MEMES AND PARASITES

A DISCOURSE ANALYSIS OF THE COPYRIGHT IN THE DIGITAL SINGLE MARKET DIRECTIVE

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ULA FURGAL
MARTIN KRETSCHMER
AMY THOMAS

CREATe

Memes and Parasites: A discourse analysis of the Copyright in the Digital Single Market Directive[1]

Ula Furgał, Martin Kretschmer, Amy Thomas[2]

[1] This is an edited transcript of a paper we gave three times in the summer/autumn of 2020: at a seminar on content and discourse analysis at the Weizenbaum Institute Berlin on 26 June 2020 (at the invitation of Prof. Axel Metzger and Dr Simon Schrör); at the Gikii conference on 31 July 2020 (presented by Ula Furgal and Amy Thomas); and at the Centre for Internet Law and Policy, Strathclyde University, Glasgow on 2 October 2020. The transcript is taken from the last presentation as a Zoom seminar. A YouTube stream is available here: https://www.youtube.com/watch?v=DLP5xtpJmV0

We thank our colleagues Dr Oles Andriychuk and Dr Angela Daly for inviting and hosting us.

[2] Ula Furgał is Postdoctoral Research Associate; Martin Kretschmer is Professor of Intellectual Property Law; Amy Thomas is Research and Teaching Associate; all at CREATe, School of Law, University of Glasgow. Authors are listed in alphabetical order. We acknowledge support from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626870626 ("reCreating Europe: Rethinking digital copyright law for a culturally diverse, accessible, creative Europe") and Kretschmer's Weizenbaum Fellowship (Berlin 2020).

Abstract

The Directive on Copyright in the Digital Single Market has been a subject of heated and highly polarised debate, and an object of intense lobbying from the outset. It grasped the attention of a multitude of stakeholders, including tech companies, publishers, platforms, creators and SMEs, and urged thousands of people to go out on the streets in a sign of protest against what they believed was the "end of the internet as we know it". The debate was often emotional, and involved such terms as "meme ban", "censorship", "upload filters", "link tax", or a puzzling "value gap". However, amongst those emotive catchphrases lies a foundational discussion on the purposes of copyright law, and how its relationship with artists, technology, media, news, culture and citizenship unfolded.

In this presentation, we investigate how discourse developed during the negotiation phase of the Directive, focusing on the most controversial provisions: draft Articles 11 (press publishers' right) and 13 (platform liability). Focusing on the period between publication of the proposal by the Commission in September 2016, and the adoption of the Directive by Parliament and Council in March/April 2019, we juxtapose these changes with an analysis of (1) parliamentary debates, (2) press releases by the Commission, Parliament and Council, and (3) 80 stakeholder submissions that sought to shape the evolving legislation.

Through discourse analysis, we uncover four *topoi* that appear to dominate the debate: (a) Technocratic (responding to tech development by updating the copyright framework), (b) Value gap (the redistribution of revenues to benefit creators and producers), (c) Internet freedoms (freedom of expression and user interests), and (d) European (the promotion and protection of European culture and identity).

Finally, we show that changes in the Directive's text can be associated with the appearance and evolution of the discourse.

We show that changes in the draft legislation can be associated with the appearance and evolution of the four *topoi* in the debates, but that changes in the proposed legal language tend to be obfuscatory, rather than addressing the issues. Controversial language such as "content identification" (associated with filtering) was removed and safeguards were offered, but many of these changes remained meaningless (in law) or open to different implementations.

(MK) Good morning to our neighbours across the city of Glasgow. So near, and yet so far. Also, good afternoon to our European friends on the participants' list. Lunch hour has truly arrived there.

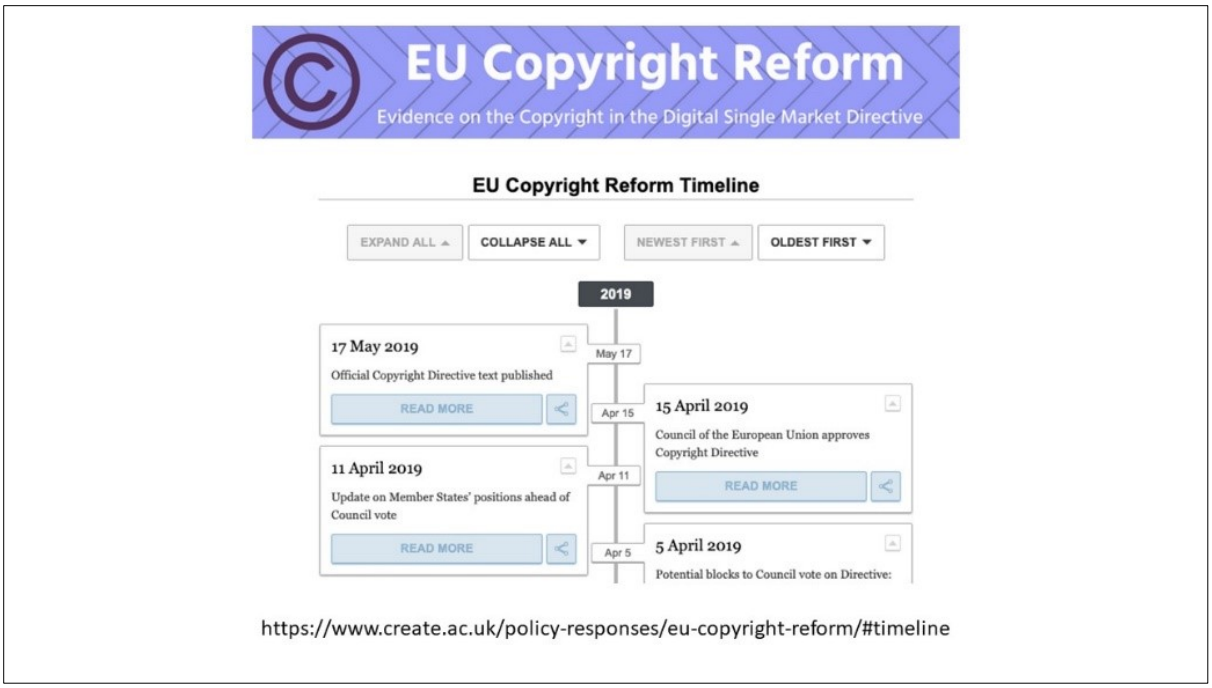
Thank you Oles and Angela for making this seminar possible. It is a great pleasure to be here with my two colleagues Ula Furgal and Amy Thomas. I start by saying a few words how this project came about.

In our pre-meeting this morning it was mentioned that we are close to the fourth anniversary of this piece of legislation. The first text of the Directive on Copyright in the Digital Single Market was issued as a proposal by the European Commission on 16th of September 2016. One of the questions we all have is: Did we spend the last four years of our life in the right manner so far as the Directive is concerned?

Many of you will know that CREATe, our research institute, operated a digital resource during the long legislative process.[3]

It was our aim to support a complicated policy process. We tracked committee reports, stakeholder submissions, new academic evidence, gossip about what happened in the trilogue. Anything that might matter for the process of policy formation. We did this because we wanted to bring independent academic input to the legislation.

[3] EU Copyright Reform: Evidence on the Copyright in the Digital Single Market Directive (ed. Martin Kretschmer, Amy Thomas). CREATe Centre: University of Glasgow. https://www.create.ac.uk/policy-responses/eu-copyright-reform/. See also: EU Copyright Reform: Evidence on the Implementation of the Copyright in Digital Single Market Directive (Directive (EU) 2019/790) (ed. Ula Furgał, Martin Kretschmer, João Pedro Quintais). CREATe Centre: University of Glasgow & reCreating Europe: https://www.create.ac.uk/cdsm-implementation-resource-page/for tracking of developments relating to the implementation phase of the Directive.



Amy worked for a couple of years on the timeline you just see in front of you, in parallel Ula worked on her PhD at the EUI in Florence on what was then Article 11, the press publishers' right. We all were immersed in primary material relating to the Directive for years.

