental rights was also mobilised to contest Article 11 of the text (now Article 15).⁸ It refers to the *freedom of expression*, but also *freedom of information* as a principle of the *open Internet*. Overall, it refers to the Internet as a borderless space where freedom as a core value prevails. We can see here that the values of open access emerged in the debates in the EP as a possible framing for the copyright directive.

This fundamental rights’ rhetoric was less used on the pro-directive side, except for MEPs from the European People’s Party (EPP), notably the rapporteur, Axel Voss. He built part of his argument on copyright as a *right of property*, and as such, a fundamental right, as valuable as, as important as, and to be balanced with freedom of speech. This rhetoric was part of all his interventions. Many MEPs advocating for the directive also referred to it as a “remuneration” for the creator rather than a property. In both cases, they mobilised a “European culture and values” rhetoric.

Culture strikes back: the European culture and values rhetoric

A large number of MEPs argued in favour of the directive, basing their argument on the idea of the protection of European culture and values. Once again, MEPs from the whole political spectrum used this kind of argument. A few of them⁹ directly referred to the notion of “cultural diversity” as being the core of European culture, with copyright as a tool to ensure this diversity. We also found references to the defence of “culture”, “European culture”, and “European values”.¹⁰ It is

particularly striking in the interventions of the rapporteur Axel Voss and the Commissioners Andrus Ansip and Mariya Gabriel. They build their argument upon the idea that the copyright directive, by protecting creators, is protecting European culture and values. One can notice that “European culture” and “European values” are never defined by the speakers. The latter is associated with democracy in some of the speeches. The logic is, for example, that Article 11, by creating a related right for press publishers, protects journalists, and thus freedom of the press and information, a component of democracy. It is to be noted here that the same argument has been used by some of the opponents who consider that, on the contrary, Article 11 doesn’t offer proper protection of journalists and, as such, threatens the European democratic model.

Some MEPs go as far as to speak of “European identity”, “cultural model”, or even “soul of Europe”:

Music and art underpin European identity and culture, reflect and emphasise our fundamental values, and we must, therefore, do everything we can to protect these values.

(translated from Polish, Bogdan Brunon Wenta,
EPP, 11/09/2018)

We have to choose which cultural model is the basis of our society, whether it should be shaped by the big global networks or it should be based on creativity, diversity, ingenuity, everything that has always characterised us.

(translated from Italian, Nicola Danti, Progressive
Alliance of Socialists and Democrats (S&D), 11/09/18)

Madam President, the copyright battle began as a technical debate, but in the process, it became a battle for the soul of Europe, namely its culture and values.

(translated from Greek, Giorgos Grammatikakis,
S&D, 26/03/19)

Once again, the rhetoric of the defenders of copyright is based on values and does not refer so much to the legal aspect of fundamental rights. We are in the scope of what would be the identity of Europe, without ever defining it. It is stated as self-evident. The syllogism seems to be: copyright protects art, art is the foundation of European culture, copyright protects European culture. The reference to “identity”, “soul”, and “cultural model”, as well as the opposition between “technical debate” that would call for rational arguments and “battle for the soul of Europe”, shows that we are here in an emotional range, calling upon values. Moreover, none of the MEPs who argued against the directive tried to contest this association between copyright and European culture and values. They stuck with the fundamental right’s rhetoric. Only three interventions referred to “cultural diversity” that the directive failed to protect,¹¹ but without directly associating it to European culture or values. A common trait, though, is the reference to the figure of the creator, which enjoys an important symbolic power.

Return of the author: the symbolic power of creators

The debates within the Parliament demonstrate the symbolic power of the figure of the creator. If we look at the lexicometry of the debates, we can see that the term “creator” was one of the most used, as well as “author” and “artist”. The qualitative analysis of the debate confirms the importance of this figure.

First, the main argument in favour of the directive is based upon the protection of creators. Even the MEPs who didn’t use the European culture and value rhetoric explained their position by stating that the text, and especially its most controversial aspects, aims at protecting creators by ensuring them a source of income. Copyright is directly linked to the author, whereas it pays the whole value chain and notably other important actors that are publishers or producers. For instance, press publishers were the main beneficiaries of Article 11 that gives them a related right to copyright, but the figure of the journalist, or “the press” as a whole, was put forward and directly associated with the protection of democracy. It is particularly striking in the interventions of the French MEP – and former journalist – Jean-Marie Cavada, shadow rapporteur for the ALDE group:

The press, ladies and gentlemen, the press, Madam President, is the basis of democracy. When there will be no free press, when there will be no journalists in Google, Wikipedia, YouTube, or anywhere else, you will have no more information. You will have passions and rumours like the ones we have just had for several months. This text is the only chance for European creators, media companies, and journalists to rebalance the situation in their favour and protect their future.

