

## Chapter 17

# The Deontic Power of the Internet – Access Controls and the Obsolescence of Legal Norms

*Thomas Dreier*

### *I. What It's All About and what Consequences Does it Entail?*

By now, it is common knowledge that the Internet<sup>1</sup> is not a legal vacuum. If, despite this generally shared conviction, it is felt that law has no or only limited validity on the Internet, this feeling has less to do with a lack of Internet-related legal regulation. Rather, it relates to a lack of adequate or at least sufficient enforcement.

But this is not all that can be said about the relationship between digital technology and the law. Generally, technology not only extends the scope of action, but it also defines and sets limits to what can be done by using it. Of course, the freedom-enhancing and, simultaneously, freedom-limiting effect of technology is not limited to digital technology and the Internet. Already analogue tools, such as a hammer, enable certain uses (such as driving nails) and they do not allow other uses (such as pulling out screws). However, when it comes to accessing digital content via the Internet, the layer of legal rules which regulate what is permitted, is super-imposed by the second layer of technology. This layer determines the limits and the extent to which content – and therefore also images – can be viewed and used. Moreover, assuming that law and ethics are not necessarily congruent, ethical rules provide a third layer to the relationship between law and technology.

To avoid falling into an abstract discussion of the two or even, three layers of regulation, this chapter will begin with only two scenarios as examples.<sup>2</sup> The first example involves private copying of copyrighted works and the second relates to the freedom to make quotations and parodies of copyrighted material in view of filtering technologies used by content

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1 The term “Internet” is used in this chapter in a general manner, referring to both technical means of digital communication (such as LAN, WLAN etc.), and distribution tools (such as content sharing platforms, social media etc.).

2 Additional examples are discussed below, II.2.c.

sharing platforms. In both examples, the starting point is that copyright laws reserve, for authors and rightsholders, the exclusive right to make copies of works subject to copyright. However, to enable communication and benefit users, the reproduction right of authors and rightsholders is limited by several exceptions. Amongst these exceptions one finds the right to make private copies and the right to cite from copyrighted works or use copyrighted works for purposes of parody. The problem to be discussed in this chapter, evident in the first example, arises if technological copy protection prevents a user from making private copies as permitted by the law. In the second example, filtering technology used by content sharing platforms might prevent the upload of an otherwise legitimate citation or parody of copyrighted material.

It is submitted that technical access controls and technical configuration regulate how users can use content. It follows that to the extent code assumes the function of law, code replaces law as the traditional regulatory instrument. Already two decades ago, Harvard law professor Lawrence Lessig described the first effect by the catchword of “code as law”.<sup>3</sup> The second effect is what I term the deontic power of technology. In other words, whereas the law defines what we *may* do, technology defines what we *can* do. The sphere of what is allowed is overlaid by the sphere of what can be done. This entails several consequences.

First, the additional technical layer does not seem to pose a problem if the technology applied to provide and communicate content enables the users to access, consume and redistribute content to the extent permitted by law. Also, those who make use of the potentially access blocking technology may decide to grant the users greater access and use possibilities than the minimum allowed for by law. To cite just one example, a technical device might allow for the making of a greater number of private copies of copyrighted works than is permitted by copyright law. From a legal point of view this is perfectly acceptable if the permission to engage in such uses is granted by the rightsholder. The possibility to make use of copyrighted works becomes, however, problematic, if the technology enables uses, e.g., of copyrighted works for which the respective rightsholder has not given his or her consent, such as in the case of illegal file sharing, including the use and marketing of tools for illegal file sharing (e.g., BitTorrent software, but also online content-sharing service providers such as YouTube, to the extent that they allow the publicly making available of copyrighted material without the consent of the respective rightsholder).

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3 Lessig (1999).

This becomes a problem when legal regulation allows users to engage in acts which technology deliberately makes impossible to perform. In these cases, users are prevented from taking advantage of the freedom to act as granted by the law. In this respect, quite practically, the law loses its regulatory function which is replaced by technology. However, this reality is not only practical, but it also has theoretical consequences. As a norm presupposes the ability of the norm addressee to decide against the fulfilment of the command contained in the norm (after all, legal norms are only “ought”-norms),<sup>4</sup> technical limitations deplete the legal norm of its normative content. Moreover, the use of such technology results in a “technically configured self-execution” of the rules defined not by the legislator but by those who use the technology. Simultaneously, the decision-making power to define the limits of the freedom to act thus shifts from the public lawmaker to private providers of products and services.

This shift tends to occur outside the institutional framework of democratic decision-making, bypassing it. Thus, the use of digital access-regulating devices by those who offer digital products and services to users not only entails consequences within rather limited and specialized areas of law such as, e.g., copyright. Rather, it affects the very structure of the organization of public life within societies, threatens its democratic structures and leads to a shift in the power relation between State authorities and private players. It is this shift which brought Pamela Samuelson from Berkeley University to speak of “private legislation”<sup>5</sup> and other authors such as Yochai Benkler from the New York University of “private ordering”.<sup>6</sup>

The notion of private parties performing legislative tasks is problematic in the following two scenarios. Firstly, when the legislature allows private legislation – e.g., the application of technical protection measures to control access and prevent unauthorized copying of copyrighted material – on a voluntary basis. In addition, in such cases the legislature has flanked this way of private legislation with the legal means of copyright circumvention protection, which in turn tends to curtail the use freedoms the legislature had initially granted himself (Section II.). Secondly, it is problematic when the legislature expressly and obligatorily transfers the power to decide disputes about the legality or illegality of posts on social media – at least at a first stage – to private platform operators. Examples are Article 17 Para-

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4 Möllers (2015/2020); for the freedom to act in an illegal way see also Becker (2019).

5 Samuelson (2003).

6 Benkler (2000).

graph 9 of the DSM-Directive,<sup>7</sup> § 3 of the German “Netzwerkdurchsetzungsgesetz”,<sup>8</sup> and at times by order of the courts, which mandate platform operators to judge the legality or illegality of posts made by users on their respective platforms (Section III.).