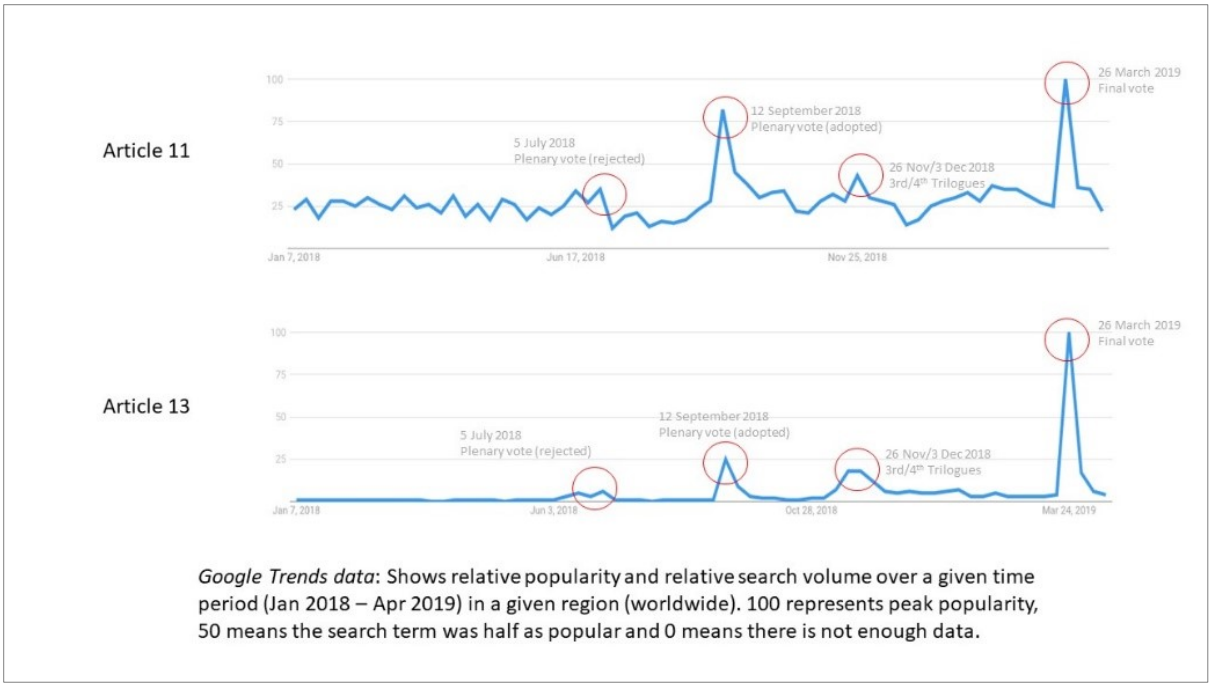
When the COVID-19 lock-down happened in March, we were looking for projects that would enable CREATe academics to collaborate beyond isolation. And this material seemed relevant. You don't just collect all this primary material and then do nothing with it. This was the starting point of this paper.

(AT) Starting in May 2017, I was responsible for tracking all of the key developments regarding the Directive. This information is distilled into our interactive timeline which details key votes, position papers, stakeholder interventions, user petitions, controversies, studies – anything that we thought was significant in the policy making process. I kept track of these via a few different sources, including news and stakeholder sites. Twitter in particular was a fruitful but at times very heated and toxic way to try and keep up to date with the latest developments.

At the time of compiling the timeline, we broadly captured everything to do with the Directive and feel this is fairly comprehensive. Perhaps unsurprisingly due to its nature and controversy, our data is more skewed towards Article 13. Thankfully Ula was able to offer a valuable and detailed perspective on Article 11.

(UF) As already mentioned by Martin, in my doctoral dissertation, which I defended earlier this year, I have focused on Article 11 introducing the press publishers' right. As a part of my research looking into how copyright is expanding to protect news and information, I have been monitoring the discussions between opponents and supporters of the Directive. I tried to identify and index all the open letters, statements and similar documents issued by stakeholders on the subject of Article 11. Our dataset for this project was created by combining the material which Amy and Martin gathered, and the documents I have collected for my PhD.

(MK) We then reflected on the potential of this material and it seemed to us that we had a window on a European public sphere. We thought we could investigate whether public discourse had an effect on law-making in this specific setting of copyright law. The slide you see now is a quick Google Trends check on web searches, looking for information on the Copyright Directive.



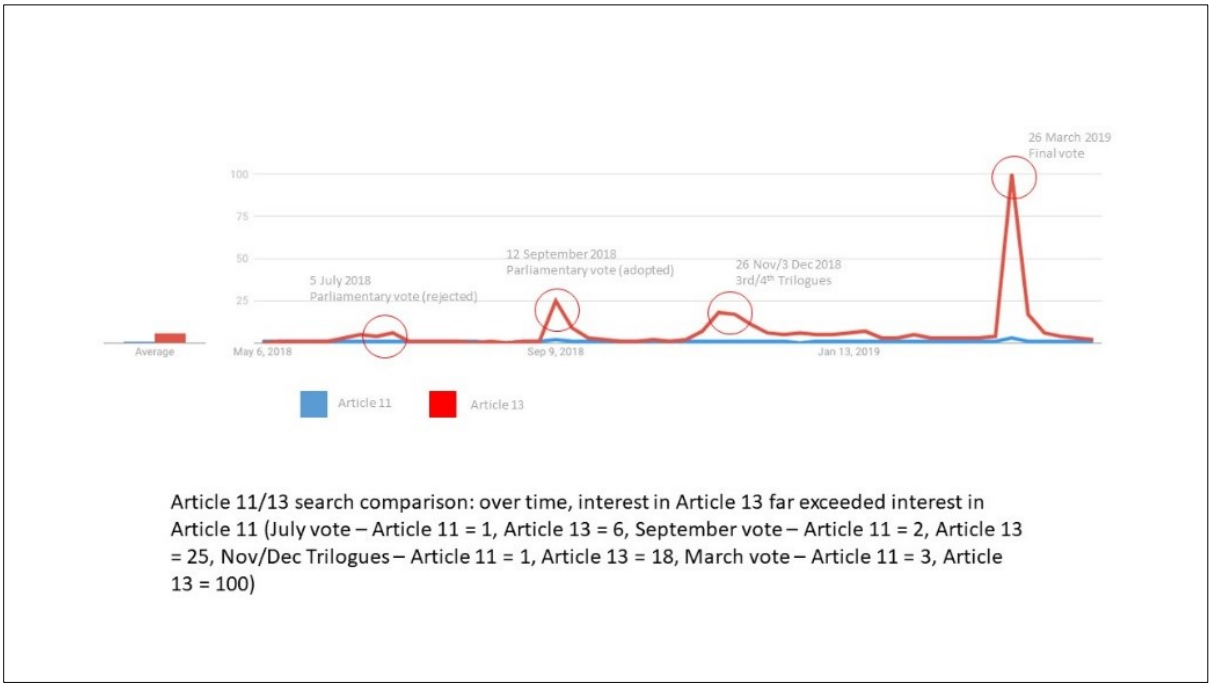
Google Trends data: Shows relative popularity and relative search volume over a given time period (Jan 2018 – Apr 2019) in a given region (worldwide). 100 represents peak popularity, 50 means the search term was half as popular and 0 means there is not enough data.

(AT) For those of you who haven't used Google Trends before, this graph shows the relative popularity and relative search volume of searches on Google for a particular phrase, in this case for "Article 11" and "Article 13". We set a given time period, over a given region; this represents

January 2018 – April 2019 worldwide. A score of 100 means that something was at its peak popularity for searches, 50 half as popular, and zero would mean least popular.

To the extent we can treat Google searches as a proxy for public interest and engagement with the debate, we can see a definite increase in the popularity of these search terms which is roughly commensurate with key dates in the negotiation phase: first the 5 July plenary vote; then the 12 September plenary vote; the trilogue negotiations in November and December 2018, and; finally this huge spike at the time of the final vote where searches were at peak popularity.

In the next slide we have an example of searches for Article 11 and 13 side by side. This confirms what we suspected that Article 13 was a vastly more popular search term than 11. You can see that they both start at roughly equal but come the final vote 13 explodes in popularity.



Article 11/13 search comparison: over time, interest in Article 13 far exceeded interest in Article 11 (July vote – Article 11 = 1, Article 13 = 6, September vote – Article 11 = 2, Article 13 = 25, Nov/Dec Trilogues – Article 11 = 1, Article 13 = 18, March vote – Article 11 = 3, Article 13 = 100)

This is one way of demonstrating public engagement with the Directive, and also the particular articles that they were interested in. We think we see here a public discourse and legal discourse coming together, and a clash between an otherwise very technical area of law and public sentiments.

(MK) What was the theoretical question we would want to ask of this material? We identified, there is a public discourse. It spikes several times. It spikes at critical points of the law-making process. There were several aspects that seemed interesting.

We were looking at one of the few instances where there seemed to be a genuinely European public space, a transnational discussion. One of the criticisms of the European Union has always been that it is a transnational entity but without a polity, without a collective identity or institutionalised form of social relations. There are only national discourses. But what we looked at here seemed to be discourse relations at a European level, albeit mostly likely among those with relevant expertise. Secondly, because we had a good window onto this policy making process, it may be possible to test if the conditions of public discourse matter for law-making.

We decided to frame this within the classic theory of the public sphere, Jürgen Habermas's *Strukturwandel der Öffentlichkeit* published in 1962 which many of you will know as *The Structural Transformation of the Public Sphere*. At the core of Habermas's approach is the idea that there are certain conditions of discourse which lead to structural changes. The form of communication itself shapes the socio-economic system, and matters whether the outcome is normatively acceptable.

In Habermas, this originally was presented as a kind of historic stylization of the birth of liberal society where authority is derived from agreement not political will. You may have heard of the idea of London coffee houses around 1800 as an early form of public space. For our contemporary setting, it is plausible to assume that under certain (public) conditions of communication, the development and exchange of arguments may lead to laws that are in some ways "better".

There are critiques of this framework. Does a functioning public sphere assume that we are all equal in the discourse process? That's an enlightenment assumption, an optimistic take on human reason that does not take account of socio-economic inequalities that may persists in national and transnational settings.

