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Dissertation Exposé

“A Tangled Web of Rights: The interplay of Copyright and Data  
Protection”

submitted by

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## 1. Introduction

A common thread across many internet platforms is the growing complexity of the intellectual property landscape both in terms of rights at stake and different rightholders. In simple terms, there has been a shift in the information infrastructure from a “one-to-many” to a “many-to-many” model.<sup>1</sup> This phenomenon is characterised by networks of data where multiple users upload, develop, react, collaborate on, and distribute content.<sup>2</sup> It follows that, from a copyright law perspective, the complexity often lies in drawing the line between protectable and not protected subject matter, as well as to whom different rights belong. In addition, these rights cannot be analysed in isolation from other legal frameworks. In particular, this thesis aims to tackle the delicate question of how the copyright regime applicable to online content interacts with the rights provided to data subjects in the General Data Protection Regulation (GDPR).<sup>3</sup> By focusing on user-provided content, it draws a picture of the clashing interests with the objective of untangling the legal complexities of the current “many-to-many” information infrastructure.

## 2. Current State of the Research

Although a comprehensive analysis of the interaction between intellectual property rights and data protection has not been portrayed yet, some scholars have attempted to address similarities and inconsistencies of these two legal instruments. Indeed, scholars have interchangeably identified a conceptual parallelism between data protection and intellectual property.<sup>4</sup> On one hand, research in the field has selectively focused on aspects where data protection and intellectual property meet the same interests, such as in situations where the enforcement

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<sup>1</sup> Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ [2009] 11 *Vanderbilt Journal of Entertainment and Technology Law* 31 at 842.

<sup>2</sup> *Ibid* at 843.

<sup>3</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (hereinafter “GDPR”)

<sup>4</sup> For example, see: Jonathan Zittrain, ‘What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication’ [2000] *The Berkman Center for Internet & Society Research Publication* No. 2000-01; Diana Liebenau, ‘What Intellectual Property Can Learn from Informational Privacy, and Vice Versa’ [2016] 30 *Harvard Journal of Law and Technology* 1.

strategies of one instrument fill the gaps of the other.<sup>5</sup> On the other, some scholars have examined scenarios where the objectives of these two legal instruments clash, in particular concerning the enforcement of intellectual property right online and the consequences on subjects' data protection interests.<sup>6</sup> Another prominent line of research analyses the suitability of applying concepts of intellectual property to argue for, or against, a property-style right in personal data.<sup>7</sup> The question of how the right to intellectual property should be balanced against the right to protection of personal data is discussed widely within the debate of online copyright enforcement.<sup>8</sup> Scholarship on this topic focuses on how the balance between these two rights should be struck from a human rights point of view, in light of the principle of proportionality.<sup>9</sup>

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<sup>5</sup> For example, see: Amanda Levendowski, 'Using Copyright to Combat Revenge Porn' [2013] 3 *New York University Journal of Intellectual Property and Entertainment Law* at 422; Julie E Cohen, 'Copyright and the Jurisprudence of Self-Help' [1998] 13 *Berkeley Technology Law Journal* at 1089.

<sup>6</sup> For example, see: Julie E Cohen, 'A Right to Read Anonymously: A Closer Look at "Copyright Management" In Cyberspace' [1997] *SSRN Electronic Journal*; Marianna Rantou, 'The Growing Tension between Copyright and Personal Data Protection on an Online Environment: The Position of Internet Service Providers According to the European Court of Justice' [2012] 3 *European Journal of Law and Technology* 2; Riccardo Sciaudone, 'The Relationship Between Personal Data Protection and Intellectual Property Rights in the Case Law of the Court of Justice of the European Union' [2013] *Journal of Internet Law*; Lee Bygrave, 'Data Protection vs. Copyright' in Dan Jerker B Svantesson and Stanley Greenstein (eds), *Internationalisation of Law in the Digital Information Society* (1. ed, Ex Tuto Publ 2013); Christopher Geiger, 'The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information' [2010] 1 *Intellectual Property Quarterly* 1; Vandana Mahalwar, 'Copyright and Human Rights: The Quest for a Fair Balance' in Manoj Kumar Sinha and Vandana Mahalwar (eds), *Copyright Law in the Digital World* (Springer Singapore 2017).

