Uber Copyright Reform

Gervais, D.J.

Publication date
2017

Document Version
Final published version

Published in
Intellectual Property and the Regulation of the Internet

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
Uber copyright reform

Daniel Gervais

'UberEverywhere' isn't a joke. It's a mantra, a call to arms, a holy ideology.¹

In previous work I have discussed the risk of regulating inchoate technologies which evolve quickly and whose evolution is hard to predict.² I have observed that regulating such technologies might interrupt innovation chains if costs or constraints imposed on innovation are equal to or higher than the benefits achieved by the regulation, especially once other unintended consequences are factored in. I also discussed the precautionary principle and suggested that it might constitute a limit to a principle of non (regulatory) intervention. In short, my concluding argument was that regulators should use a light touch.

As business models keep falling victim to technology-based Schumpeterian destruction, this chapter builds on my earlier work in order to delineate the scope of the principle of non-intervention and specifically its application, in part to reflect more fully the role of legacy regulation; put differently, how shifting technology-based models that have 'brick-and-mortar' impacts should be regulated. This includes a discussion of how and when to regulate (means and timing), issues mostly absent from my previous article – unsurprising, given it was mostly a plea not to step in without a precise set of circumstances.

Some technologies, like nuclear fusion, must be regulated even if they provide benefit (electrical generation) because of the risks of mass destruction. That is a most extreme example of this duality of consideration, and on a smaller scale examples are abound. One such example, which provided a double entendre for this chapter's title, is Uber.

Some say Uber is destroying the taxi industry. Others say it is transforming it. The spotlight is on the way in which the app has changed how people use taxis. Some suggest that while the changes induced by Uber can be seen as net positives for customers, this should not be used to mask the sheer magnitude of Uber's destructive force. Philippe Rossignol, a Parisian taxi driver with 17 years of experience explains it best. He agrees that Uber's phenomenal success was made possible by serious shortcomings in the taxi industry. Indeed, this has already
led to major improvements to call centres and even the appearance and attitude of drivers. But Rossignol rightly complains that ‘taxi drivers face stricter regulations, including annual inspections of cars and medical checkups’, making Uber’s competition ‘neither right nor fair’. He wonders what will happen once Uber becomes dominant and no longer faces the same incentive to outperform an existing industry.

An alternative approach to this analysis is to elevate the level of abstraction and claim that one should not speak of a ‘taxi industry’ but rather of a transportation service. In this sense the industry is alive and well, and growing, even though the service is now performed by different entities, namely private car owners using their vehicles via Uber to establish connections with customers. Should regulators step in? If so, how? Uber provides a great example of the regulatory challenge.

Uber is an excellent illustration of how a mobile app (with location services) can impact an existing service industry. Uber is a technology with very real impacts in a brick-and-mortar world (or in this case, ‘rubber and steel’). More broadly, Uber can serve as a poster child for a technology that disrupts a firmly established modus operandi – the ‘taxi industry’ is over 400 years old and has not changed all that much.

Uber has become the Silicon Valley term for a type of service, such as Uber for massages, alcohol or dry cleaning. The term *ubersisation* is used to encapsulate a phenomenon which could be defined as improving brick-and-mortar services by using online/mobile technology – in Uber’s case essentially ubiquitous GPS-equipped mobile devices. This is thought not just to improve delivery of services (that is, the way people purchase the service) but also the way in which people provide it. As a *New York Times* columnist put it:

Just as Uber is doing for taxis, new technologies have the potential to chop up a broad array of traditional jobs into discrete tasks that can be assigned to people just when they’re needed, with wages set by a dynamic measurement of supply and demand, and every worker’s performance constantly tracked, reviewed and subject to the sometimes harsh light of customer satisfaction. [. . .] Uberization will have its benefits: Technology could make your work life more flexible, allowing you to fit your job, or perhaps multiple jobs, around your schedule, rather than vice versa.

This chapter thus uses Uber as a flagbearer for disruption and draws a parallel with internet intermediaries: those who provide access to ‘content’ and are pushing hard to be able to use such content without payment or authorisation, even if protected by copyright. Content is a means to an end, and that end is revenue, often in the form of targeted advertising. By maximising the type and amount of content they can use for free, intermediaries reduce costs (and increase profits). In some cases, powerful normative arguments support their efforts.
For example, when copyright material is no longer commercially available, it is often de facto unavailable (except perhaps through a library, especially for books and periodicals). Here, providing access may be seen as a clear positive. Digital content may be much more easily accessible for blind and other print-disabled users. Text-based material can also be word-searched once it has been properly digitised.

In some cases, content that is provided for ‘free’ is commercially available, however. Market interferences emerge. Here, can the ‘new’ intermediaries simply ride behind Schumpeter’s horse? Should we simply let existing distributors be Uberised? I argue that there is a parallel to be drawn between Uber and online copyright reform. Let us begin.

Two things are clear. First, few people will protest when offered free candy. So making more content ‘freely’ available — even in exchange for viewing advertisements — is rarely going to be massively opposed. A more advanced — though in my view specious — argument is that those, such as authors, who want to get paid for their content are simply greedy and/or obsolete. This view rings hollow, especially when voiced by or on behalf of intermediaries who generate billions in advertisement revenue that they do not, or only very reluctantly, share with creators of the ‘content’ who lead people to the ads to begin with. Internet industries have made tons of revenue on the backs of creators. In previous (brick-and-mortar) models, those revenues were shared; now they tend not to be.