So it is not straightforward that a Habermasian theory of the public sphere will work, but it offers an compelling perspective. Why do we conduct this seminar here? Why do we try to engage in discussion if we think that informed and critical discourse does not matter. Why do we do it? Why do academics make submissions into the policy process? Why do interest groups make submissions using reasoned arguments? If law-making is all just a reflection of power (and arguments are just a deflection), we are really in a difficult situation. And perhaps we are.

There are some limitations to treating the Copyright Directive as a European coffee house, so to speak. All materials we collected are in the English language. We think this is justifiable if we can show that the European public sphere is constituted in English. There are indications that actually may be the case. Stakeholders publish their position papers in English. Even legislative developments at national level are often translated into English. For example, when the first German draft for the national implementation of the Copyright Directive was discussed, it was also offered as an English translation, so that it could influence the European policy process. So the assumption that European level discourse takes place in English is we think defensible.

A second limitation is that the discourse surrounding the Directive was not only text-based. Interventions on social media were often visual, the memes we refer to in the title of our paper. The orthodox understanding of discourse-based reasoning relies on words. It has, to our knowledge, never been applied to the type of intermedial interchange we are observing in the context of the Copyright Directive. This second limitation could also be considered as an opportunity. Perhaps web-based discourse allows us to explore something more theoretically ambitious about the conditions for a public sphere in the digital environment.

How did we construct the dataset? We cover three and a half years from September 2016. We have the initial legislative proposal, which then changed over time until the adoption by the European Parliament, the Council and official publication on May 17th, 2019. The primary sources on which we built our content and then discourse analysis are three: Transcriptions of the parliamentary debates which coincide with two of the spikes in public interest; Press releases of the Commission (5), Parliament (3) and Council (3); Finally, we catalogued 80 stakeholders submissions relating to articles 11 (press publishers' right) and 13 (new rules for platform liability), the two most controversial provisions.[4]

[4] We use the original article numbers in this paper because the provisions were known and referred to as such during the period we investigate, before being renumbered right at the end of the legislative process. This late renumbering itself can be interpreted as an attempt by the Commission to change the discourse.

Construction of Dataset

- *Time frame*: Commission proposal in (14 Sep 2016) –> publication of official text (17 May 2019)
- Primary sources drawn from three essential parts of the policy formation process:
  - Transcriptions of parliamentary debates (11 September 2018, 26 March 2019) – divided into *for* and *against*
  - Press releases by the Commission (5), Parliament (3) and Council (3)
  - 80 stakeholder submissions

Once these decisions are taken: you have got a theory, you've got the data, then you need a research design which delivers. Ours is extremely simple, and perhaps too ambitious in its simplicity.

Research design

(a) Doctrinal analysis of changes in drafts

(b) Content analysis of vocabulary frequencies

(c) Discourse analysis of dominant vocabulary: how groups of concepts constitute themes (topoi)

(d) Linking discourse and doctrinal changes

First, you need to know what has changed in the legal drafting, amendments, new provisions introduced. Then you have to relate those in some ways to the public discourse.

In order to do this, we captured the public discourse initially by a traditional kind of quantitative content analysis. We constructed frequency tables of the 12 most used terms in each set of primary sources. Then we dived deeper into a discourse analysis that has enabled us to identify what we call *topoi*, groups of concepts used in argumentation. The construction of a *topos* (plural: *topoi*) is a particular approach to discourse analysis.

In a third step, we link the changes in law and the discourse. If it was this simple, the paper would be published already.

Now I hand over to Ula and Amy, to start with step one. What did actually happen to Articles 11 and 13 during the legislative process?

(UF) Article 11, as I hope we all already know, introduces a new neighbouring (related) right for publishers of press publications. The right which was originally proposed in September 2016, was considerably broader than what we ended up having in the final text of the Directive.

Article 11 – Summary of Doctrinal Changes

Before (Original Commission Proposal – 14 September 2016)	After (Official Text – 17 April 2020)
Digital uses	Online uses
Effective *erga omnes*	Covers only uses by information society service providers
Granted to all publishers of press publications	Granted only publishers of press publications established in a Member State
Exceptions: • Hyperlinks which are not acts of communication to the public	Exceptions: • All hyperlinks • Single words and very short snippets • Private or non-commercial uses by private individuals
-	Guarantee of fair share of publishers' revenues for authors
20 years	2 years
Applies retroactively	Applies to publications published after CDSM entered into force

We started with a right which was effective *erga omnes* [towards all] and covered all digital uses of press publications. What we ended up having, however, is a right that covers only online uses by information society service providers, not all internet users. This new right is granted to the publishers of press publications. The definition of a press publication did not change that much throughout the time, however, the right was eventually granted only to those publishers who were established in one of the Member States.

Some important changes to the text of the right, or more accurately a multitude of carve-outs to the right's scope, were included in the final text of the Directive. Essentially, the press publishers' right gives publishers of press publications a bundle of two rights: a right of reproduction and a right of making available. However, the press publishers' right does not cover all hyperlinks – originally it was inapplicable only to those links which were not acts of communication to the public. The press publishers' right also does not apply to individual words and very short extracts, as well as to private or non-commercial uses by of individual users.

What is also significant is that the term of the right has been shortened from 20 to two years. It is a considerable change to the right's duration.

In the final text of the Directive we also have a guarantee of a fair share of the revenues which press publishers will generate based on this new right to journalists and other authors whose works are included in a press publication.

(AT) The doctrinal changes to Article 13 were substantive. We saw a relatively simple three-section long article change into a very complex and multi-layered provision.

Article 13 – Summary of Doctrinal Changes

Before (Original Commission Proposal – 14 September 2016)	After (Official Text – 17 April 2019)
Modification of existing safe harbour regime for ISSPs under Article 14 of E-Commerce Directive	Direct liability for new category of ISSPs – 'OCSSPs'
"Ensure the functioning of agreements"	Make "best efforts" to obtain authorization, for example via a licensing agreement
Prevent availability of unauthorized works with reference to "effective content recognition technologies"	Make "best efforts" and use "suitable and effective means" to ensure that works are unavailable in accordance with "high industry standards of professional diligence"
No user exceptions	Mandatory exceptions for (a) quotation, criticism, review and (b) caricature, parody or pastiche
No exclusions for other platforms	Excludes certain platforms depending on function (e.g. Wikipedia, Git Hub and Cloud storage). 'Lite' version of Art. 17 for new and small platforms (make best efforts to obtain authorization and remove content upon notice)

Initially, the original Commission proposal sought to modify the existing safe harbour regime provided under the E-Commerce Directive, and compelled Information Society Service Providers (ISSPs) to either ensure the functioning of agreements with rightsholders, or otherwise to prevent availability of their works on their platforms through effective content recognition technologies. At this point, there was no consideration of how non-infringing user-generated works would escape the ambit of this, though there was the suggestion of at least a complaints and redress mechanism.

There were numerous developments, many of which focused on softening this otherwise very explicit starting point. The finished result is very different from the original Commission proposal, and an amalgamation of these developments.

We now have direct liability for Online Content Sharing Service Providers (OCSSPs), a sub-set of ISSPs, who communicate to the public when they give access to protected works.

Instead of ensuring the functioning of agreements we now ask that platforms make "best efforts" to obtain authorisations from rightsholders.

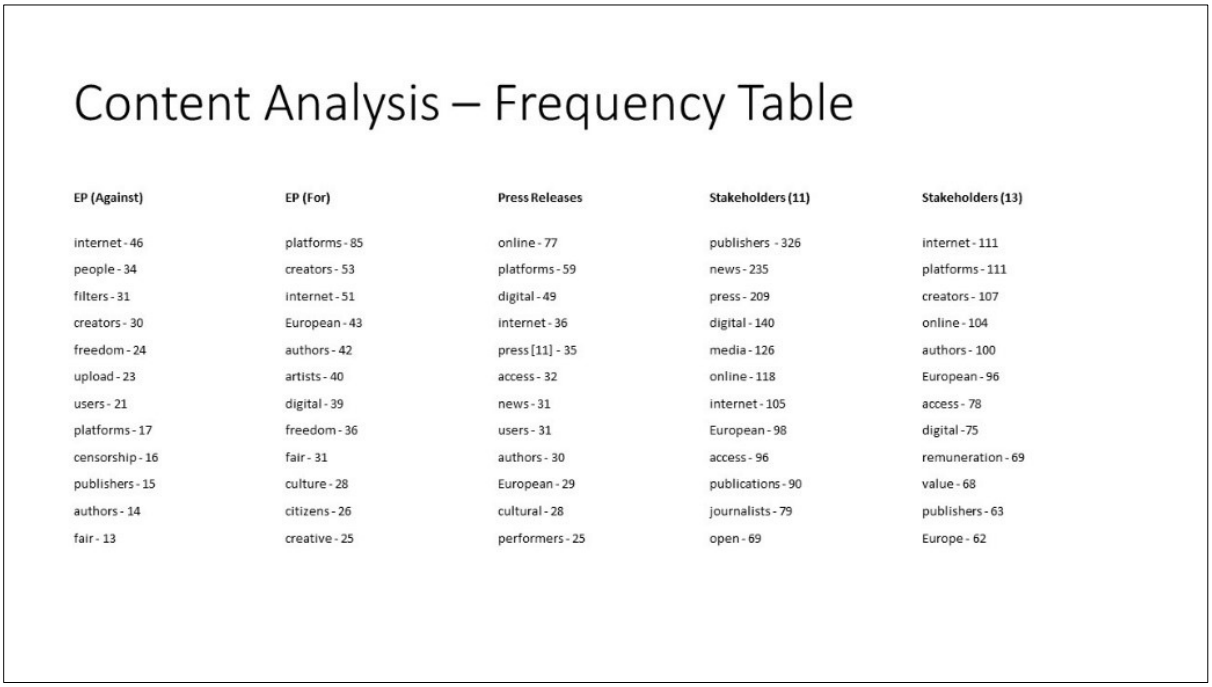
Most notably we no longer have the stark language of "effective content recognition technologies" and this is softened considerably to making "best efforts" and using "suitable and effective means" to ensure that works are unavailable in accordance with "high industry standards of professional diligence".