<sup>7</sup> Paul M Schwartz, 'Property, Privacy, and Personal Data' [2014] *Harvard Law Review*; Pamela Samuelson, 'Privacy As Intellectual Property?' [2000] 52 *Stanford Law Review*; Ali M Al-Khouri, 'Data Ownership: Who Owns "My Data"?' [2012] 2 *International Journal of Management & Information Technology* 1; Václav Janeček, 'Ownership of Personal Data in the Internet of Things' [2018] 34 *Computer Law & Security Review*.

<sup>8</sup> For example, see: Gloria González Fuster, 'Balancing Intellectual Property against Data Protection: A New Right's Wavering Weight' [2012] *IDP Revista de Internet Derecho y Política* 34; Roberto Caso and Federica Giovannella, *Balancing Copyright Law in the Digital Age: Comparative Perspectives* (Springer Berlin Heidelberg 2014); Vandana Mahalwar, 'Copyright and Human Rights: The Quest for a Fair Balance' in Manoj Kumar Sinha and Vandana Mahalwar (eds), *Copyright Law in the Digital World* (Springer Singapore 2017); Charlotte Bagger Tranberg, 'Proportionality and Data Protection in the Case Law of the European Court of Justice' [2011] 1 *International Data Privacy Law* 11; Christopher Geiger, 'The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information' [2010] 1 *Intellectual Property Quarterly* 1; Marianna Rantou, 'The Growing Tension between Copyright and Personal Data Protection on an Online Environment: The Position of Internet Service Providers According to the European Court of Justice' [2012] 3 *European Journal of Law and Technology* 2; Riccardo Sciaudone, 'The Relationship Between Personal Data Protection and Intellectual Property Rights in the Case Law of the Court of Justice of the European Union' [2013] *Journal of Internet Law*.

<sup>9</sup> For example, see: Charlotte Bagger Tranberg, 'Proportionality and Data Protection in the Case Law of the European Court of Justice' [2011] 1 *International Data Privacy Law* 11; Orit Fischman Afori, 'Proportionality – A New Mega Standard in European Copyright Law' [2014] 45 *IIC - International Review of Intellectual Property and Competition Law*; Anna-Sara Lind and Magnus Strand, 'A New Proportionality Test for Fundamental Rights?' [2011] *European Policy Analysis* 7; Filippo Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights' [2016] 36 *Oxford Journal of Legal Studies*.

However, despite these isolated research efforts, the current body of research tackling the interplay between data protection and intellectual property is rather limited. On a general level, the disparity of literature dealing with issues at the crossroad of intellectual property and data protection highlights how the boundaries between these instruments is becoming increasingly blurred.<sup>10</sup>

From a conceptual point of view, Liebenau provides an interesting analysis of how intellectual property and informational privacy may interact.<sup>11</sup> The author applies three commonly accepted theories of privacy to intellectual property, namely control, limited access and contextual integrity.<sup>12</sup> Hence, by providing a theoretical framework, this research aims to offer a starting point for further scholarly discussions about the intersection between intellectual property and privacy.<sup>13</sup> Moreover, Schneider builds upon the existing literature by discussing the development of the relationship between European data protection and intellectual property through the lens of the digital-algorithmic economy.<sup>14</sup> In the author's opinion, intellectual property and data protection law have undergone a role reversal in terms of their systemic functions, where intellectual property controls and keeps information secret while data protection encourages transparency.<sup>15</sup>

As regards a possible conflict between data subject rights according to the GDPR and copyright, existing scholarly literature is scarce. Focusing on the right of access (Article 15 GDPR), Sobolciaková discusses to what extent the right under data protection is compatible with copyright, concluding that copyright law will prevail over the right of access in case of conflict.<sup>16</sup> A substantial contribution by Graef, Husovec and Purtova examines the impact of the right to data

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<sup>10</sup> Giulia Schneider, 'European Intellectual Property and Data Protection in the Digital-Algorithmic Economy: A Role Reversal(?)' [2018] 13 *Journal of Intellectual Property Law & Practice* at 229.

<sup>11</sup> Diana Liebenau, 'What Intellectual Property Can Learn from Informational Privacy, and Vice Versa' [2016] 30 *Harvard Journal of Law and Technology* 1.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Giulia Schneider, 'European Intellectual Property and Data Protection in the Digital-Algorithmic Economy: A Role Reversal(?)' [2018] 13 *Journal of Intellectual Property Law & Practice*.

