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Re-thinking and closing the Value Gap

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Finding the Value in the Gap in 2018

Last year's IAEL annual book ("Tech: Disruption and Evolution in the Entertainment Industries"), examined the positive effect of technology on the music industry in supporting a return to growth and stimulating disruptive and evolving ways for revenue growth . In other words, looking at the ways in which technology can support, rather than destroy, value creation.

In 2018, we pick up on this concept of value creation and focus on the so-called "Value Gap", seeking to broaden the popular perception of the expression by looking beyond the "Safe Harbour" debate at what other factors might contribute to the gap between the rights owners'/artists' expectations and reality when it comes to income generation in the new paradigm.

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What do we mean by the "Value Gap"?

As we have commonly come to know it, the "Value Gap" refers to a disparity in online content exploitation between the position of digital content intermediaries (such as YouTube, Vimeo, Dailymotion, LinkedIn, Facebook, SlideShare, Dropbox, Instagram, Flickr as well as search engines and app stores) and copyright owners and distributors. Such disparity concerns royalties paid for contents exploitation and, consequently, revenues generated by such players.

The "Value Gap" has been generated by the "neutrality principle" (colloquially referred to as "Safe Harbour") stated by Digital Millennium Copyright Act of 1998 and European Directive 2000/31 on information society service providers, which allows digital content intermediaries to be exempted from direct and indirect responsibility for infringing contents uploaded on their platforms by users, despite the fact that the same intermediaries gain profits and economic advantages from such contents.

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In Robert Ashcroft and Dr. George Barker's paper "Is Copyright Law Fit for Purpose in the Internet Era", the authors rely on the use of the 'Pareto efficiency test', which states that if an outcome is to be judged efficient and society is to become wealthier, some must become better off without others becoming worse off. This supports a view that no rational person would voluntarily consent to a transaction that put them in a worse position. 'Pareto-optimal growth' requires the consent of all parties to an economic transaction.

By contrast, where one person (the "parasite") becomes better off at the expense of another, this type of 'Parasitic Growth' creates a negative sum outcome that damages society's wealth as a whole.

The transfer of value, facilitated by the "Safe Harbour" exemptions, is a form of 'Parasitic Growth'.

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Whilst the transfer of value creates the circumstances in which the "Value Gap" exists, the two expressions reflect different concepts. The transfer of value concept is underpinned by economic theory, whereas the "Value Gap" has become a set of more complex considerations, some of which don't necessarily flow from that theory.

The fact that "Value Gap" has become the more widely used and catchier expression means that not every instance of its use can necessarily reflect the impact of the "Safe Harbour" exemptions, especially where commercial deals are being made to ensure that consents are properly given. Those deals, often made by intermediaries, may still not, for a number of reasons, satisfy the requirement for value or a "fair share" of the value created by the products using rightsholders' IPR and, therefore, there is still a perceived "Value Gap".

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What do we mean by "Value"?

It's not a homogenous concept so the book will examine what the reference points are and where it can be extracted.

There's no doubt that difficulties in tracking exploitation, missed royalties, failings in the CMO system and piracy all have their part to play but, in a world where historical value is not necessarily the benchmark for potential future value, should we accept that "Value" is a dissipating commodity or that depreciation of the copyright content in the consumer offering is a natural consequence of accessibility to the mass market?

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Should "Safe Harbour" take all the blame ?

As a clarion call, the "Value Gap" now extends beyond "Safe Harbour" to the gap in perception of value where digital content intermediaries are paying for rights.

The existence of the "Value Gap" seems also to have been an easy scapegoat for the financial troubles and identity crises suffered by the traditional players in the entertainment industry in the last 20 years. If the "Safe Harbour" exemptions were modified in favour of rights holders would the Value Gap disappear or would it simply take on another form or forms?

Maybe rights holders have to take their share of the blame. Content management in the digital era has been inadequate and contradictory; lack of a coordinated strategy and response to the intermediaries' role has worsened the consequences.

Late awareness and reaction to the change in the digital content distribution have produced irreparable damage to the industry.

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The reaction of legislator and Courts

The Courts have tried to address the issue of the "Value Gap" distinguishing between "active" or "passive" intermediaries, and then introducing the principle of "notice and stay down" imposing the platforms to use technical means, on the basis of good faith and duties arising from their position and activity.

In the "Public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy" the European Commission recognized that online content intermediaries "*raise particular problems, such as the absence of a level playing field, lack of transparency, concerns around personal data collection and imbalanced bargaining power between platforms and suppliers, which could lead to unfair practices vis-à-vis consumers and businesses*".