We now have mandatory user exceptions for (a) quotation, criticism, review and (b) caricature, parody or pastiche.

We now also exclude certain platforms from the ambit of the provision depending on their function, such as not-for-profit encyclopedias (like Wikipedia) or open source software sharing platforms (like GitHub). We also have a "lite" version of Article 13 for new and small platforms.

Overall, this is quite a transformation, but the core of the original Commission text stays the same; platforms must now either agree a licence with rightsholders or find a way to make their work unavailable - now with some exceptions.

(MK) Having identified doctrinal developments during the legislative process, we now move to the analysis of the policy discourse. We start with a quantitative content analysis. Using "word cloud" software, we initially identified the top 12 terms used in each of our sets of data.



These we grouped into six semantically related groups.

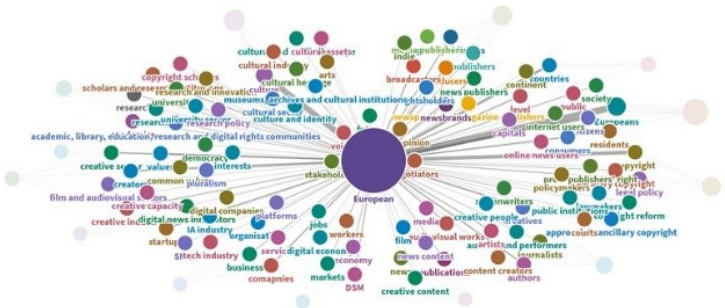
Six groups of semantically related concepts

1. Individual creators: *Creators, authors, artists, journalists*
2. Collectives: *People, users, citizens*
3. Communication: *Media, filters, censorship, news, access*
4. Technology: *Digital, internet, online*
5. Corporations: *Platforms, publishers, press*
6. Identity: *European, culture, freedom, fair*

For the lead concept for each group. We then dived deeper and investigated in which context the concepts were used. We demonstrate our approach for two concepts: "Platform" and "European".

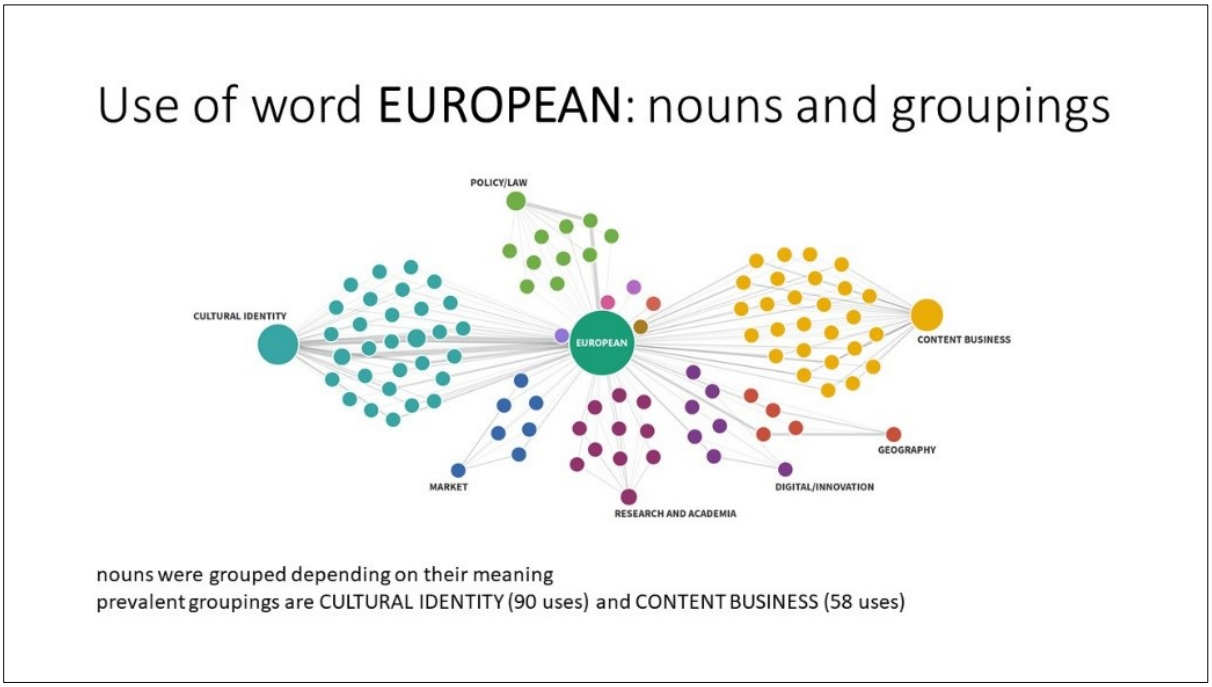
(UF) The first concept we are going to consider is European. To understand the context in which the adjective European was used, we went back to our dataset and checked which nouns it was used to describe. In total, the word European was used 226 times to describe 98 different nouns.

Use of word **EUROPEAN**: nouns and groupings



adjective EUROPEAN was used 226 times to describe 98 different nouns

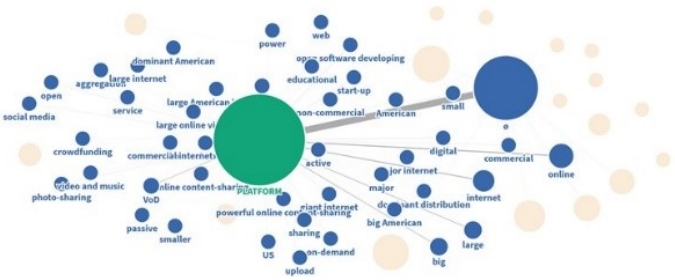
To bring clarity to this plethora of nouns, our next step was to group the nouns based on their meaning.



Among created groupings, two are prevalent. The first group, is cultural identity, and it includes such nouns as culture, Europeans, citizens, common values, arts, cultural sector and heritage. The second grouping is content business, and it covers those who produce cultural content: publishers, producers, broadcasters, but also content itself: film, media, audiovisual content

The second concept is Platform. Here, we first searched our dataset for phrases which include the word platform. As the graph shows, the word platform was used 262 times as a part of 43 different phrases. Most commonly, however, the word platform was used by itself. A word platform or platforms without any descriptor was used 131 times, which stands for 50% of total uses.

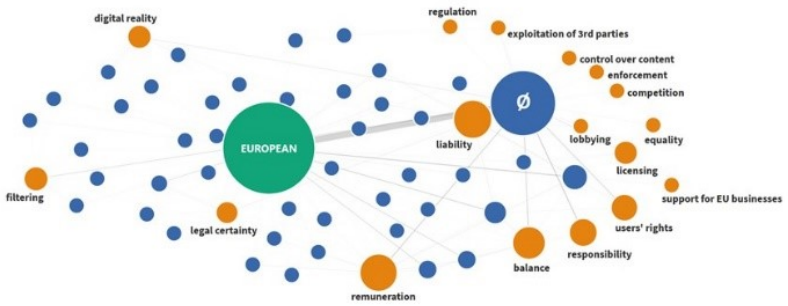
Use of word **PLATFORM**: phrases and context



word PLATFORM used 262 times in 43 different phrases

In the second step of our analysis, we examined in which contexts the word platform and the phrases including it were used. Two dominant contexts were liability and remuneration, followed by balancing of interests and responsibility.

Use of word **PLATFORM**: phrases and context



131 times used with no descriptor (Ø), simply as "platform(s)"
word PLATFORM was used in different contexts, most often: liability (45 uses), remuneration for content (43 uses) and balance of interests (33 uses)

(MK) After we explored the discourse context of the dominant concepts in detail, we then re-arranged the frequency tables into four *topoi*. That is an iterative process. If you ever engaged in discourse analysis, you will know that there is no "right" answer. You try to get as close to the meaning as you can. You try to make sense, review groupings and context again and again. We went through a lengthy process of about two months, coding and re-coding, back and forth. In fortnightly meetings we discussed possible *topoi* and their instantiation. So what you see here is an interpretation, supported by some quantitative frequency indicators.