## *II. Voluntary Application of Technical Measures Restricting Legal Freedoms Supported by Anti-Circumvention Legislation*

### *1. From public goods to technical protection measures*

The question becomes how did the law react to this discrepancy between what is permitted by law and what is technologically possible? What mechanisms has the legislature created to eliminate, or at least counter this discrepancy?

Examining the area of copyright – an area where this discrepancy plays a role in the case of communication via images – one must step back in time and briefly recall why exclusive copyright protection exists in the first place. From a European-centred author’s rights point of view, copyright is designed with the aim of recognizing creative works as emanations from their authors and protects the author’s financial interest in the proceeds generated by the exploitation of their works. Conversely, Anglo-American copyright law focuses almost exclusively on the economic aspect of providing incentives to authors and publishers for investment in creative works.<sup>9</sup> Hence, from an economic point of view, intellectual property law is the answer to what has been called the “tragedy of the commons”, i.e., to the undesirable results of inefficient under-investment in and over-consumption of the scarce resource of intellectual creations.<sup>10</sup> By creating an artificial, legal exclusivity, intellectual property rights turn the public good of intellectual creations into a commercially tradeable object.

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7 Directive (EU) 2019/790 of the European Parliament and of the Council 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ EU L 130 of 17 May 2019, 92 et seq.).

8 Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz, NetzDG) of 1 September 2017 (German OJ BGBl I 3352), as last modified by article 1 of the law of 3 June 2021 (BGBl. I p. 1436).

9 For a more detailed comparison see, e.g., Baldwin (2014); Strowel (1993).

10 See only the fundamental works by Hardin/Baden (eds) (1977); Ostrom (1990).

The problem described above that digital and networking technologies create for the exclusive intellectual property rights' system results from the ease of copying copyrighted material at marginal cost without loss of quality, as well as from the possibility of unlimited communication via the Internet. These effects which are a direct consequence of digital and networking technologies undermine the participation of authors in the proceeds which result from the use value of their intellectual creations as well as the return of the publishers' investment. When copyrighted content in digitized form was still distributed using a material carrier, the problem was that such acts of unpaid copying undertaken by users was beyond the rightsholders' control of the content copied. This eroded the rightsholder's revenue-stream which no longer corresponded to the aggregate use value users derive from using the copyrighted subject matter.

Hence, the idea was formulated to use technology to prevent this outcome unwanted by the rightsholders, or, as Charles Clark, then advisor to the UK publishers' association, once formulated: "The answer to the machine is in the machine".<sup>11</sup> According to this strategy, the legal exclusivity disturbed by digital and networking technology should be re-established by protecting the otherwise defenceless copyrighted intellectual creations through the application of technological protection measures (TPMs). Typically, TPMs block access to copyrighted material or regulate use intensities such as, e.g., copy protection attached to a musical CD, which does not dis-enable the possibility to listen to the music, but dis-enables the possibility to make copies.

However, from the rightsholders' perspective, the problem remained unresolved. Although TPMs might prove successful in practice, at least in theory they could almost always be circumvented. Moreover, once a circumventing tool is designed it can easily be distributed via the Internet, thus undermining the very protection the application of a TPM was supposed to provide. It comes therefore not as a surprise that the legislature succumbed to the pressure of rightsholders, adding yet another layer of protection by way of a legal anti-circumvention protection. This legislation, first introduced by two international Treaties adopted as early as 1996 on a global level in a top-down approach,<sup>12</sup> deems the "manufacture,

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11 Clark (1996).

12 Article 11 of the WIPO Copyright Treaty (WCT) and Article 18 of the WIPO Performances and Phonograms Treaty (WPPT). For the justification of anti-circumvention protection in the field of copyright, see, in particular, Marks/Turnbull (1999); Gasser (2006). – The international rules were followed, on the level of the EU, by Article 6 of the InfoSoc-Directive 2001/29/EC (Directive 2001/29/EC of the

import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures” as illegal according to EU law.<sup>13</sup>

## 2. *Technical protection measures and copyright exceptions and limitations*

However, generally, TPMs are rather “stupid”. Implemented like any other piece of software by means of informatics, TPMs work based on zeros and ones. They only “know” “black” and “white”, “current” and “no current”, and their output reads either “pass” or “block”, i.e., “do not pass”. It follows that as long as TPMs are not able to arrive at a decision on the semantic level of information,<sup>14</sup> they are unable to recognise on a discrete yes/no-basis. This is particularly troubling when deciding whether a portion of the text or image copied is used as an illegal reproduction or as a legal citation, satire, parody or pastiche.<sup>15</sup> In other words, as long as TPMs are not “smart” enough to make decisions on the basis of a semantic understanding of both the content they judge and the context in which the content in questions is used in a given case, TPMs inevitably tend to block uses of copyrighted content which are perfectly legal.

The question becomes how did the legislature, the courts and legal literature react to this problem of technological over-protection?

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European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ EU L 167 of 22 June 2001, 10 et seq.), which was subsequently implemented into EU Member States’ national copyright laws. – An earlier rudimentary anti-circumvention protection regulation was at the European level already contained in Article 7 (1) (c) of the Computer Program Directive (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ EU L 122 of 17 May 1991, 42 et seq.).

13 Art. 6 (2) of the InfoSoc-Directive 2001/29/EC.

14 For the distinction between the structural, syntactic and semantic layers see Raue (2022).

15 For these exceptions to the exclusive reproduction and public communication rights of copyright see Art. 5 (3) (d) and (k) of the InfoSoc-Directive 2001/29/EC.

a) *Legislative solutions*

When adopting the InfoSoc-Directive in 2001,<sup>16</sup> the legislature was aware of the discrepancy between the legal freedom to act and the freedom to act allowed by technology. As a result, it was stated in Art. 6 (4) (1) of the InfoSoc-Directive that rightsholders should make available to users whose use of copyrighted material is covered by a copyright exception “the means of benefiting from that exception ... , to the extent necessary to benefit from that exception”. Although this legal provision seems to arrange for the primacy of law over technology, it does have several limitations.

Firstly, it only applies when the user has legal access to the protected work in question.