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Proposal of a new European Copyright Directive

On September 14, 2016, the European Commission announced its proposed copyright reform, including a new directive on Copyright in the Digital Single Market, aimed at pursing, amongst other objectives, "*a reinforced position of right holders to negotiate and be remunerated for the online exploitation of their content of video-sharing platforms*". The proposal highlighted the need "*to guarantee that authors and right holders receive a fair share of the value that is generated by the use of their works*".

Such Directive proposal is based on technological measures and duty of cooperation and transparency in order to address the issue of the "Value Gap". In particular it refers to information society providers which store and provide access to the public to large amounts of copyright protected works uploaded by their users.

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Beyond the Value Gap and enforcement: the role of self-regulatory solutions and private agreements for a coordinated strategy in the digital era

Legislation and enforcement, though crucial, shall not be enough to solve the issue of "Value Gap" and, more broadly, the identity crisis of entertainment industry, which has still to develop adequate business models for the digital era.

Along with rules and judges, a profitable digital exploitation requires, amongst other things:

- self-regulatory solutions;
- cooperation and agreements between players, intermediaries and consumers;
- a sagacious use of technical tools for a tailored offer flexible and linked to consumers' perception.

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Closing the Gap

New technologies create new revenue streams and commercial enterprise creates revenues from a variety of sources. The problem is that many of these revenue streams are not currently shared with rights holders or, where royalties are paid, they are regarded as inadequate, especially when compared to expectations in the world of physical product. Taking Spotify – a driving force for streaming - as an example of the latter, although many rights owners have been vocal in their disapproval of the amount of royalties they receive and, in certain cases, have withdrawn their repertoires (even if only temporarily), Spotify is reported to spend roughly 80% of its revenues in rights payments. That is clearly an unhealthy situation for both Spotify and rights holders.

Is it a fact, then, that content value must depreciate as a result of media convergence or can the independent and autonomous significance of creative content be re-established?

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New and innovative licensing practices will be required across the board. In this context data is king but whose data; will competing initiatives help or hinder?

There are potential dangers in diminishing the role of collective licensing if it leads to a more fragmented licensing landscape for the user. The question must be asked "if it's good for the rights holder is it good for the rights user?". If the answer is "no", then what are the consequences?

The challenges to royalty distribution (created by the split between reproduction rights and communication to the public/making available rights) make it more likely that there will be fewer licensing intermediaries but that wouldn't necessarily be a bad outcome from the user point of view, provided that the licensing entities remained effectively regulated.

We will be examining all the issues raised above in the 2018 IAEL Book and hope that it will help readers better to understand the challenges, contribute to solutions and formulate their own business models for the digital age accordingly.

ABOUT THE AUTHORS

The IAEL was officially founded in 1977 at MIDEM, Cannes. However, for three years prior to that the lawyers who were to become the Association's founding members had been holding informal seminars and discussion groups for MIDEM participants interested in the legal aspects of the entertainment industry.Over the past 40 years, the IAEL has come to fulfil a unique role for lawyers involved in the industry throughout the world. It has expanded enormously in terms of both the numbers of its members and the scope of its activities. Nonetheless, continuity of membership (some of the founding members of the Association are still actively involved with the IAEL) combined with the energy of its officers, past and present, mean that the Association's style remains distinctly personal. IAEL members have areas of expertise that cover nearly all aspects of entertainment law. If you are a lawyer or executive working in the entertainment industries, you may wish to find out about joining the Association or merely to contact us via Duncan Calow at duncan.calow@dlapiper.com

Massimo Travostino

After classical studies, Massimo received a piano Diploma at Conservatorio G. Verdi in Torino, a Degree in Law at Torino University, in Comparative Law in Strasbourg and a Master Degree in international law in Torino. He was admitted to the bar in 1996 and his activity has been especially dedicated to IP/IT, commercial and company law. Today he is a partner in DGTB Legal law firm, teaches in Masters and specialization courses and participates in seminars and conferences.

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A graduate in business law, Paul is Managing Director of the Footprint Music, a specialist rights and licensing consultancy that he founded in 1994 and that is focused solely on music copyright and associated rights in the media and entertainment industries. Paul has advised both national and international television broadcasters, digital platforms and content makers and has appeared as an expert witness or filed expert testimony in a number of international court cases, tribunals and mediations.

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