EP (Against)	EP (For)	Press Releases	Stakeholders (11)	Stakeholders (13)
internet - 46	platforms - 85	online - 77	publishers - 326	internet - 111
people - 34	creators - 53	platforms - 59	news - 235	platforms - 111
filters - 31	internet - 51	digital - 49	press - 209	creators - 107
creators - 30	European - 43	internet - 36	digital - 140	online - 104
freedom - 24	authors - 42	press [11] - 35	media - 126	authors - 100
upload - 23	artists - 40	access - 32	online - 118	European - 96
users - 21	digital - 39	news - 31	internet - 105	access - 78
platforms - 17	freedom - 36	users - 31	European - 98	digital -75
censorship - 16	fair - 31	authors - 30	access - 96	remuneration - 69
publishers - 15	culture - 28	European - 29	publications - 90	value - 68
authors - 14	citizens - 26	cultural - 28	journalists - 79	publishers - 63
fair - 13	creative - 25	performers - 25	open - 69	Europe - 62

We finally settled on the following four *topoi* that seemed to have explanatory potential in shaping the policy discourse: Technocratic, Value gap, Freedom and European. We shall say a bit more about each of these.

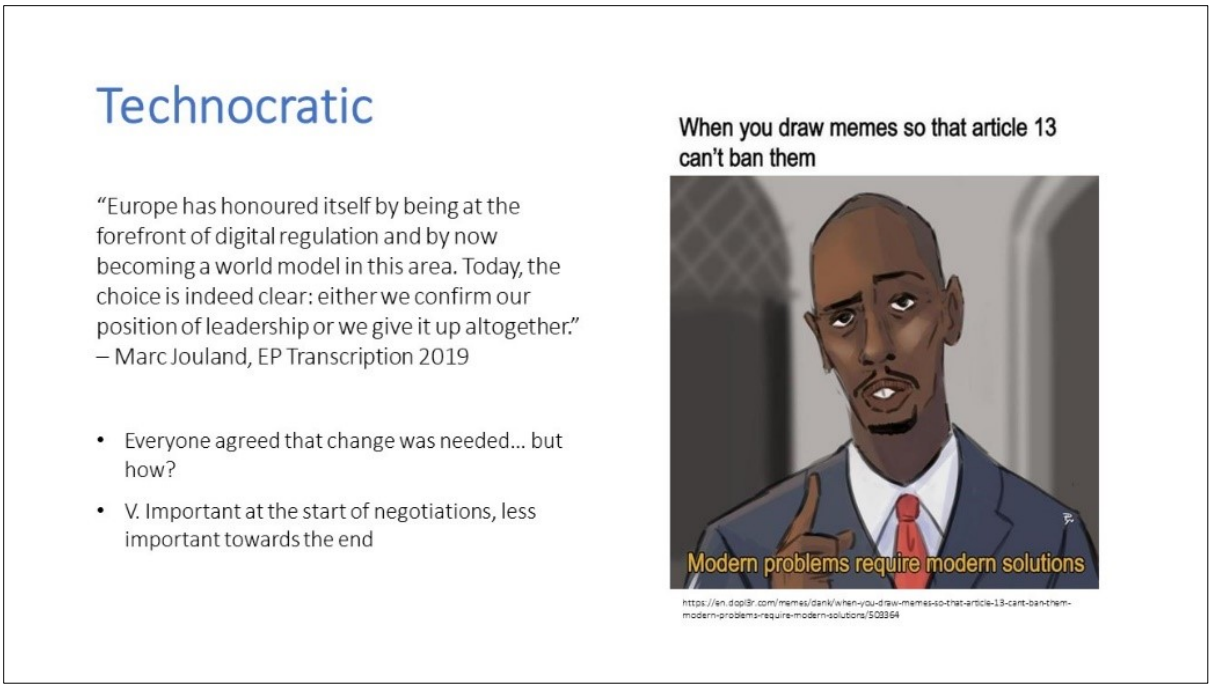
In order to offer a descriptive indication how the *topos* analysis of reasoning fits into the initial frequency tables, we have re-coded these in this slide, with one colour for each *topos*. The 12 most used words in each primary dataset are now allocated to one of those four *topoi*. This gives you an intuitive feeling for the structure of the policy discourse as a whole. For example, you see immediately that the value gap *topos* dominates reasoning.

For now, these four brief summaries offer an orientation:

The technocratic *topos* is strong among the press releases. Regarding the value gap, we perceived a strange fusion of interests between labour (creators) and capital (right holders) against other capital (GAFA). The freedom *topos* we expected to be associated with user interests. This turned out differently, as you will see. And finally, the European *topos*, with a focus on culture and identity, seemed to carry protectionist undertones.

Now we'll illustrate each of these four *topoi* in more detail. Memes, as we promised in the announcement for this seminar, will feature.

(AT) The first *topos* we found was that many parts of the debate were technocratic in nature; there's a drive to address the internet era with updated legislation. As this meme succinctly summarises, modern problems require modern solutions.



As you can see in the quote on the slides, this was very much presented as a "do or die" scenario. The discourse talked frequently about how the internet has changed everything, about how we need an update for the digital era and to address the challenges of the digital age.

More so than this, proponents of the Directive show this as being a very desirable position – they talk about putting Europe at the forefront of the digital revolution and to be a world model in this area. We are invited to infer from this that the Directive is a necessary intervention against this abstract, compelling force of digital-ness and revolution. Supporting the Directive becomes positioned as an objective and rational goal in the face of that challenge.

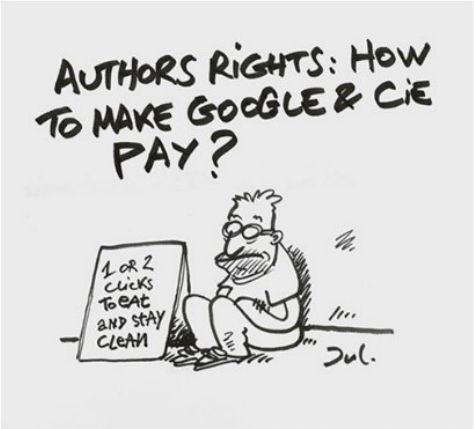
This theme started out as very important at the start of the debate as the impetus to set the Directive in motion, but over time it frittered out as more technical challenges and disagreements began. So, whilst everyone agreed that change was needed, most of the debate was spent talking about how exactly that change should take place.

(UF) The next *topos* we are going to discuss is value gap. As already mentioned, this *topos* was quite dominant throughout the discourse.

Value Gap

"big tech firms mak[e] massive profits on the backs of authors artists and creators of the European Union. This is something we can't continue to countenance." – Axel Voss MEP, EP Transcription 2018

- Art. 13 = a value gap provision, but calls for fair remuneration of creators were omnipresent
- Rebalancing "the relationship between the GAFA and those who feed them"
- Platforms are parasites, whose actions endanger authors' livelihoods
- General consensus on need to fairly remunerate creators, no agreement on how to do it



https://societe.sacem.fr/en/news/authors-rights/european-copyright-directive---cut-trough-the-noise-get-the-facts

At the heart of the value gap *topos* lies the idea that creators and creative sectors should be fairly renumerated. The term value gap itself has been used in the official communications of the EU institutions only once. The Council has defined a value gap as a difference between remuneration received by creators and performers for their works, and the revenue platforms are generating by making those works accessible.

What is quite interesting is that even though the EU institutions abandoned the value gap language, the term value gap has been consistently used by stakeholders until the very end of the debate. The stakeholders used the term value gap only in connection to Article 13, which came to be known as the "so-called value gap provision". However, the rationale behind the value gap, the calls for the fair remuneration of creators, were omnipresent, and they went beyond discussion on Article 13.