Secondly, and more importantly however, it does not apply to all, but only to a limited number of existing copyright exceptions. These exceptions concern (1) paper reproductions, (2) non-commercial reproductions made by publicly accessible libraries, educational establishments or museums as well as by archives, (3) certain ephemeral recordings of works made by broadcasting organisations, (4) reproductions of broadcasts made by social institutions pursuing non-commercial purposes, as well as reproductions and public communications (5) for the purpose of illustration for teaching or scientific research, (6) for persons with a disability as well as (7) for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.<sup>17</sup> To apply the preference of the law over technology likewise to the exception allowing private copying is, however, optional.<sup>18</sup> It is interesting to note that in the InfoSoc-Directive, neither the exception allowing for quotations nor the one for the purpose of caricature, parody, or pastiche are listed as receiving such preferential treatment. This may sound more disquieting than it actually is, since in practice, beneficiaries of these latter exceptions can make use of protected works at least in those cases in which they have legitimate access to the works quoted, criticized or humourized via parody and satire.

Thirdly, it seems to be generally accepted in EU Member States that the legal provision cited does not establish a right to self-help of the user. Rather, rightsholders are only obliged to provide the necessary means to

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16 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ EU L 167, 10 et seq. of 22 June 2001.

17 Article 5(2)(a), (c), (d), (e), (3)(a), (b) and (e) of the InfoSoc-Directive.

18 Article 5(2)(b) of the InfoSoc-Directive.

the beneficiaries of the exceptions listed.<sup>19</sup> Most importantly, however, according to Art. 6 (4) (4) of the InfoSoc-Directive, the rules just described do not apply in an online environment. In other words, if a rightholder and a user are directly linked with each other via the Internet, the rightholder is legally allowed to block the use covered by any statutory exception by way of technological means. It appears that this provision was motivated by the – neo-liberal – consideration that once two parties are in direct contact, they can freely negotiate and mutually agree upon the terms and conditions of their transaction.

However, despite the criticism which Article 6 (4) (4) of the InfoSoc-Directive attracted,<sup>20</sup> recently the pendulum appears to have slightly swung back. Firstly, when enacting the DSM-Directive,<sup>21</sup> Art. 6 (4) (4) of the InfoSoc-Directive was declared inapplicable to the new exceptions contained in the DSM-Directive for text and data mining, cross-border online teaching and reproductions made for the preservation of cultural heritage.<sup>22</sup> Secondly, the EU legislature recognized the importance of the exceptions for quotation, criticism, review as well as for uses for the purpose of caricature, parody or pastiche, especially in the online environment of content-sharing platforms used as social media. These exceptions, which were not included in the list of exceptions that may trump TPMs in the InfoSoc-Directive, have now been strengthened at least vis-à-vis technical filtering systems used by online content-sharing platforms so that they ultimately prevail over any technical blocking.<sup>23</sup> Even if details are left to the stage of national implementation and negotiations between rightholders and operators of content-sharing platforms, this new regulation is definitively a step forward.

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19 See also recitals 51 and 52 of the InfoSoc-Directive, and for an overview of the situation in several Member States von Lewinski (2010) para. 11.6.13.

20 See, e.g., Dusollier (2003); Koelman (2000); Koelman/Helberger (2000).

21 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ EU L 130 of 17 May 2019, 92 et seq.

22 Articles 7 (2) sentence 2 and 3 to 6 of the DSM-Directive.

23 Article 17 (7) of the DSM-Directive.

## b) Reactions of the courts

In the beginning, the courts dealt less with the scope of legal anti-circumvention protection, but rather with to what extent the scope of the exclusive right of making copyrighted works publicly available via the Internet depended on the application of TPMs. In this regard, initially the Courts did not seem very sensitized to the problem of technology overriding legal freedoms. On several occasions, when holding that certain acts committed on the Internet were copyright-free, the courts in their decisions added that this applies as long as there are no TPMs in place.<sup>24</sup> By way of *argumentum e contrario*, already such formulations suggested the inverse conclusion that the very same acts with regard to technologically protected copyrighted material are as such subject to copyright, and this in addition to the infringement of the legal prohibition of circumventing TPMs.

Indeed, in the meantime – in which the CJEU declared both the acts of hyperlinking and framing/embedding falling outside of the public communication right in case no TPMs are applied,<sup>25</sup> encompassing framing of works that are protected by copyright which were made, with the authorisation of the copyright holder, freely accessible to the public on another website – the CJEU<sup>26</sup> concluded that the author’s exclusive public communication right is infringed by embedding in cases in which “that embedding circumvents measures adopted or imposed by that copyright holder to provide protection from framing”. Already before, some national courts of the EU Member States had arrived at similar conclusions.<sup>27</sup>

24 See only, e.g., for the case of simple hyperlinking CJEU, case C-466/12 of 13 February 2014, para. 26, ECLI:EU:C:2014:76 – Svensson (the copyrighted material linked to “was not subject to any restrictive measures”); similarly the German Federal Supreme Court (Bundesgerichtshof, BGH), case I ZR 259/00 of 17 July 2003, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2003, 959 (961) – Paperboy (“Ein Berechtigter, der ein urheberrechtlich geschütztes Werk ohne technische Schutzmaßnahmen im Internet öffentlich zugänglich macht”).

25 CJEU, case C-466/12 of 13 February 2014, ECLI:EU:C:2014:76 – Svensson (hyperlinking); case C-348/13 of 21 October 2014, ECLI:EU:C:2014:2315 – BestWater International (embedding). For the boundaries between copyright-relevant and not copyright-relevant linking to copyrighted content which was illegally posted, see CJEU case C-160/15 of 8 September 2016, ECLI:EU:C:2016:644 – GS Media.