(translated from French, Jean-Marie Cavada,
ALDE, 26/03/2019)

To summon *the author* bears a symbolically more rewarding connotation: it is linked to culture, to *art pour l’art*, and, in the case of journalists, to democracy. Publishers or producers, on the other hand, embody the mercantilist aspect of art. They refer to the market, which seems negatively connoted when one wants to argue in favour of the copyright directive – coping with the reverse economic logic of the fields of cultural production. Thus, it seems more valuable to refer to cultural values. Indeed, if we look at the arguments against the directive, the figure of creators appears in two ways: (1) before arguing in favour of Internet users and freedom of speech, some MEPs warn that they are not arguing against creators, who are as important and valuable; (2) they sustain their position with the protection of creators argument, explaining that the directive is not protective enough. The interventions of João Pimenta Lopes [Gauche unitaire européenne/Gauche verte nordique (GUE/NGL)] against the directive are particularly paroxysmal of this latter argumentation. He explicitly opposed culture and market, with the idea that the directive is protective of the market and not of the creators:

Let us be clear, what is at stake is the distribution of profits resulting from the dissemination of content without guaranteeing fair remuneration to creators.

For these remain inequalities, dependence, and precariousness. Filters are institutionalised, conditioning creative freedom, freedom of the press, and free access to culture, while promoting greater concentration and monopoly in the digital sector. Culture is marketed and normalised.

(translated from Portuguese, 26/03/2019)

Overall, it seems impossible to say, “I am against the protection of creators”. Also, some MEPs underlined the fact that the directive is problematic because it doesn’t protect creators but other actors of the value chain, especially publishers. The creators, associated with arts and culture, have a strong symbolic capital. Culture values sustain their protection. The producers and publishers are associated with the pursuit of benefices, which is negatively connoted from a culture set of values. Thus, if the latter set was more obviously mobilised by the supporters of the directive, it would be wrong to assume that it was absent from the opposition’s rhetoric. From that perspective, we can see that the opposition between sets of values is not that obvious, and they play as repertoires that can be instrumentalised in various ways.

The importance of the figure of the author within the EP debates had concrete legal effects. Indeed, in its final version of the text, the EP included an article setting a principle of “appropriate and proportionate remuneration” for creators (Article 14, now 18). It was defended by a large part of MEPs, mainly from the left and centre political groups [GUE/NGL, Greens/European Free Alliance, S&D, and ALDE], thus including a majority of MEPs who voted against the directive because of Articles 11 and 13.

In most cases, the figure of the creator was presented as a weak actor having to be protected against a bigger one, enjoying a competitive advantage. It was summoned along with free competition rhetoric in what we identified as a David vs. Goliath narrative.

Fairness and free competition: David vs. Goliath narrative

A major thread in the debates on the copyright directive was to frame it as a David vs. Goliath story, whether it is to support or to contest it. David embraces two different identities: the European creators or the European SMEs. Goliath, on the other hand, can be identified as the big American digital platforms – the GAFA or GAFAN¹² – and the big European press publishers (such as Axel Springer).

The supporters of the directive mainly framed the opposition as the European creators facing the GAFA. They argue that the legal text protects the first against the big digital platforms. Four MEPs directly mentioned the GAFA: Jean-Marie Cavada, shadow rapporteur for the ALDE group, António Marinho e Pinto (ALDE), Marie-Christine Boutonnet, shadow rapporteur for the Europe of Nations and Freedom group, and Marc Joulaud (EPP), rapporteur for the Culture and Education Committee. Other references can be found to “big platforms”, “American platforms”, “digital platforms”, “American giants”, or directly to Google, Facebook, or YouTube. We find these references also among the opponents to the

directive, who opposed the GAFA to European creators, but also European SMEs. Besides, regarding Article 11, they refer to the big European publishers as a threat to creators and especially journalists, for example in the following:

The introduction of related rights for press publishers will mean a serious reduction in public debate. Only the biggest publishers will be on the market, who already have a huge influence on shaping public opinion. They will share the profits from the link tax and create an information monopoly that smaller portals or bloggers will no longer be able to break. I, therefore, call for this directive to be rejected.