As a part of this *topos*, we see a very negative view on platforms. Platforms are considered parasites who steal content, wield tremendous power, and who do not want to share their revenues with creators and creative industries. However, platforms are not seen as a monolithic group. There is a clear distinction between small and large platforms, since it is only the major, big platforms who should share their revenues. Even the communications from the EU institutions use the term "tech giants" and name Google, Facebook and YouTube as platforms who should remunerate the authors. On the opposite side of the spectrum are non-commercial

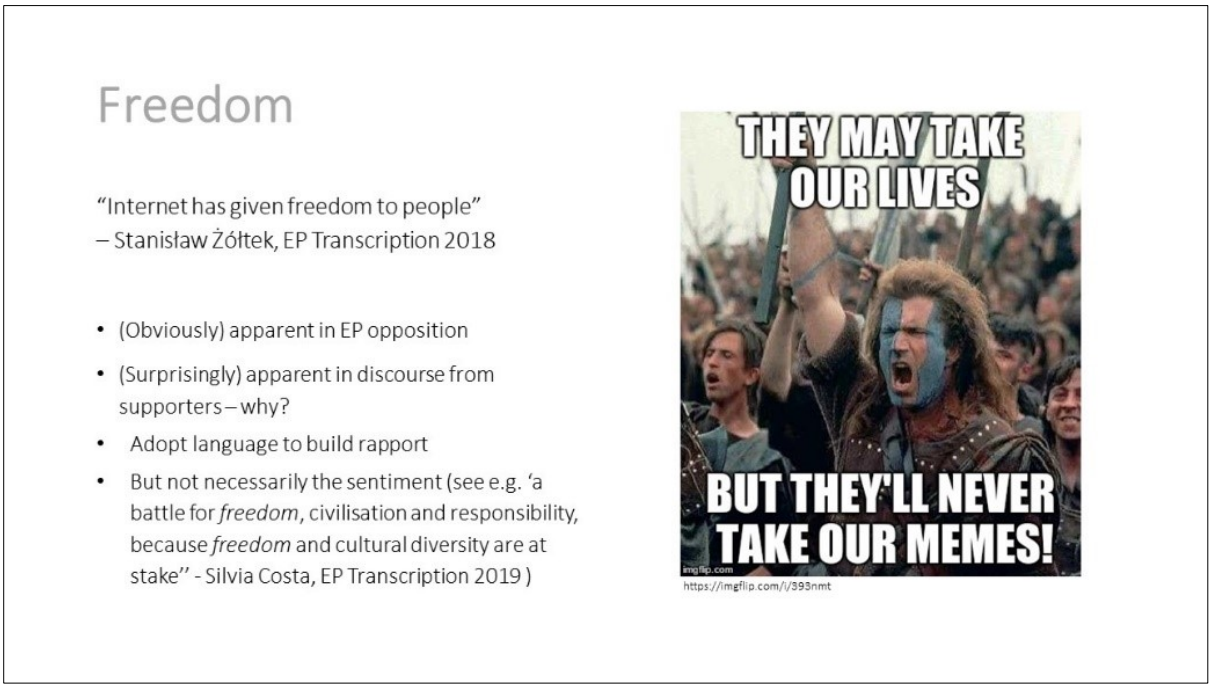
platforms, with GitHub and Wikipedia often used as examples. Those types of platforms should be excluded from the new regulation.

The idea of balance is omnipresent. The purpose of the Directive is the creation of a level-playing field between the stakeholders, by rebalancing the relationship between GAFA (Google, Apple, Facebook and Amazon), and "those who feed them". The goal of this rebalancing exercise, is a guarantee that creators receive renumeration, which is described as fair, proportional or simply adequate.

The general claim is that creators should be paid, however this claim is tackled differently for Articles 11 and Article 13. When it comes to Article 13, we clearly see that creators are to receive a fair share of revenues generated by platforms directly from those platforms. In the case of Article 11, there is a proxy: a press publisher. Journalists and other authors of works included in a press publication are to receive a fair share, but of what press publishers receive from platforms. The publishers are the ones to negotiate on behalf of authors.

The value gap *topos* engages very emotional language while discussing the protection of authors' livelihoods. One of my favourite quotes is that authors should not be "paid through tips".

(AT) The third *topos* is what we've dubbed the freedoms *topos*. And here we even have Mr. Freedom himself, Mel Gibson, screaming for memes. I think this is the sentiment that resonated the most with protesters and user groups that dubbed this Directive the 'meme ban'.



As many of you may know, the Directive stirred up lots of concerns that freedoms would either be taken away from us through Orwellian-style surveillance of upload filters. So, the concerns about freedom were expressed both in a positive sense – an entitlement *to* upload and post a link, for example – and a negative sense – such as freedom *from* surveillance.

As we anticipated, these types of arguments were prevalent in discourse from the opposition. But surprisingly, we found that the discourse from supporters of the Directive also frequently talked about freedoms. This doesn't mean they necessarily agreed with the same sentiment. You can see on the slide the suggestion that freedom in this sense is freedom from the tyranny of platforms, and freedom to make platforms responsible for their actions. Or stakeholders that say that not allowing creators to make a living from their work is the real threat to freedom of expression and the free flow of information online.

So, opponents engage with the language of the freedoms *topos* but for different reasons. They adopt the language and turn it into something that ultimately supports their argument to support the Directive. This may have been an effort to build rapport by engaging with the language of opponents and echoing the main concerns from the public – that perhaps we're not so different after all and our interests are aligned. In fact, come the end of the debate, press releases boast that the Directive will now *allow* users to upload copyright protected content, suggesting this wasn't the case before. They change from saying that they'll safeguard and preserve user interests to saying that they'll enhance the existing user rights regime. The take home message becomes that users will have more freedoms and be better off than if the Directive had never been enacted at all.

(UF) The last *topos* we are going to discuss is European.

European

"Until now, American internet giants have soaked up the lion's share of that money. It is a crucial issue for the press, artists, democracy and culture. And the object of an extraordinary battle waged by the major internet platforms." – journalists open letter, March 2019

- David vs Goliath = European creators vs US tech giants
- Calls to preserve European cultural identity & diversity
- Linked to general questions on platform regulation (e.g. digital tax)

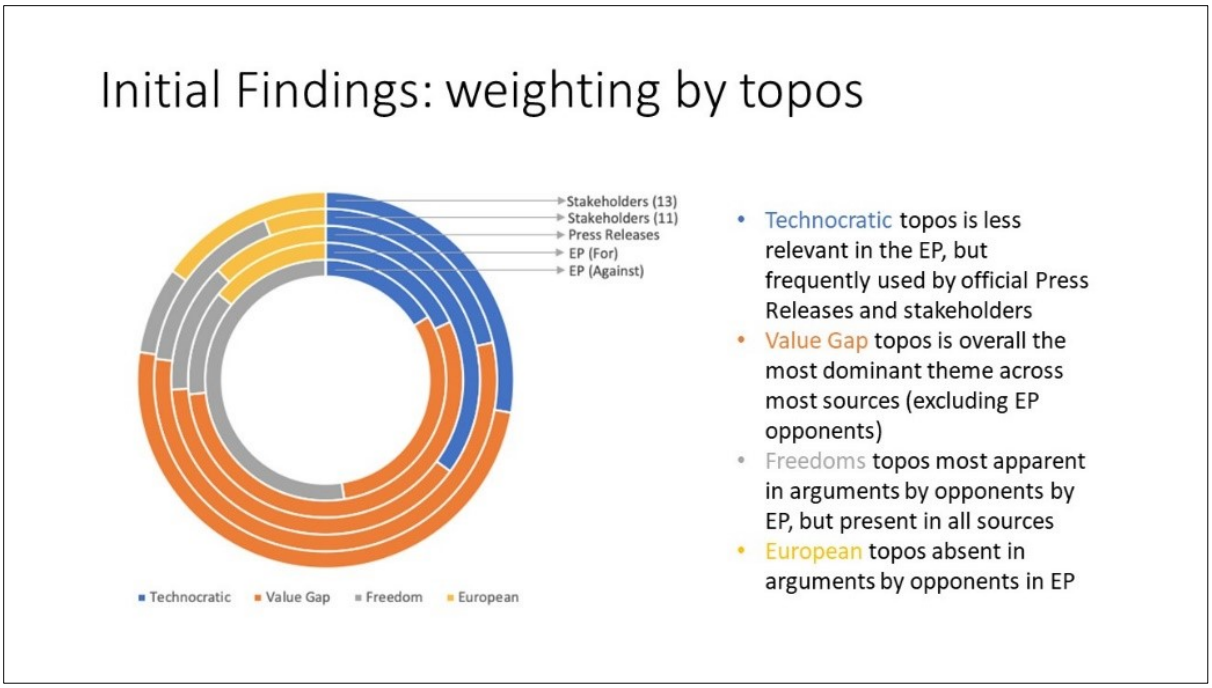
https://twitter.com/EUForCreators/status/1036962090160988162/photo/1

The gist of the European *topos* is the call to protect European cultural identity. A commonly used analogy is David vs Goliath. The role of Goliath is played by the US tech giants who exploit the rich cultural heritage of Europe. David stands for European authors, those who create and who are inherently a weaker party.

To some extent the European *topos* is a reincarnation of the value gap argument. The European *topos* has some protectionist characteristics: foreign platforms, "giants of Silicon Valley" are exploiting and benefitting from rich cultural heritage created by European authors.

This connects the European *topos* to broader debates on platform regulation, and especially the issue of taxation of American tech giants.

(MK) Now we come to the initial findings. We had the analysis of the legal changes; we identified what we believe are the key argumentative patterns which we call *topoi*. What does the story tell us so far?



(AT) To visualise the bigger picture and significance of these *topoi*, we created a doughnut chart. Each colour corresponds to a different *topos* and the size of segment relates to the weighting and emphasis that's given to each of them. Each layer of the doughnut represents a different source of our primary data so you can see how each gave different weight to each *topos* and any patterns to be discerned from this.

First, you see the technocratic *topos* is most frequently cited in press releases, which by their nature have to show the need for the Directive and promote it, and then secondarily by stakeholders in respect of Articles 11 and 13. But this is used far less frequently in the Parliament. We think that this is because MEPs showed more of a consensus about the need for change in response to the internet era, but this in itself was not the main topic of debate, rather the form of those changes.

