Algorithmic Copyright Enforcement, Artificial Intelligence, and the Problem of Free Speech
(abstract)

Andrea Katalin Tóth

Although digitalization and the emergence of the Internet has caused a long-term crisis for copyright law by accommodating inexpensive mass reproduction and distribution, technology itself also seems to offer a seemingly ideal solution: copyright has been a major use case for algorithmic enforcement from the early and simple digital rights management technologies to the more advanced Content ID algorithms. These technologies identify and filter possibly infringing content automatically, effectively and often in a preventive fashion. These methods have been criticized for their shortcomings, such as the lack of transparency, bias and the possible impairment of fundamental rights, most prominently of the freedom of expression and information. Artificial intelligence, or machine learning, has the potential to offer even more sophisticated and expeditious enforcement by code, however, these new technologies could also aggravate the aforementioned issues associated with algorithmic enforcement. Nevertheless, the EU legislator has envisioned to make the use of such technologies essentially obligatory for certain online platforms in the infamous Article 13 of the proposal for a directive on copyright in the digital single market as part of its copyright law reform, given that the mentioned provision aims to declare these online platforms primary users of copyright-protected content uploaded by their end-users. As the negotiations on this legislative proposal have come to an end and the last hurdle in the way of the directive entering into force is the final approval of the co-legislators, the assessment of the situation in light of future technological development has become a current and relevant topic.

Apart from identifying the main issues and potential long-term consequences of employing filtering algorithms as well as presenting some proposed solutions to address these problems, (such as the implementation of a balanced complaint and redress mechanism for users, detailed disclosure requirements and a wide exception for text and data mining) this paper focuses on the long-term implications concerning the freedom of expression and information, the private regulation of free speech and how its detrimental impacts could be eliminated or reduced. Even though the idea behind making large online platforms primarily liable for copyright infringement and compelling them to make sure that no unauthorized content appears on their sites was intended to create an obligation for these entities, it actually bestowed a significant power to these private companies (whose trustworthiness, based on recent controversies, is dubious regarding their respect towards basic rights). This wide authorization to have the final say in what constitutes infringement is even more questionable as copyright is asserted more and more often for reasons external to intellectual property rights (e.g. to remove critical or unfavored content) and also by persons other than the rightholders, providing an effective tool for corporate censorship based on misuse and an abuse of power.

Even though copyright law's history has always been one of balancing between the rightholders' proprietary interests and the users' fundamental rights, the question arises, whether technological advancement at this point warrants a new approach to speech regulation and creates a new role for legislators. The legislative intent and the political discourse behind Article 13 were seemingly obvious, however, the actual potential impacts of the provision as well as the likely direction of the development of AI technology have not been thoroughly considered. As the next major stage in the life of the directive is going to be its national implementation, this paper suggests that a careful balancing should be exercised while transposing these provisions into national law in order to protect fundamental rights without compromising the effectiveness of the new technologies and consideration of the ways new innovations could actually help and advance this cause is due as well.