26 CJEU case C-392/19 of 9 March 2021, ECLI:EU:C:2021:181 – VG Bild-Kunst.

27 See, e.g., for Germany BGH, case I ZR 39/08 of 29 April 2010, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2011, 56 – Session-ID. – Similarly in Germany also BGH, case I ZR 178/08 of 11 February 2010, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2010, 822 (824) – Half-Life 2 (concluding that legal exhaustion of the distribution right was excluded in the case of a computer

However, regarding the potentially overreaching effect of TPMs, the CJEU seems to follow a somewhat less strict line. At least in one case, the CJEU required that legal protection against anti-circumvention requires that “other measures ... which ... could cause less interference with the activities of third parties or limitations to those activities, while still providing comparable protection of the rightsholder’s rights” are not available.<sup>28</sup> This decision subjects legal anti-circumventing legislation to the principle of proportionality.<sup>29</sup> Hence, in order to define in practice, which TPMs are protected against circumvention, a complex balancing of many factors such as “inter alia, of the relative costs of different types of technological measures, of technological and practical aspects of their implementation, and of a comparison of the effectiveness of those different types of technological measures as regards the protection of the rightsholder’s rights, that effectiveness however not having to be absolute” must be taken into account. Additionally, “the purpose of devices, products or components, which are capable of circumventing those technological measures” must also be examined.

In that regard, “the evidence of use which third parties actually make of them will, in the light of the circumstances at issue” be particularly relevant. And in particular, it should be examined “how often those devices, products or components are in fact used in disregard of copyright and how often they are used for purposes which do not infringe copyright.”<sup>30</sup> It is needless to state, on the one hand, that this balancing undertaken by the CJEU leaves a relatively large margin of discretion to the national courts of the Member States. On the other hand, by focusing solely on the configuration and use of TPMs and their primary use for copyright protection, the CJEU does not even address the core issue discussed in this chapter. Of course, firstly, the problem of a possible overreaching and over blocking was at best indirectly at issue in the case referred to the CJEU. Secondly, it can be said that in line with the separation of powers the CJEU respects

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game which was protected by a technical program key); it is, however, at least questionable whether this holding can still be upheld after the decision of the CJEU in case C-128/11 of 3 July 2012, ECLI:EU:C:2012:407 – *UsedSoft*.

28 CJEU, case C-355/12 of 23 January 2014, ECLI:EU:C:2014:25, paras. 29 et seq. – *Nintendo*.

29 Article 6 (2) of the *InfoSoc-Directive* 2001/29/EC, as interpreted in the light of its Recital 48, which states that in order to enjoy anti-circumvention protection, TPMs “should not ... have a commercially significant purpose or use other than to circumvent the technical protection”; CJEU, case C-355/12 of 23 January 2014, ECLI:EU:C:2014:25, para. 30 – *Nintendo*.

30 *Ibid.*, para. 38.

the decision of the EU legislature which, with the InfoSoc-Directive has opted for strong and far-reaching copyright protection.<sup>31</sup>

*c) Additional issues described in legal literature*

It shall only briefly be mentioned here that the problem of technological configurations blocking actions by users which are as such permitted by law, is not limited to the limitations of copyright and access and/or reproduction-controlling TPMs. In legal literature, several other situations have been identified in which the same problem arises.<sup>32</sup>

One such constellation concerns the question whether the principle of EU-wide exhaustion of the national distribution rights can be eliminated by technical dispositives.<sup>33</sup> According to the principle of EU-wide exhaustion,<sup>34</sup> once an object protected by an intellectual property right has been put on the market by the rightsholder or with his or her consent, this object can freely circulate within the Single Market, without being hindered by national distribution rights. This principle was established by the ECJ at an early stage of the European integration process with the aim of preventing the principle of free movement of goods from being undermined by the exercise of nationally split distribution rights.<sup>35</sup> With the advent of technology, however, it became possible to resort to market segmentation within the EU both for digital goods and services. The resulting question is whether it is legally permissible, under EU law, to separate national markets within the EU by way of technology in cases in which EU law forbids market segmentation.<sup>36</sup>

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31 See Recital 9 of the InfoSoc-Directive (“Any harmonisation of copyright and related rights must take as a basis a high level of protection”. – For criticism, favouring a balanced approach of legitimate protection interests and freedom of expression see, e.g., Dreier (2016); Geiger (2021).

32 For both an overview and extensive discussion see Specht (2019).

33 Other cases are the factual extension of statutory terms of IP protection, the de facto reservation of legal prerogatives not provided by law, and territorial limitations of use possibilities; see Specht (2019), pp. 353 et seq.

34 In the US, the principle of exhaustion is discussed under the name of “first sale doctrine” (17 U.S.C. § 109(a)).

35 ECJ, case 78/70 of 8 January 1971, ECLI:EU:C:1971:59 – Deutsche Grammophon.

36 It should be noted, however, that so far, in view of the absence of an obligation to deliver goods and services in all of the EU-Member States, such prohibitions exist above all, if not exclusively, in intellectual property law.

In this respect, the so-called Portability Regulation<sup>37</sup> sticks out. This Regulation requires providers of an online content service provided against payment of money to enable subscribers who are “temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence”.<sup>38</sup> The example of the Portability Regulation is interesting for two reasons. On the one hand, it prohibits technical configurations on a strictly territorial basis which would block access of legitimate users to the service once they are temporarily abroad. And in imposing this duty on the providers of online-musical services, the EU legislature is not concerned with how providers would comply with this legal obligation. On the other hand, by limiting this duty of providing access to national users who are temporarily abroad, the EU legislature accepts the general validity of the principle of territoriality and the otherwise unhindered freedom of online-music providers to restrict access to their service on a territorial basis. Of course, it might be argued that providing online-music is in essence a service to which the principle of exhaustion – which is generally limited to the resale of physical copyrighted objects but doesn’t extend to public communications – doesn’t apply.<sup>39</sup> Also, economic concerns point to the direction of keeping the internal market territorially segmented, since deciding otherwise might eventually prevent the emergence of music services. However, the problem of tension between mandatory effects of exhaustion on the one

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37 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ EU L 168, 1 et seq. of 30 June 2017.

38 *Ibid.*, Article 3 (1).