(translated from Polish, Kosma Złotowski,
European Conservatives and Reformists
(ECR) Group, 09/11/2018)

The main argument to support the reform seems to be that it will protect European creators (individuals) against American digital platforms. In response, the opposition argues that the directive opposes big American platforms to big European publishers, SMEs, and creators being left behind. The value that is summoned here is *justice*. No matter who Goliath and David are, the common idea is the protection of *the weak* against *the strong*. Many MEPs framed it as a matter of *fairness*. What is particularly interesting is that in many cases, fairness is linked to *free competition* and *fight against monopolies* (of the GAFA or the European publishers). As an illustration, we can quote the intervention of Theresa Griffin (S&D):

We must vote tomorrow on our European values, pay creators properly for their work, protect them against exploitation, and end the unfair monopoly of a few big platforms.

(09/11/2018)

Thus, the *free competition* value was common to all sides, as the market plays both a role of a set of values and a general framework for the debate.

***Regulation dilemma and discursive commodification:
the market takes it all***

The debate seems to have been dominated by the use of cultural and open access values. We can find examples of both sets of values on each side of the debate, but the general picture shows the domination of cultural values to support the reform, against open access values to contest it. Market values appear through the idea of fighting monopolies. They equally irrigate speeches from opponents as well as supporters of the directive. The different sets of values are mobilised to sustain a specific vision of market regulation: should there be *more* or *fewer* barriers to entry? In that sense, the 2018 debate is still set in the same framing as the one described by Annabelle Littoz-Monnet regarding the 1990s' European debate on copyright (2006). Thus, cultural values are largely used to sustain *more* regulation,

whereas open access values are used to argue in favour of *less* regulation. Interestingly, free competition values are used to defend both, leading to what we called a *discursive commodification*. From that, three remarks can be made.

First, this centrality of the market in a debate on copyright cannot be a total surprise regarding the socio-history of this instrument of public policy. Indeed, as previously explained, copyright is an instrument of balance between public good and market logic. The debate at the EU level confirms it as a tool of regulation. Interestingly, where one would have expected the EU to take the path of deregulation (Denord and Schwartz 2009), it seems to go for copyright as a necessary barrier to entry. An interesting aspect is a link made by many MEPs with the question of free competition, creators appearing as entrepreneurs to be protected. In that sense, we can see a discursive trend of the commodification of culture (Gray 2000).

Second, while the open access set of values was used to sustain fewer barriers to entry, especially by MEPs from the ECR group, it still brought in a new vision that is not a question of market (de)regulation. Indeed, the Internet is framed as a *public space* to be protected and not as a market. Thus, if we look at the discourses from the left side of the hemicycle, they defend an alternative model that would ensure both the protection of the creators and the inner freedom of the Internet. As such, copyright is confirmed as deeply anchored into a market vision of society. Yet, even the MEPs defending this alternative frame mobilised economic arguments to sustain their position. For example, Julia Reda, shadow rapporteur for the Greens, pointed out the risk that big American platforms would have a competitive advantage compared to small European platforms that would eventually have to buy their algorithms from these digital “giants”.

Third, culture values embrace the same pattern of discursive commodification. In many interventions by MEPs, they were mobilised along with economic arguments. Free competition, but also the economic weight of the European cultural sector, justified a strong European copyright framework. The cultural argument was rapidly completed by the *creative industries* one.

Overall, we can see here the strength of what Antoine Vauchez called the *econopolity* of the EU that acts as the “original matrix” of the European decision-making process (2015). It is both an institutional – the internal market being the main competence of the EU – and a cognitive structure that forces the agents to adapt to it, visible here through this discursive commodification. This whole debate demonstrates the strength of this “matrix”, as it paradoxically manages to be a medium for sets of values opposed to marketisation that are culture and open access.

Conclusion – market, culture, and open access: an impossible trinity?

The market vs. culture debate does embrace a new shape in the digital age when it comes to debating a new legal framework for European copyright. Digital technologies, and more exactly, the Internet, as a borderless and immaterial space, brings in new issues along with a new set of values. Freedom of expression,

democracy, and freedom of information are not new as such, but their medium is. They question the role of copyright as a balance between the public good and market logic, and between cultural and economic incentives, and are mobilised by political actors.