Secondly, in terms of the value gap *topos*, you can clearly see how overall this dominates in most of the sources, with the exclusion of opponents in the Parliament, confirming what we anticipated. So, discussions about things like the value of creators, their entitlement to remuneration, and the responsibility of platforms are the primary concern throughout the negotiations. In turn, we would anticipate that the final text of the Directive should be most reflective of this *topos*.

Thirdly, perhaps unsurprisingly, the freedoms *topos* is most prominent with opponents in the Parliament, which we anticipated, but more surprisingly there is this small but definitely

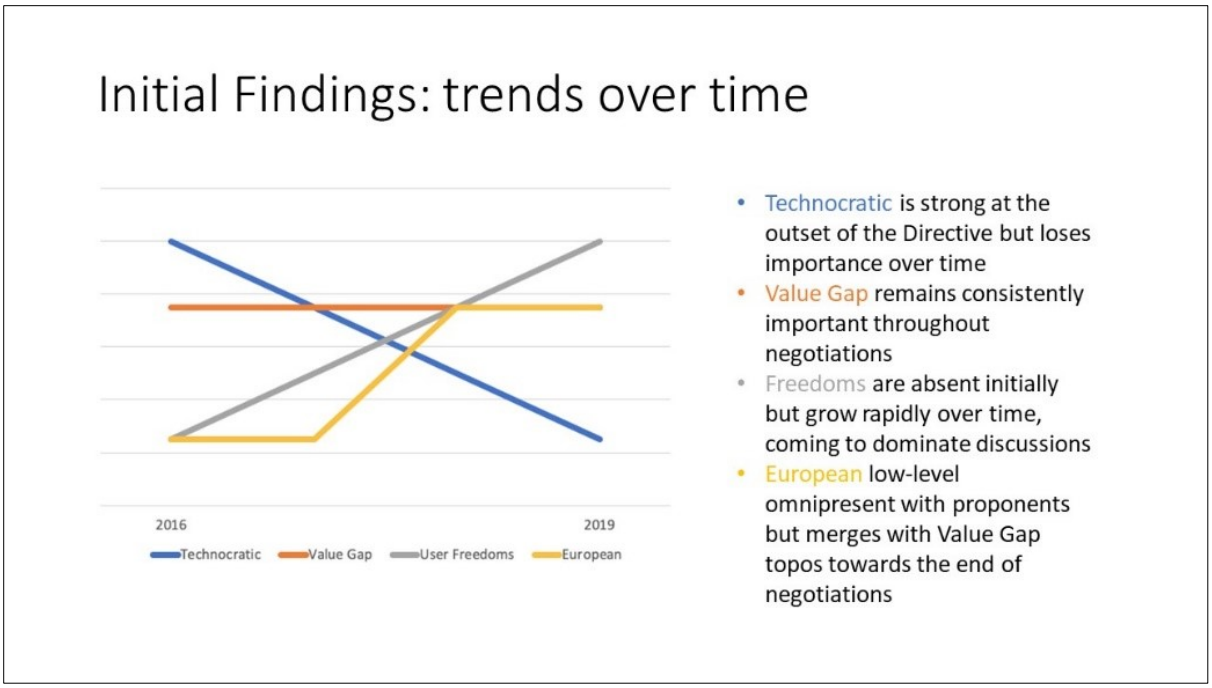
present usage of the *topos* throughout each of the sources, even from proponents of the Directive, which we did not anticipate. We suspected they might refer to the language of freedom just to dismiss it – so to say there isn't a concern about freedom of expression or censorship, for example. And whilst this type of discourse is definitely present, as I mentioned earlier there is a much more interesting form of discourse, particularly with stakeholders and proponents in the Parliament, where they repurpose the language of freedom and adapt it to suit their own argument. So, the argument becomes that freedom of expression is in fact secured by the Directive because it enables creators to make a living, for example. The usage of the freedoms *topos* in this instance certainly doesn't correspond with the same sentiment as the opponents, and the result is that the *topos* becomes muddied and absorbed by proponents of the Directive, rather than being a clear line of argumentation adopted by its opponents.

Lastly, you can see that when it comes to the European *topos* and European cultural values, this line of argumentation is completely absent in the arguments by opponents in the Parliament. This is very evident from the outset of our research when we look back to the frequency tables. For example, proponents in the Parliament mention "European" and "Culture" over 50 times in the transcriptions, whereas opponents mention these values only five times. This is an appreciable difference, and clearly the European *topos* is something that's more likely to be adopted if you are supporting the Directive. It could be called a defensive *topos*.

(MK) These are already quite exciting findings. Regarding the value gap, we all would have suspected that this dominated the discourse. We expected that. But what we found about the use of Internet freedom arguments is very interesting. While the *topos* was introduced by user interests (i.e. opponents of Arts. 11 and 17 as proposed by the Commission), during the legislative process the proponents of the Directive absorbed the discourse. This is rhetorically very interesting.

A second observation: European identity, as articulated in the European *topos* seems to have been handed over to the proponents of the Directive, at least in parliamentary debate. In effect, a good European can't be an opponent of the Directive.

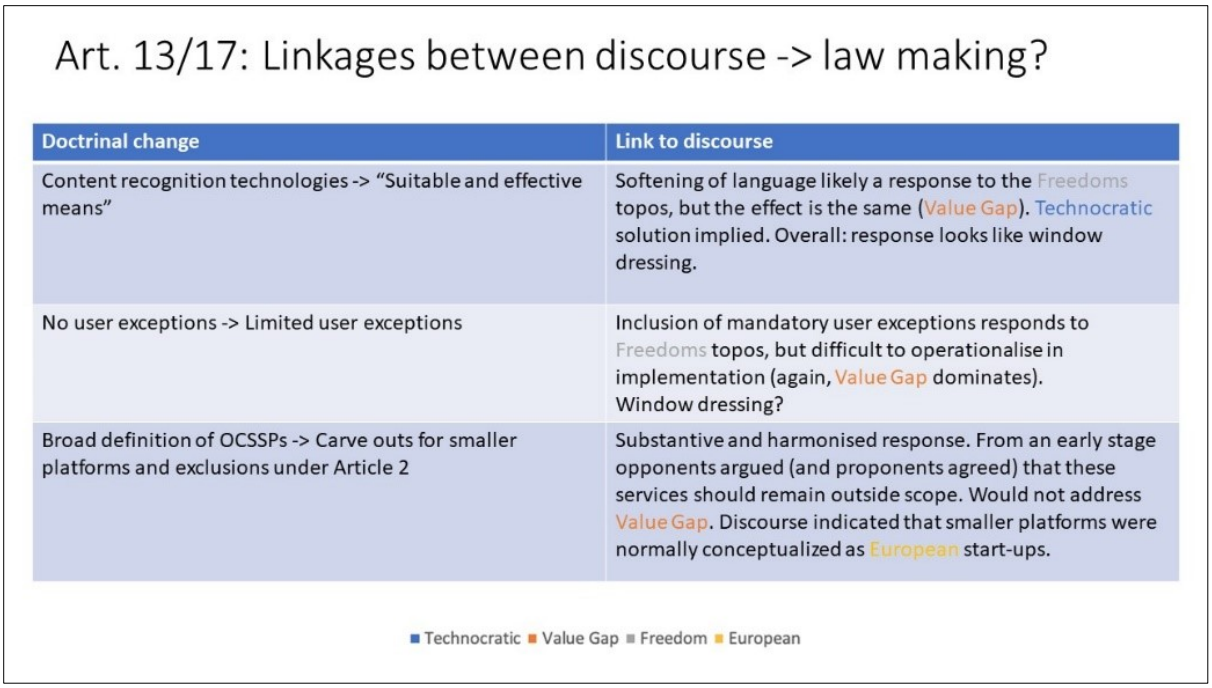
We tried to capture these trends in discourse patterns over time. This is a stylized representation. We assigned values in a spreadsheet. Discourse analysis normally should not be represented in this (positivistic) form. Still we wanted to illustrate movement, how the public sphere changed. We are exploring how to illustrate this in a more fluid way in the future.



Here you see that technocratic language disappears, freedom language emerges and becomes the most important discourse (memes), and in the process of becoming important is adopted by the proponents of the Directive. The value gap is there all the way through, and the European discourse gets hooked to the value gap discourse (platforms as parasites).

This is our analysis of the discourse. So what does it tell us about the public sphere? What does it tell us about the big theoretical picture we are trying to paint?

The challenge is to articulate a link between the discourse, the process of policy formation and changes in the law. This is not a one-directional, causal relationship. Let us make some suggestions how you might do that.



Here we look specifically at Article 13 (later 17), new obligations on platforms that host content uploaded by users. Let's consider three changes.

First, the language of "content recognition technologies" disappears. This phrase, associated in the public's mind with filtering systems, was removed and replaced with a different language. Under Article 4(4), Online Content Sharing Service Providers shall be liable for unauthorised acts of communication to the public unless the service providers demonstrate that they have "made best efforts to obtain an authorization" and "best efforts to ensure unavailability", taking account the availability of "suitable and effective means".