39 This is explicitly stated in Article 4 (2) as further interpreted by Recital 29 of the InfoSoc-Directive. – It should be noted, however, that when the ECJ, in case 62/79 of 18 March 1980, ECLI:EU:C:1980:84 – *Coditel v. Ciné Vog* firstly made the distinction between the distribution of physical goods (exhaustion) and the public communication of protected works in immaterial form (no exhaustion), it didn’t argue on the basis of strict principles, but, but rather examined whether rightsholders have obtained, when authorizing the first public communication of their works also for subsequent acts of public communication such as a cable retransmission of an initial over the air-tv program signal. Secondly, in its *Used-Soft*-decision, case C-128/11 of 3 July 2012, ECLI:EU:C:2012:407, the CJEU has adopted a different approach at least for the exhaustion of computer programmes which were transmitted online to both the first and the second acquirer. However, in its subsequent *Tom Kabinet*-Decision, case C-263/18 of 19 December 2019, ECLI:EU:C:2019:1111, the CJEU refuted this approach for works covered by the InfoSoc-Directive.

hand, and the hindrance of these effects by way of technology remains worth being discussed.

Another major area where legal freedoms can be eliminated by technology is technologically implemented end-user license agreements (EULAs). Generally, in countries, such as Germany, that provide for court control of unfair standard terms and conditions,<sup>40</sup> certain conditions can be declared null and void, thus losing their binding force. In other words, the end-user who is not bound by such illegal clauses, can access and use the content by disregarding the non-binding restrictions. The situation, of course, differs when the restrictive conditions are technologically implemented. A user wanting to use digital content has no choice but to agree to the pre-formulated and non-negotiated terms and conditions. If the user does not agree, he or she cannot access the content in question at all. This is a typical “love it or leave it”-situation, which severely limits the end-users’ room for action. Of course, the user might give his or her consent and, after being granted access, use the content disregarding any illegal standard term which limits his or her freedom to make use of the digital content. However, even this leeway may easily be blocked by the person offering the service. All that is necessary is to implement the restrictive clauses not merely in writing, but through self-executing technology which makes it impossible to use the product or service in a way that disregards the otherwise illegal standard use terms.

### 3. *Some thoughts for discussion*

#### a) *Is there really a problem?*

However, when making an ethical judgment about such technical configurations that overstep, restrict, or even eliminate legally guaranteed freedoms to act, some additional thoughts must be considered.

To begin with, it should be recalled that every technology has in-built restrictions on the freedom to act. While enabling certain actions, technological devices never enable all of them. Therefore, already by definition, when using a particular technical device or technology, users are unable to perform certain acts one might think of. In ethical terms, it follows that non-enabling features of technology and technological devices cannot as such be considered as being ethically objectionable. On a psychological

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40 Sections 305 et seq. of the German Civil Code (Bürgerliches Gesetzbuch, BGB).

level, users are well aware of this phenomenon. In the analogue environment, it is clear to users that not obtaining the full potential of a given technology is justified when it would require additional investment from the person offering the technology. In the digital environment, however, artificial use restrictions are less well received by users, since offering the full technological potential often does not require additional investment. Quite to the contrary, it is the technology which restricts *per se* existing possibilities of use which calls for additional investment on the part of those who offer such use-restricted digital devices or services. It follows that an ethical problem is evident when a given technology or technical device might enable its users to a greater extent, if it were not for its technological use-restricting features which have been built in by its designer. In such cases, the artificially built-in limitation of otherwise technically possible uses appears to need justification.

Before examining such possible justifications,<sup>41</sup> one might ask why not simply let the free will of the users – and by their aggregate the market – decide? Indeed, one might argue that no ethical problem exists with in-built technological restrictions if the consumers are content with them, do not feel unduly burdened and do not complain. After all, technical use restrictions notwithstanding, users may view and experience such devices as enlarging – rather than as restricting – their freedom to act. If this were not so, the long queues in front of branded IT stores could not be explained, whenever a new device containing certain deliberately in-built technical restrictions is put to the market. Moreover, as Lawrence Lessig has pointed out, whether a user considers a particular technical device as enhancing or restricting his or her freedom to act, depends on the point of reference. For children, e.g., a smartphone is a tremendous enlargement of their possibilities to communicate, whereas for adults, who were already used to portable telephones, any possible advantages of a smartphone might be offset by perceived disadvantages because of a lack of expected data and privacy protection.

Similarly, regarding the intervention of the law, it can be argued that legal regulation is not an end in and of itself, but rather a means to guarantee citizens' freedom to choose. From this perspective, whenever users are content with the restrictions of a particular technical device, a legal norm that prohibits such restrictions would be difficult to legitimize. Of course, the situation is different when the consumer is happy with a particular technical device and the price paid because he or she hasn't been properly

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41 See below, II.3.b.

informed about the scope and effects of the built-in technical restrictions. Since withholding the information affects the basis for the formation of the user's free will, what has been said above therefore only holds true if users are sufficiently informed about the technical restrictions in place. Hence, legitimizing built-in technological use restrictions therefore presupposes that the user will be duly informed about such restrictions. In legal – and most likely also in ethical – terms, this points into the direction of adopting obligations to make the restrictions transparent, rather than to ban them completely. In addition, even if users are sufficiently informed in order to form a free will of their own, they can only exercise their free will if they have a real choice. However, there is no such possibility to choose in cases where the technical configuration only allows for the binary decision of obtaining “access” or “not obtaining access”. To be more precise, in such cases the freedom to choose is affected to the extent that other competing offers of goods and services are not available, which provide for less restrictive – or at least different – technical restrictions. The latter is, of course, questionable in view of the present oligopolistic situations regarding the “big five”.<sup>42</sup>

At any rate, it becomes clear that an ethical – and legal – judgement of whether built-in technological restrictions should be banned at all, the extent they should be banned, if a transparency obligation is required, or whether anti-monopolistic measures should be taken can only be made on a case-to-case basis.

### *b) Advantages of technological restrictions*

Apart from the possible in-built technological restriction justifications based on the individual user's free will, her or his personal choices on the micro level and the market as arbiter discussed above,<sup>43</sup> there are also justifications on the macro level of the economy at large.