<sup>15</sup> *Ibid.*

<sup>16</sup> Angela Sobolčiková, 'Right of Access under GDPR and Copyright' [2018] 12 *Masaryk University Journal of Law and Technology* at 26.

portability (Article 20 GDPR) beyond data protection.<sup>17</sup> Their research underlines how an extensive interpretation of this right may create tensions with the intellectual property rights at stake, addressing copyright, trade secrets and *sui generis* database rights.<sup>18</sup> In particular, according to the authors, when a data asset is protected under copyright law, it may be the case that, on one hand, copyright safeguards exclusive rights to use it and data portability, on the other, promotes its reuse.<sup>19</sup> As can be seen, the current literature is lacking a comprehensive analysis of conflicts between copyright legislation and the European data protection regime, in particular concerning data subject rights and rightholder interests. Hence, drawing upon these isolated efforts, this doctoral project aims to fill this research gap by analysing the interplay of copyright interests and data subject rights under the GDPR.

### 3. Description of Intended Doctoral Project

‘User-provided content’ is a common thread across many internet platforms. The term ‘user-provided content’ refers to material that is uploaded on a platform by its own end users.<sup>20</sup> This type of content may contain personal data, but it may also satisfy the requirements to be protectable under copyright law. Thus, considering its potential dual nature, ‘user-generated content’ is an interesting type of information when analysing the interplay of copyright and data protection.

With the objective of analysing the tension between data protection law and the copyright regime, this thesis, firstly, discusses the rationales of these two legal instruments as mechanisms regulating information flows. At a general level, intellectual property functions by creating restrictions on the circulation of information with the objective of safeguarding its economic value, whereas data protection limits the flow of information with the aim of protecting

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<sup>17</sup> Inge Graef, Martin Husovec and Nadezhda Purtova, ‘Data Portability and Data Control: Lessons for an Emerging Concept in EU Law’ [2018] 19 German Law Journal. See also: Stephanie Elfering, *Unlocking the Right to Data Portability: An Analysis of the Interface with the Sui Generis Database Right* (Nomos Verlagsgesellschaft mbH & Co KG 2019); Bjorn Lundqvist, ‘Portability in Datasets under Intellectual Property, Competition Law, and Blockchain’ [2018] SSRN Electronic Journal.

<sup>18</sup> Inge Graef, Martin Husovec and Nadezhda Purtova, ‘Data Portability and Data Control: Lessons for an Emerging Concept in EU Law’ [2018] 19 German Law Journal.

<sup>19</sup> Ibid.

<sup>20</sup> Gianclaudio Malgieri, ‘“User-Provided Personal Content” in the EU: Digital Currency between Data Protection and Intellectual Property’ [2018] 32 International Review of Law, Computers & Technology at 118.

individuals.<sup>21</sup> However, there is structural parallelism between data protection and intellectual property, as the core interest of both legal instruments is the control of information.<sup>22</sup>

In order to set the scene, it is important to define the scope of this doctoral project. The intended research focuses on content protected under both copyright and data protection law, as it is in relation to this type of data that tensions may arise when relying on these laws' respective rights. In other words, the subject matter of this thesis is data that fulfils the requirements necessary to be protected by copyright while also falling within the scope of the GDPR. Concerning the former, the general requirements in Europe are that the content must fall within the 'list' of protectable subject matter and be original, in the sense of the "author's own intellectual creation".<sup>23</sup> Relevant subject matter includes literary, artistic and scientific works.<sup>24</sup> Whereas in order to be protected under the GDPR, the content at stake must fall within the definition of "personal data", entailing "any information relating to an identified or identifiable natural person ('data subject')".<sup>25</sup> Hence, when both these conditions are fulfilled, there is potential collision between these two instruments' rights.

It is important to emphasise that this thesis distances itself from the debate concerning "ownership" of data in an intellectual property, or property law, sense.<sup>26</sup> In fact, the question of whether someone can "own" personal data itself is not as such relevant for the analysis, as the starting point of this thesis is that it examines data which specifically qualify for protection under both copyright and data protection law. For example, a photograph of a person may be protected under copyright law if it embodies the "author's own intellectual creation", while also falling within the definition of personal data as it relates "to an identified or identifiable natural person."<sup>27</sup> When considering user-provided content, a vast amount of data may be protected under both the GDPR and copyright law. Further examples include Tweets, comments and online

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<sup>21</sup> MR Curry, 'Data Protection and Intellectual Property: Information Systems and the Americanization of the New Europe' [1996] 28 Environment and Planning A: Economy and Space at 896.