The language has changed but the effect remains the same. There is a new obligation for certain platforms. They become liable if they don't prevent availability. You can only prevent liability if you have a mechanism for filtering. So the change in language is window dressing. It responds to the public discourse, but only in form not in substance.

The second example is the introduction of user exceptions under Article 17(7). This looks like a substantive change. For the first time, we have mandatory user exceptions in European law. When uploading, users must be able to rely on the exceptions for "quotation, criticism, review" and "for the purpose of caricature, parody or pastiche".

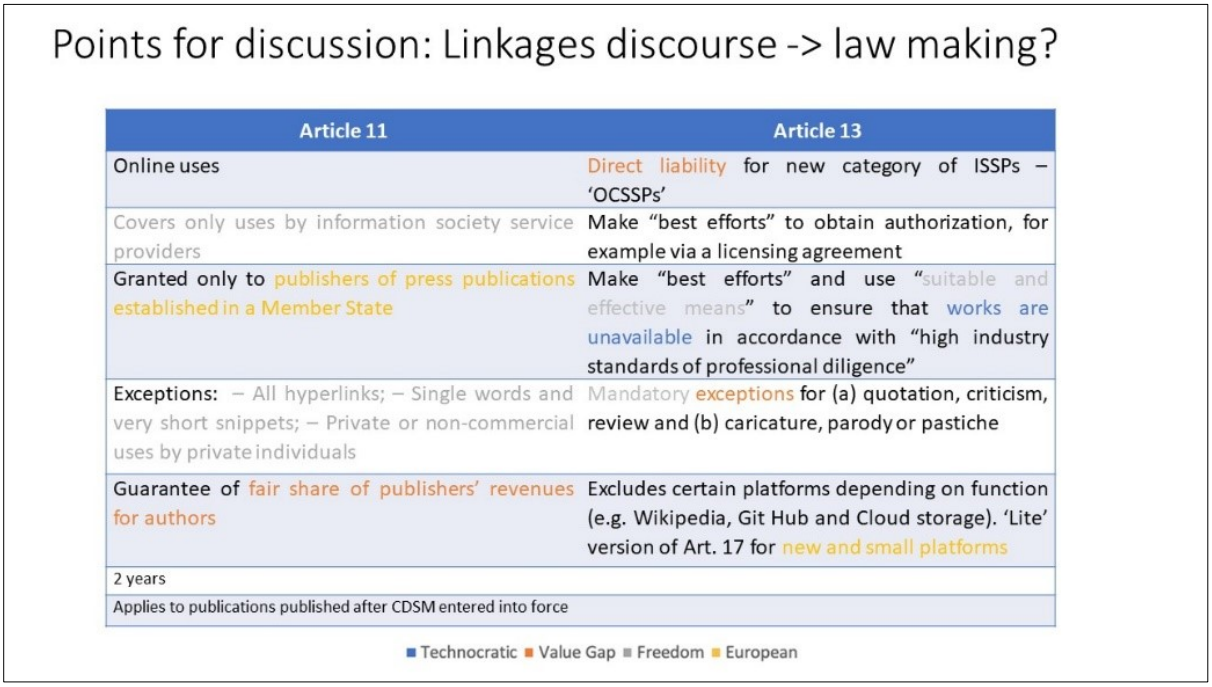
Here the question is how this provision will be operationalised in the implementation phase. The freedoms may be there in law, but how are they preserved? What is the redress mechanism?

One of the ideas floated, for example in the German implementation draft, is that you, as an uploading user can flag if you think that your material falls under a copyright exception. This would then override technological filters and necessitate human review. That looks like a meaningful operationalisation.

From what we hear from Germany, this implementation draft has now been vetoed by the CDU within the Coalition Government. The effects of the nice words in the Directive depend on the politics of national implementation. The same dynamics appear to happen at national level as they did at European level. So our diagnosis is that this change, responding to the freedom discourse, also could end up as window dressing, as something that is not effective in practice.

Lastly, let's consider which platforms are within the scope of the new Article 13/17 obligations. The amended text of the Directive now includes a carve-out for smaller platforms and also a long list of exclusions under the definition of Online Content Sharing Service Provider in Article 2. That really made a big difference. Wikipedia, GitHub, eBay, Dropbox all were in effect exempted from the new liability, as well as start-ups (as long as they don't reach a turnover of EURO 10 million per year). So the discourse could be said to be reflected in the change in the law.

This is our concluding slide. Struggling with this particular issue, how to link discourse and law-making, we have colour coded how changes in legal language may reflect one or more of the four *topoi* that shaped the policy discourse. Does this picture reflect a public sphere where arguments count and lend normative validity?



The original title of our paper was "Disharmonisation and the failure of a European public sphere". On reflection this is too stark. Public discourse did indeed matter, but there was an elusive relationship to the law-making process. Legal language changed sometimes in an ineffective or even deceptive way. Discovering these processes of managed incorporation of difficult counter arguments would appear to be a genuinely new insight. We would be very interested to hear your comments. We have presented a complex picture with an uncertain answer. There is certainly engagement in the production of distinctive discourses occasioned by legislation of EU-wide import. Does this amount to a European public sphere?

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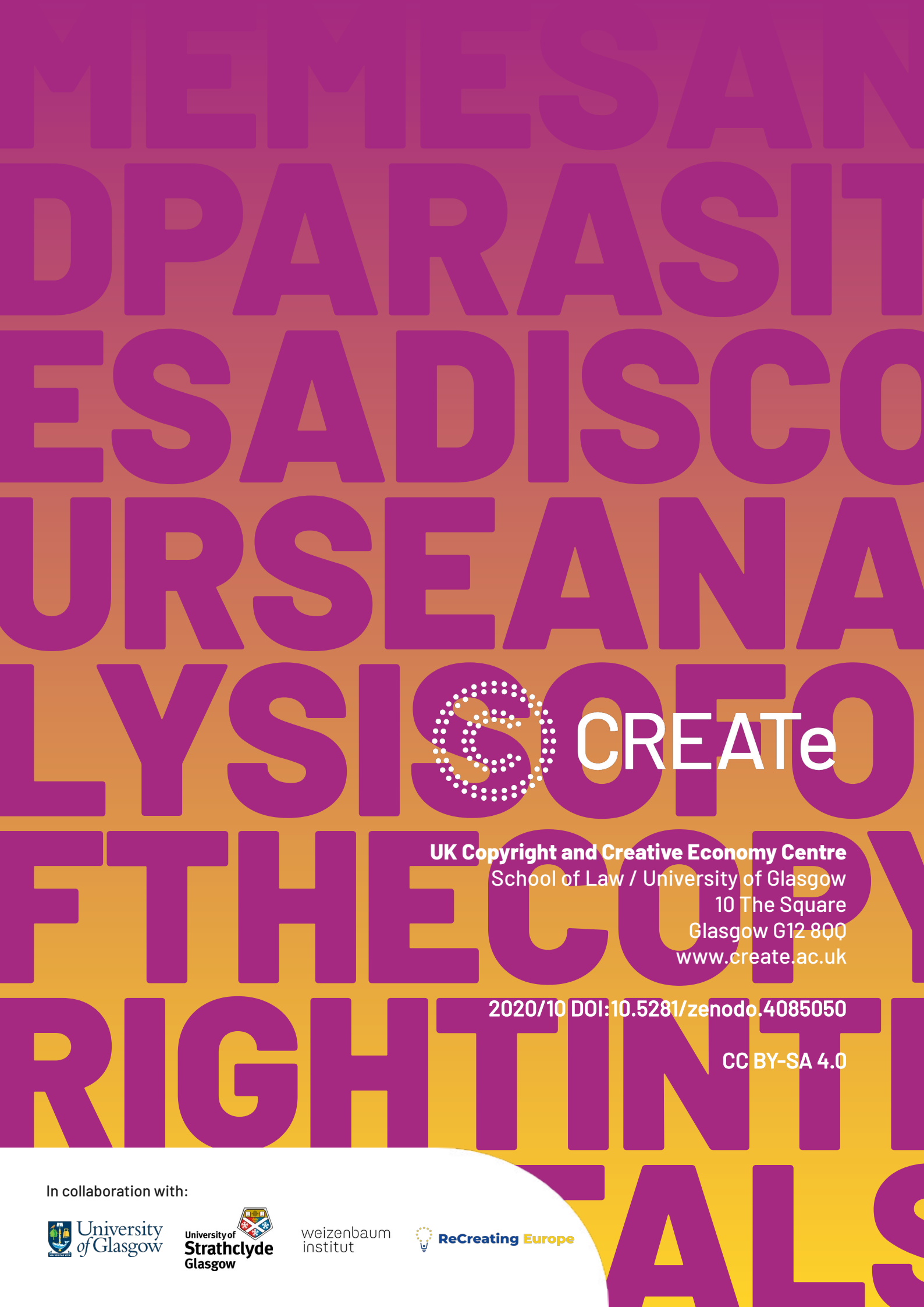

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UK Copyright and Creative Economy Centre
School of Law / University of Glasgow
10 The Square
Glasgow G12 8QQ
www.create.ac.uk

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