According to economists, technical configurations which artificially restrict use possibilities of a technical device allow for what is called product and service diversification together with price differentiation. What is meant by these terms is that by applying technological devices which regulate access and use possibilities of a given content, one and the same

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42 “Big Five”, or GAFAM, relates to Google (Alphabet), Amazon, Facebook (Meta), Apple and Microsoft.

43 See above, II.3.a.

content can be offered to consumers in various forms, each allowing for different use possibilities. In addition, these different use possibilities could then be offered by way of price differentiation, i.e., by asking a different price for each of them. An example might be movies which can be sold in the form of DVDs without or with copy protection, in the form of streaming which can be recorded or only be viewed once. Each of these different versions of one and the same movie can be offered on the market for a different price.

In general economic terms, product diversification and price differentiation are said to make sense – and hence, could be said to be ethically justified. This is because the availability of cheaper versions allows for more consumers to view the content made available (in the example cited the movie), thus leading to a better consumer supply. At the same time, over-payments by those consumers who only intend to make restricted use of the content offered are avoided. Further, as more users will pay for cheaper – albeit use-restricted – versions, producers can better skim the users' overall willingness to pay and hence, increase their income. In sum, from the point of view of an overall welfare analysis, this is what economists call a “win-win situation”. If this analysis proves to be true,<sup>44</sup> then it is evident that leverage on the part of users must be excluded. In other words, it must be guaranteed that users do not buy a cheap use-restricted version and then remove the restriction to obtain greater use-possibilities than they paid for. In view of this, legal anti-circumvention protection would seem to be justified as well, as the essential building block of such an environment of optimal distribution of digital content.

It is, of course, another matter to then justify any overshooting tendency of the TPMs used to achieve the desired product differentiation. In this regard, a proper balance will have to be found between the actual and consequential costs of tailormade technical solutions on the one hand, and the desire to retain the possibility to undertake acts permitted by law on the other hand, especially if these acts contribute to the freedom of information and the freedom of speech. In this regard, a balancing which only would look at dollars and cents would be inappropriate, considering that the two freedoms just mentioned are the most fundamental values in democratic systems.<sup>45</sup>

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44 For a critical account of anti-circumvention protection applied to music which can be shared via peer-to-peer filesharing networks, see, however, Benkler (2000).

45 For further general discussion of those fundamental freedoms see, e.g., Eichenhofer (2022) and Geiger (2022).

### III. Mandatory Decision-Making Power by Private Parties

#### 1. Case scenarios

It is one thing that the legislature leaves it to the *discretion* of private parties to decide whether they want to affix technological access-restricting devices to their digital technological products and services, and if they do so, to provide legal anti-circumvention protection. However, it is yet another thing if the legislature itself *mandates* private parties, i.e., platform providers, to decide the legality of content posted which leads to blocking or even deletion of the content that is considered, by the platform operators, as illegal. The latter scenarios are found both on the European and – depending on the individual states’ laws – national level. Only three such scenarios shall be briefly presented here to illustrate the ethical and legal problems that are linked to them.

At the European level, Article 17 (7) (1) of the DSM-Directive<sup>46</sup> obliges EU Member states to provide legislation which imposes the burden on content-sharing service providers to ensure “the availability of works or other subject matter uploaded by users, which does not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation”. This particularly applies to the now EU-wide mandatory exceptions concerning “quotation, criticism, review” and “use for the purpose of caricature, parody or pastiche” (Article 17 (7) (2) (a) and (b) of the DSM-Directive). According to this mechanism, content-sharing service providers will decide whether an individual upload of third parties’ copyrighted content by a platform user is covered by a copyright exception or not. In addition, Article 17 (4) obliges online content-sharing platform providers to ensure that users do not post copyrighted material for which no consent has been given by the rightsholder. In case of an unauthorised posting, the platform provider is burdened with the duty to pay damages to the respective rightsholder, unless he or she can demonstrate that he or she has “(a) made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove

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46 See footnote 22.

from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).” In other words, platform providers are obligated to decide themselves whether a posting by one of its users occurs with or without the consent of the rightsholder’s consent.

At the national level, a similar scenario arises whenever national legislation provides for a ban on certain speech acts, such as incitations to hate or even war, denial of the holocaust, etc.,<sup>47</sup> and, at the same time, obliges the providers of platforms on which users can post comments to delete, or block access to, illegal postings.<sup>48</sup> Here too, the legislature has mandated the platform operators to make a first judgement regarding the legality or illegality of the postings before the issue is eventually forwarded to a reviewing body and, in the event of a continuing dispute, decided by the courts.

Finally, also at the national level, a similarly structured scenario is to be found when the platform operator, rather than being obliged to remove certain speech acts which are explicitly forbidden by law, is called upon to delete or block access to posts made by one user which the person targeted by the comment considers the post in question as offensive and insulting, if not as outright libellous and slanderous. In Germany, e.g., such a duty of platform providers to become active once they receive a complaint by an allegedly aggrieved party, has been developed by the courts with the aim of providing effective protection to personality rights’ infringements.<sup>49</sup>

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47 In Germany, such restrictions are indeed quite numerous, see sections 86, 86a, 89a, 91, 100a, 111, 126, 129–129b, 130, 131, 140, 166, 184b, 185–187, 201a, 241 and 269 of the German penal Code (Strafgesetzbuch, StGB).

48 See, e.g., the German law on the enforcement of rights in social networks (Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken; Netzwerkdurchsetzungsgesetz, NetzDG) of 1 September 2017 (BGBl. I p. 3352), last amended by Article 1 of the law of 3 June 2021 (BGBl. I p. 1436). The law imposes a duty on platform operators to delete or block access to “obviously illegal” content within 24 hours, and other illegal content within 7 days after a complaint has been filed.

49 For the duty to remove or delete upon fulfilment of the corresponding duties to examine the posts, and the procedure of giving each of the two parties concerned the possibility to be sufficiently heard, see, e.g., BGH VI ZR 93/10 of 25 October 2011, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2012, 311 – Blog-Eintrag, and VI ZR 34/15 of 1 March 2016, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2016, 855 – www.jameda.de.

