

DSA as a creator's charter?

The creative industries were the first to feel the heat from digital services. Long before taxi drivers worried about ride-sharing apps, technological change upended the music business. Digital services liberated the distribution of art from editors and dramatically reduced the cost and skills needed to become an author. The empirical work of Joel Waldfogel shows that digitization brought us a digital renaissance. It probably spurred more creativity of high quality than any legislative copyright extension of the recent years.

In 2000, the E-Commerce Directive's liability chapter introduced an initial digital social contract for the Internet in the European Union. It stipulated conditions under which providers of various digital services that store third-party content must assist authors to enforce their rights to preserve the legality of their services. The idea was simple: right holders and providers of digital services share the responsibility for copyright infringements to preserve the key features of the new ecosystem: its scale, speed, and global reach. This way, the ecosystem can flourish without editors. While the arrangement puts the burden on right holders to find and notify, they also benefit from the key features of the ecosystem. Authors, in particular, are liberated from a small set of gatekeepers who previously controlled distribution of their works.

Unsurprisingly, the old gatekeepers of copyright industries, such as publishers, labels and studios, never settled for what was written in the digital social contract. Before the courts, they spent twenty years re-negotiating its provisions. It was argued that the ecosystem that the EU legislature had in mind was somehow akin to a digital whiteboard rather than reality. Such arguments were channelled through unproductive debates about who is active, or passive, and whose business model is by default illegitimate. The main shared assumption was that the only proper way to achieve better enforcement is to expose providers to more liability. In this logic, the liability exemptions needed to be interpreted narrowly to only benefit the most diligent actors on the market. Arguably, the whole system did not politically collapse earlier only because the injunctions against intermediaries allowed right holders to re-negotiate bit by bit before the judiciary that equally saw the rising power and technological capabilities of new gatekeepers – the platforms.

The Digital Services Act introduced in 2022 democratically renews vows to the initial digital social contract about liability. It is now clear that the EU legislature thinks of the digital ecosystem in all its colours, with all the algorithmic recommendations and personalisation and interactivity that we value. The DSA unconditionally preserves the liability exemptions but also offers another policy lever to formulate expectations – due diligence obligations. The rulebook thus also includes new stipulations. These obligations offer a new platform for arguments about what can be done better. The DSA's obligations are more targeted and compliance with them will not cost providers the legality of their business. The answer to the question of who is passive becomes less relevant because whatever the answer, the DSA and its due diligence obligations apply. Thus, being too active is not a way out of the DSA.

The DSA moves the conversation to accountability for how systems enabling risks are being designed. It institutionalizes accountability through due diligence hoping that the liability debates for users become the provenance of clearly bad actors who are easy to single out. Unlike injunctions

against intermediaries, the DSA's accountability is much more horizontal, applying to all fundamental rights, and is thus likely to benefit a broader set of stakeholders.

So, how exactly will the due diligence obligations benefit creators?

The DSA has many components but, in its essence, it is a digital due process regulation bundled with various risk-management tools. It creates universal due process guarantees, invites transparency to private decision-making and institutionalizes constant risk management by larger players. Europeans gain enforceable procedural rights owed to them by private parties operating the digital ecosystem. Regulators gain tools to hold such providers accountable for what science tells us goes wrong with their designs. Victims, NGOs, and industries gain tools to better enforce their rights at scale.

There is a lot that creators will find in the DSA. On the most fundamental level, they will find assurances that the businesses and audiences that they have painstakingly built on these digital services are not standing on quicksands. For creators, the DSA puts in place the minimum level of mutual courtesy – rules of engagement – in their (sometimes rocky) business relationships with new gatekeepers. The DSA lays down rules about how they must be treated if a dispute arises and gives individuals credible remedies to contest the decisions internally and externally.

By institutionalizing the concept of trusted flaggers, it motivates the creative industries to raise their game. If the concept is approached well, it can incentivise the industry to use better technologies to find and notify content. Providers of digital services are asked to help trusted flaggers by providing them with the right interfaces and help with standardization of how notices are exchanged. If the quality of enforcement becomes the shared goal, it will not matter anymore who exactly uses what technology in the process.

The DSA's commitment to freedom of expression and due process will hopefully serve as a horizontal rulebook that steps in whenever these values are thrown out of the window in the heat of the political fight. It is often forgotten that bad enforcement by one set of creators usually harms another set of creators who have equal claims to authorship. The example par excellence is how the DSA promises to introduce the missing safeguards of transparency, dispute resolution, auditing, and state oversight into the implementation of Article 17 CDMS Directive. In this sense, the DSA might become an ever-present universal charter embodying safeguards much like the GDPR has become for the data protection right. The creators are among the first to benefit from it.

To see all the opportunities, we must finally change the optics. It is quite astonishing that in 2022, we are still trapped in the piracy-era vocabulary. We want to protect "users" when we are talking about the multimillion-euro economy of creators – authors in the flesh and blood – who distribute their art through digital services. We protect "users" against "right holders" even though they are often the same people. "Platforms" are then pitted against "right holders" even though they are often just two different types of gatekeepers, both building their businesses on the back of creators.

The Digital Services Act is unlikely to change our vocabulary. But at least it should finally change our thinking about who is who. When due process obligations protect "recipients of the service", they often protect *authors* against the arbitrary use of power by their new business partners – the platforms. Instead of thinking about piracy, we should be thinking about the creator economy and conditions under which creators can create, distribute, and get paid for their art. When we talk about "over-blocking", we should be thinking about the authors whose life's work is upended in a second by blind tools or under-resourced employees of faceless companies seated across the world, and not about pirates sitting in their dungeons eating popcorn and complaining about unavailability of a new video. When we hear about "content moderation", we should be thinking about new

gatekeepers of art and how they control its distribution and money. The sooner we get used to these new images, the earlier we will be ready to see the DSA's benefits to creators.

But the DSA will not settle all the digital enforcement issues. For instance, because only very large online platforms (and search engines) are subject to periodic risk management measures, the thirst for solutions against smaller, or less significant players will remain. The same applies to services that are not in the DSA's scope, such as payment services. After the DSA, it is possible that the obligations of platform services slowly stabilise, but the copyright disputes will move deeper into the Internet's infrastructure. In this regard, it is telling that the political compromise behind the DSA did not dare to touch the engine of gradual change during the last twenty years — injunctions against intermediaries. The most significant change that the DSA introduces to these injunctions is indirect. The DSA's provisions of due diligence can start pre-empting injunctions that try to go beyond what the legislature deemed appropriate. But the digital ecosystem is broad, and many infrastructure services, such as domain name registries, and VPN providers, are only subject to light touch due diligence obligations. The litigators will thus undoubtedly continue to keep inventing new obligations for new players and push them forward through injunctions against intermediaries.

Despite these limitations, for the time being, the DSA is Europe's best bet on how to update its rulebook for the new era of gatekeepers – platforms. The sooner we change our way of looking at the ecosystem the sooner we realise that the providers' due diligence obligations are creators' rights. The DSA is then a creators' charter.