That being said, this analysis confirms the strength of economic values in the European arena. Indeed, in the first part, we have seen that the fundamental opposition between market and culture values was eventually overcome by the creative economy framing. And, as such, the EU cultural policy constitutes a typical case where culture is embedded in market values. The development of digital technologies could have challenged this domination of the market set of values over culture. Indeed, in theory, both open access and culture sets of value condemn the pursuit of profit and commodification of the Internet for the first and the arts for the second. But this potential proximity between culture and open access sets of values on the issue of copyright is ultimately not translated into a policy solution defended by those who otherwise stress culture and open-access values. The debate eventually turns into one about more or fewer barriers to entry, where proponents of more barriers refer to market and culture values, while opponents point mostly to open access and market values. In the spirit of Rodrik's trilemma of the world economy (2008), in our case study, culture, open-access, and market sets of value seem to be working as an "impossible trinity": two can be combined but never all three together. Culture and open access sets of values share the promotion of non-profit creations; open access and market share the promotion of free access; culture and market share the promotion of the remuneration of the cultural value chain (see Figure 3.1). And in the EP's debates on copyright, the market set of value seems to be working as a common denominator, as free competition is compatible with free access and with the remuneration of the whole value chain.

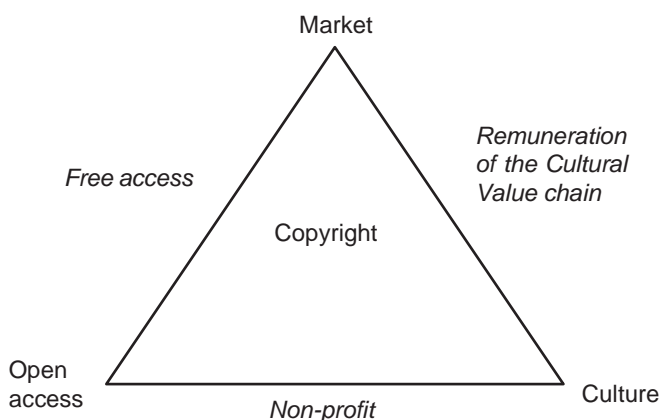


Figure 3.1 The trilemma of market, culture, and open access sets of values in the copyright regulation

The exponential development of digital-related policies at the EU level since the early 2010s, and the ongoing construction of the digital single market, invites us to investigate further this incorporation of an open access set of values to sustain or fight policy choices and its interaction with other sets of values, especially the market one. For instance, a similar analysis could be conducted on the debates related to personal data protection that led to the adoption of the General Data Protection Regulation in 2016, or on the development of a European artificial intelligence policy initiated in April 2018 by the European Commission with its communication “Artificial intelligence for Europe”.

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Notes

- 1 In the last stage of negotiations, a coalition of cultural actors launched a campaign based on the slogan “Yes to copyright” with a final press release entitled “Europe said yes to creation”.
- 2 Only national treasures serve as an exception and are strictly defined.
- 3 The introduction of a book’s single price is tolerated for national markets but not for books circulating from one national market to another. See CJEU Ruling, “*Fachverband der Buch- Und Medienwirtschaft against Libro Handelsgesellschaft MbH30*”, April 2009.
- 4 The two main developments affecting the cultural sector during this period are *Commission v. Republic of Italy* of 1968, where the CJEU explained that cultural property is an economic property like any other, and the adoption of several guidelines liberalising the film industry.
- 5 Former Article 235, which allows the EU to act in areas where it does not have assigned jurisdiction to achieve treaty objectives.
- 6 The likeliness to be in favour or against the directive is more correlated to the nationality of the MEPs than their political group. The EPP was the only one that managed to remain quite homogenous, approving the directive. For example, French MEPs massively voted in favour, whereas most Polish MEPs, including from the EPP, voted against.
- 7 They either directly mentioned “freedom of speech”, the threat of “censorship”, or the need for protection of “fundamental rights” (implying freedom of speech).
- 8 Article 15 creates a related right to copyright for press publishers: news services from digital platforms such as Google News will have to pay press publishers for the use of their publications.
- 9 Patrick Le Hyaric (GUE/NGL), Bogdan Burdon Wenda (EPP), and Silvia Costa (S&D) in her two interventions.
- 10 The occurrence of the word “value” in the lexical analysis doesn’t say much due to its polysemy. Indeed, it has largely been used to talk about “European values”, but also “value chain” or “shared value”.
- 11 Two from João Pimenta Lopes (GUE/NGL) and one from Catherine Sthiler (S&D), rapporteur for the IMCO Committee.
- 12 The acronym GAFAM is also used, with “M” representing Microsoft.

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