## 2. Structural issues

In all three scenarios mentioned, the issue discussed in this chapter of technology not permitting (speech) acts which otherwise are permitted by law,<sup>50</sup> is a direct consequence of the sheer number of uploads.

Traditionally, in the analogue world, the number of actionable infringements remained by and large manageable.<sup>51</sup> In the digital world of platforms, however, individual control of each single out of the millions of posting is clearly no longer possible. Moreover, digital technology allows for a far wider and quicker spreading of illegal postings than in the analogue world. Hence, leaving illegal postings accessible until redress by the courts – even if only by way of interim relief – has been obtained, is likewise no longer an option. Rather, immediate action is required, if the harm resulting from illegal postings is to be limited to a tolerable extent.

Inevitably, this finding entails two consequences. Firstly, it leads to the legal involvement of intermediaries, i.e., in the cases discussed here, the providers of content-sharing platforms and platforms where opinions can be posted by individual users. It is these platform providers who are entrusted by the lawmaker with a first-sight control since they are the only actors able to speedily enforce the law by way of blocking access to – if not even outrightly deleting – illegal postings. Secondly, even if automated filtering-technology is nowhere mentioned in the DSM-Directive,<sup>52</sup> there is almost general agreement that the mass of uploads can only be effectively controlled by rather elaborate upload-filters.<sup>53</sup> However, with filtering inevitably comes the danger – if ineffective under-blocking is to be avoided – of over-blocking, i.e., the blocking of so-called false positives. In the area of copyright, the task of the platform providers is not made any easier by the fact that due to the need to safeguard users' human rights as per the Charter of Human Rights of the EU, Article 17 (8) of the DSM-Directive

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50 For private legislation under the German NetzDG Tschorr (2021).

51 Of course, even in the analogue world, certain mass transactions required some bundling of individual means of legal redress, such as, e.g., the control of commonly used standard terms and conditions by way of judicial test cases and forms of collective or class actions, which shall, however, not be discussed here in detail.

52 Article 17 (4) (b) of the DSM-Directive only speaks of “best efforts to ensure the unavailability of specific works and other subject matter”, and only mandates platform providers “in accordance with high industry standards of professional diligence”.

53 This is notwithstanding the somewhat sybilline statement by the German Government to the contrary; see German Government (2019), para. 4 (“Upload filters should be prevented if possible”).

explicitly prohibits – in line with prior CJEU decisions<sup>54</sup> – that monitoring for unlawfully uploaded content on a content-sharing platform by the platform provider results in a “general monitoring obligation”.

Therefore, in all three scenarios discussed, platform providers are intermediaries legally responsible to first decide the legality or illegality of content posted. The question is how the number of false positives can be minimized. It should be noted that it is not always easy to judge whether a given speech act is illegal or whether it can be said to be legal. The reason simply is that on the one hand, the semantic meaning of speech acts is to a large degree context dependent. On the other hand, the courts have developed an elaborate system of balancing a variety of different criteria, which cannot be easily replicated by filters, nor by the hundreds of platform provider employees whose task it is to minimize the number of false positives after the stage of filtering.

But even if the law provides for complaint procedures,<sup>55</sup> asymmetries exist between the default setting of blocking and non-blocking on the one hand, and the number of complaints filed against false positives and false negatives by the parties concerned. If “blocking” is the default setting of the filtering systems used, there will be a tendency of over blocking and hence an infringement of the fundamental right of free speech, since most of those whose posts have been *blocked* will not complain. However, choosing “not-blocking” by the platform provider as the default setting will invariably lead to under blocking, since many of those who consider themselves *infringed* by the postings, will not complain.<sup>56</sup> This, however, results in an increased number of infringements of personality rights or copyrights. In addition, if platform providers are threatened by the possibility of paying damages in the event of an incorrect judgement,<sup>57</sup> this

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54 See CJEU Cases C-70/10, Slg. 2011, I-11959 – Scarlet Extended; C-360/10, ECLI:EU:C:2012:85 – SABAM; and again C-314/12, ECLI:EU:C:2014:192 – UPC Telekabel Wien. – Whether Article 17 of the DSM-Directive complies with these requirements is the subject of the proceedings before the CJEU in case C-401/19 – Poland./Parliament and Council. Answering this question negatively, e.g., Spindler (2019) and Reda/Selinger/Servatius (2020), whereas Specht-Riemenschneider (2020) arrives at a positive conclusion under the condition that certain safeguards in favour of freedom of expression are provided for.

55 See, e.g., Article 17 (9) of the DSM-Directive; Section 3 of the German NetzDG; and the decisions by the German BGH (footnote 51).

56 For the German NetzDG see the empirical findings by Liesching (2021).

57 For a detailed analysis of the multiple duties of online content-sharing platform providers see, e.g., Conrad/Nolte (2021).

is an incentive for platform providers to block more rather than less and hence to exercise some form of censorship.<sup>58</sup>

And, finally, the problem with private legislation enabled by entrusting providers with decision-making powers is that the providers' own private preferences decide what can be said and/or found on the Internet. Thus, on the Internet, these private preferences at least partially replace, and in some cases threaten to undermine the legal rules and the values underlying the fundamental rights guarantee of freedom of expression. In other words, in many cases the platform's community standards decide the limits of freedom of expression and no longer the legislator or, within the framework of fundamental rights control, the courts.

### 3. *Ethical considerations*

From an ethical point of view, one might, of course, argue in all three cases that the legislature should not mandate private platform providers neither with such potentially far-reaching powers to formulate binding rules nor with the authority to make final decisions in individual cases in the first place. However, as has been described above, due to the incredibly large number of conflicts enabled by digital communication technology between freedom of expression on the one hand and personality as well as copyrights on the other hand, such a solution is no more a viable option than banning digital platforms altogether. Quite to the contrary, the state legislator must ensure that the fundamental freedoms of its citizens are protected and balanced in a way which limits the individual fundamental freedoms as little as possible. Thus, the state most likely has a duty to involve private platform providers in the prevention of infringements and the enforcement of its citizens' fundamental rights.