<sup>22</sup> Jonathan Zittrain, 'What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication' [2000] The Berkman Center for Internet & Society Research Publication No. 2000-01 at 1226.

<sup>23</sup> See, for example: Mireille MM van Eechoud, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International BV 2009) at 35.

<sup>24</sup> Article 2(1) Berne Convention for the Protection of Literary and Artistic Works.

<sup>25</sup> Article 2(1) and Article 4 GDPR.

<sup>26</sup> See, for example: Paul M Schwartz, 'Property, Privacy, and Personal Data' [2014] Harvard Law Review.

<sup>27</sup> Article 4(1) GDPR.

review as literary works, as well as picture, videos and audios as artistic works, all of which may be personal data. Moreover, this thesis intends to shed light on the relationship and parallelism between data protection rights and intellectual property rights on online platforms taking into account the impact of intellectual property licenses. It is, thus, useful to consider the legal characterisation of user-provided content as a bundle of rights, where different parties' interests interact.

The core objective of the thesis is that of examining how reliance on data subject rights in the GDPR may result in a conflict with copyright interests. In particular, compliance to the right of access and the right to data portability may result in copyright infringement. Firstly, the right of access provides data subjects with the right to obtain from the controller a copy of the personal data undergoing processing.<sup>28</sup> In theory, this gives rise to copyright issues, as compliance with this obligation may result in copyright infringement, effectively being a reproduction of the protected subject matter.<sup>29</sup> The text of the GDPR itself emphasises that the right to obtain such copy “shall not adversely affect the rights and freedoms of others.”<sup>30</sup> Thus, it seems that possible tension with intellectual property rights was foreseen by the drafters of the GDPR.<sup>31</sup> When analysing this sub-section, three questions are crucial in its interpretation. Firstly, the GDPR is silent as regards the application of “adversely affect” in terms of how a controller should draw the line between an impact and an adverse effect. Secondly, the question is what shall “rights and freedoms” refer to. In this regard, Recital 63 GDPR explicitly refers to intellectual property rights. Thirdly, it is unclear who “others” refers to, possibly only aiming at rights of third parties.

Secondly, another relevant data protection subject right is the right to data portability. Article 20 of the GDPR establishes the subjects' right to receive the personal data concerning them and the right to transmit those data to another controller.<sup>32</sup> This right may be incompatible when content protected by copyright is included in the transferable dataset, as creating a copy and transferring

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<sup>28</sup> Article 15(3) GDPR.

<sup>29</sup> Article 2 Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (hereinafter “InfoSoc Directive”). See, for example: Angela Sobolčiaková, ‘Right of Access under GDPR and Copyright’ [2018] 12 Masaryk University Journal of Law and Technology at 26.

<sup>30</sup> Article 15(4) GDPR.

<sup>31</sup> See also Recital 63 GDPR which mentions that “The right should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software.”

<sup>32</sup> Article 20(1) GDPR.

it to another controller may qualify as an act of unauthorised reproduction and communication to the public.<sup>33</sup> It is important to emphasise that the focus of this right is on data provided by the data subject, which may already be seen as a measure to limit intellectual property infringement. Similarly to the provision on the right of access, the GDPR explicitly mentions that the right to data portability “shall not adversely affect the rights and freedoms of others.”<sup>34</sup> It is unclear whether this sub-section and its elements should be interpreted in the same manner as Article 15(4) GDPR, taking into account the function of data portability.

The final objective of the doctoral project is that of defining how, in case of conflict between copyright and data protection rights, these two rights should be reconciled. From a fundamental rights perspective, the right to data protection is protected in the EU Charter of Fundamental Rights in Article 8 and the right to intellectual property in Article 17.<sup>35</sup> In a multitude of cases dealing with online copyright enforcement, the European Court of Justice has acknowledged that the right to intellectual property and the right to the protection of personal data are not absolute rights, and they must, hence, be balanced against other fundamental rights when necessary.<sup>36</sup>

As previously mentioned, the GDPR specifically refers to the need for the right of access and the right to data portability not to prejudice or adversely affect the rights or freedoms of others.<sup>37</sup> Indeed, when applying the GDPR, the right to the protection of personal data must be considered in relation to its function in society and be balanced against other fundamental rights in accordance with the principle of proportionality.<sup>38</sup> The principle of proportionality, thus, is an open and flexible standard functioning as a “tool of reconciliation” between clashing fundamental rights in the contemporary digital environment.<sup>39</sup> In its ruling, the CJEU did not provide a clear formula for solving the conflict between copyright and data protection, but emphasised that

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<sup>33</sup> Article 2 and Article 3 InfoSoc Directive. See, for example: Inge Graef, Martin Husovec and Nadezhda Purtova, ‘Data Portability and Data Control: Lessons for an Emerging Concept in EU Law’ [2018] 19 German Law Journal at 1377.