Hence, to reconcile automated mass examination of huge amounts of images with a legal assessment in each individual case in an ethically founded way, the task of the legislature must – and can only – be to strike a proper, albeit delicate, balance between restrictions on the right of free speech on the one hand, and copyrights and personality rights on the other hand. Moreover, since part of this task is delegated to internet platform providers, their rights must be safeguarded as well.

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<sup>58</sup> For detailed reasoning see Ortland (2022).

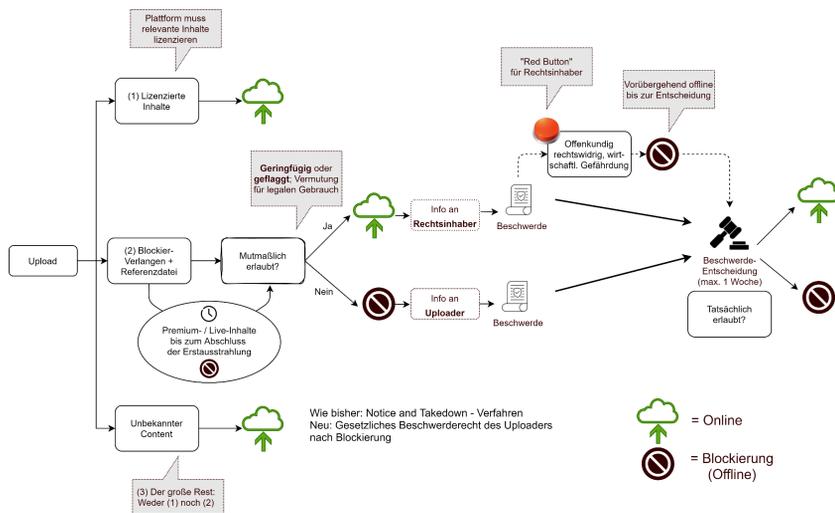


Fig. 1: German Ministry of Justice: Flowchart of uploading, checking, blocking, and allowing of third party copyrighted content to be posted by the users of content-sharing platforms, implementing Art. 17 of the DSM-Directive<sup>59</sup>

There are several options available to the legislature to accomplish this task. First, the legislator can exert influence by fine-tuning the content and scope of the control obligations imposed on platform operators. Another possibility is to create a carefully differentiated and balanced mechanism of posting, objection, removal, objection and renewed posting or final blocking, an example of which has been proposed by the German Ministry of Justice and Consumer Protection in the wake of the implementation of Article 17 of the DSM Directive (Fig. 1). A complimentary tool is to design efficient and fast-working complaint mechanisms and to ensure that remaining disputes are resolved without undue delay by the courts, and eventually under state control.<sup>60</sup> Of course, just decisions in individual cases are only possible at the cost of the complexity of the relevant procedures. However, this phenomenon is neither a new one, nor is it

59 [https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE\\_Gesetz\\_Anpassung\\_Urheberrecht\\_digitaler\\_Binnenmarkt\\_FAQ.pdf?\\_\\_blob=publicationFile&cv=4](https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Gesetz_Anpassung_Urheberrecht_digitaler_Binnenmarkt_FAQ.pdf?__blob=publicationFile&cv=4).

60 Postulating such an at least partial regaining of state control see, e.g., the Recommendation of the 2<sup>nd</sup> Chamber of Parliament, the German Bundesrat (2021) 19 (at para. 24).

limited to solving the problem of separating legal from illegal postings via content-sharing platforms on the Internet. Rather, it is also well known from other conflicts of interest in which the legislator is called upon to act.

At least it can be said that in respect of providers of online content-sharing services who make use of filtering technology, the legislature has put themselves back into the driver's seat by setting a particular goal to be achieved while leaving it to the platform operators to decide how this result is to be achieved by technical means.

Finally, the legislature is well advised to limit the freedom of platform providers to draft their community guidelines to make sure that such internal regulations and standards do not conflict with and undermine essential fundamental freedoms guaranteed by law.

#### IV. Concluding Remarks

It is of course true that regarding both the voluntary application of access blocking or use-restricting devices to digital content, and the mandatory decision making by intermediaries, the legislator establishes the legal framework of general rights and obligations, compliance with which is ultimately reviewed by the courts. However, in both cases, the legislature enables private parties to further define the limits of what users of digital technical devices can do effectively. Moreover, asymmetries in the use of the complaint mechanisms provided for by law and, not least, in the use of recourse to the courts, result in private providers of products and services ultimately deciding what is considered permissible. This can include what is considered an appropriate technical access or use restriction in the one case and an impermissible expression in the other case. Consequently, the ethical question is in which cases this result appears to be ethically justified in the light of the necessary balance of conflicting freedom rights (right of property, right of expression, freedom of market formation and decision making on markets etc.). As has become apparent, there is no easy answer to this question. Most importantly, however, as it appears there also is no one-size-fits-all answer. Rather, individual answers will have to be found for each individual case scenario, based on what appears to be ethically appropriate. This might, in turn, instruct the lawmaker when regulating the limits of permissible private legislation by technological means as described in this chapter.

Finally, one might ask whether the issue described in this chapter is – on a general level – not just another variant of the opposition of *ex ante* paternalistic protection on the one hand, and *ex post* correction by legal

action on the other hand. Thus, such solutions may already be found in other such constellations with similar dilemmas. Indeed, regulation theory has developed and provides a greater array of regulatory mechanisms than the mere alternative of an ex-ante approach of prohibiting on the one hand and an ex-post approach of assessing whether damage is done on the other. A promising solution to this dilemma might be to aim at increased transparency and greater information of users about the existence and properties of technology.

And yet, for the time being, when trying to find an appropriate answer, the ethical compass does not always point to a clear direction. It seems that appropriate ethical and legal rules will still have to be formulated.

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### Photo credits

- Fig. 1: German Ministry of Justice and Consumer Protection; [https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE\\_Gesetz\\_Anpassung\\_Urheberrecht\\_digitaler\\_Binnenmarkt\\_FAQ.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Gesetz_Anpassung_Urheberrecht_digitaler_Binnenmarkt_FAQ.pdf?__blob=publicationFile&v=4)