<sup>34</sup> Article 20(4) GDPR; this is emphasised also in Recital 68 GDPR which states that “Where, in a certain set of personal data, more than one data subject is concerned, the right to receive the personal data should be without prejudice to the rights and freedoms of other data subjects in accordance with this Regulation”.

<sup>35</sup> Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU* at 61.

<sup>36</sup> Case C-70/10, *Scarlet Extended SA v Société Belge Des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)* at 44.

<sup>37</sup> Article 15(4), 20(4), Recitals 63 and 68 GDPR .

<sup>38</sup> Recital 4 GDPR.

<sup>39</sup> Orit Fischmann Afori, ‘Proportionality – A New Mega Standard in European Copyright Law’ [2014] Max Planck Institute for Innovation and Competition at 899.



national court shall apply a 'case-by-case' analysis.<sup>40</sup> It follows that online platforms should strike a fair balance between compliance with subjects' data protection rights and the protection of copyright.<sup>41</sup> This thesis aims at assessing how this balancing exercise should be carried out, taking into account influencing factors and the rationales of these two legal instruments.

## 4. Research Questions

The overall research question is the following:

- What are the potential conflicts between data subject rights in the GDPR and copyright protection and how should these clashing rights be balanced against each other?

In order to be able to identify answers to this question, the following sub-questions will be analysed:

- What are the rationales and objectives of intellectual property and data protection law as information regulation mechanisms?
- To which extent can data be the subject matter of protection under both copyright law and data protection?
- How does reliance of data subjects' rights stemming from the GDPR (right of access and right to data portability) collide with copyright protection?
- How should the right to the protection of personal data be balanced against intellectual property rights according to the principle of proportionality?

## 5. Outline of the Dissertation

**Chapter 1:** *Introduction*

**Chapter 2:** *The Rationales of Data Protection and Intellectual Property: Two Sides of the Same Coin?*

- i. Conceptualising the Right to Data Protection
- ii. The Justifications of Copyright Law
- iii. Data Protection and Copyright as mechanism regulating information flow

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<sup>40</sup> Case C-461/10, *Bonnier Audio AB v Perfect Communication Sweden AB* at 59.

<sup>41</sup> Marianna Rantou, 'The Growing Tension between Copyright and Personal Data Protection on an Online Environment: The Position of Internet Service Providers According to the European Court of Justice' [2012] 3 *European Journal of Law and Technology* 2 at 12.

**Chapter 3:** *Setting the scene: When is personal data also protected under copyright law?*

- i. Data as an 'object' of protection
- ii. User-provided content as a bundle of rights
- iii. Drawing a picture of the tangled web of rights

**Chapter 4:** *The conflict between data subjects rights under the GDPR and copyright*

- i. Right of access
- ii. Right to data portability

**Chapter 5:** *The right to data protection vs. the right to property: striking the right balance*

- i. Jurisprudence of the CJEU
- ii. Applicability of the principle of proportionality
- iii. Possible approaches to solve the conflict

**Chapter 6:** *Conclusion*

## 6. Timeline

SoSe 2020: signing Doctoral Thesis Agreement, writing Chapter 2.

WiSe 2020/2021: writing Chapter 3, starting Chapter 4.

SuSe 2021: finishing Chapter 4, starting Chapter 5.

WiSe 2021/2022: Finishing Chapter 5, writing Chapter 1.

SuSe 2022: writing Chapter 6, Defensio.

## 7. Methodological Approach

This doctoral thesis will follow the methods of legal-dogmatic research. In order to answer the posed research questions, applicable case law and European legislation will be identified, interpreted and discussed. Furthermore, in light of the relevant legal scholarship, a descriptive, conceptual, as well as evaluative analysis of the presented issue will be carried out. Due to the complexity of the legal landscape at stake, specific examples will be used to support the otherwise more theoretical, literature-based discussion.

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