Second, no business or business model has a right to survive. The music industry has been transformed by the use of ‘self-help’ tools for musicians (for example, Pro Tools) and free use of internet-based distribution tools. Must we throw the copyright baby out with the recording industry’s bath water? Do we even have a choice?

In this chapter, I explore whether these are similar situations from a regulatory perspective amid a Schumpeterian utopia of rapid and ultimate destruction which we should let happen, either as a neoliberal approach of letting market forces do their thing, or because we think the outcome will be better. The former has been referred to as ‘unrestrained hyper-capitalism’. My ultimate aim is to provide the building blocks of an analytical framework for regulatory interventions aimed at new technologies.

**Uber: The business, and the ideology behind it**

The ethos that separates Uber (and other disruptive Silicon Valley players) and the legacy industries they seek to replace is that the technology companies see themselves as online middlemen — or in tech lingo, ‘platforms’.” “They are just connectors, with no responsibility for what happens there.” In other words, ‘they think of themselves as online companies — yet they mostly operate in the offline
world. In fact, when describing attempts to question Uber and possibly regulate it, expressions such as 'regulatory woes' are used. By implication, anything that impedes the progress of Uber and similarly disruptive technologies must be negative.

There is a deeper assumption at play, namely that technological changes translate to human progress. This arguably drives some of our regulatory regime, notably intellectual property. And indeed, there has been progress. The internet is offering a wide array of new informational choices. But while technological changes often lead to higher productivity, which the economic system requires, they do not necessarily equate to greater wellbeing or happiness—neither one of which is a metric used to measure 'progress'.

Be that as it may, there is undoubtedly a degree of arrogance in technology development, fueled by the enormous valuations that Wall Street gives new 'plays' like Uber. The incomprehensible amounts of money flowing to new tech entrepreneurs reinforces the zeitgeist that wealth accumulation, often through commoditised commerce-based social interactions but also through disruptive services like Uber, is a sign of belonging to the higher classes (to which regulators do not belong but which American political elites often need to fund elections). This in turn means that no pre-existing social order has a chance of survival. The arrogance is visible when, for example, Charlie Hales, the mayor of Portland, Oregon, said that Uber operations in the city were illegal. The city was reportedly told: 'We're here; deal with it.' The city's commissioner of the Bureau of Transportation declared, 'This is not about whether we should have a thoughtful conversation about changing taxi regulations – we're up for that. This is about one company thinking it is above the law.' To this the Uber spokesperson responded, 'The statement by Commissioner Novick shows a real disregard for consumer demand, choice and what the people of Portland want.' Not all disruptors have acted in this way, and comparisons have been drawn with another technological play, Airbnb, which is said to be taking a much softer stance with regulators.

Uber has clearly tapped in to unmet needs, at least in London, New York and San Francisco, where it is larger than the size of the (previous) taxi industry and still growing. In London, this can be combined with the fact that GPS technology has made it less necessary to have 'the knowledge': the apparently exceedingly difficult test required to obtain a taxi driver licence in the British capital. All of this suggests that Uber is a highly valuable business model which should be allowed to continue to grow. Against this backdrop, what exactly could or should regulators look at? At least five possible regulatory targets come to mind.

One might consider first the safety of vehicles used by Uber drivers, something which is typically regulated in the taxi industry. Uber implicitly recognises a need for some kind of 'regulation' of its cars and drivers, though it seems to believe
that its own private ordering scheme is perfectly sufficient. Uber says it performs checks on its drivers before they can offer the service, and 'deactivates' any driver (ex post) who has a less than stellar feedback record. A related key issue is how Uber deals (or not) with reduced-mobility users, an obligation imposed on many taxi companies by regulators and/or legislation.

Second, a regulator might look at the way Uber adjusts its rates to demand. Whether customers always benefit from this was questioned, for example, when Uber jacked up its prices for people fleeing a hostage-taking in Sydney, December 2014. When Uber was criticised, however, far from apologising, it said it was seeking to obtain a patent on its pricing (surge) system. Whichever view one takes of the matter, whether Uber and taxis should be allowed to compete on the same rates and terms is an obvious question to ask.

Third, because it is the central hub for all the requested rides, Uber knows too much. Uber ride data is theoretically very valuable, both to Uber itself but also to marketers if it is made searchable and exploitable for advertisement. Use of Uber data can go well beyond this. Uber may have 'sensitive data on journalists who used it for rides [...] Uber had just told all its users that if they were having an affair, it knew about it. Rides to Planned Parenthood? Regular rides to a cancer hospital? Interviews at a rival company? Uber knows about them, too.' Of course similar statements can probably be made about social media apps, but in those cases the information posted is at least voluntarily disclosed. While regulation of sensitive data (such as banking information) is typically protected by regulation, this is not the case here. In fact, Uber's view is that it is merely 'doing only what other technology companies regularly do'.

Fourth, Uber considers all their drivers private contractors. FedEx also claimed not to be a delivery company but a 'logistics' company, which hardly passes the 'straight face test'. Indeed, questions have been raised about labour laws, especially in California. As one commentator put it, to thrive Uber needs a 'large enough labor class willing to work at wages that customers consider affordable and that [Uber] considers worthwhile for their profit margins.'

Finally, if Uber ends up beating the industry by destroying extant taxi companies - and even its direct competitor Lyft - its de facto market dominance should trigger antitrust scrutiny. Andrew Leonard believes that '[s]ociety is going to realize that power as great as Uber's needs to be checked. Uber, by virtue of its own success, will demonstrate where the lines need to be drawn for the general good.' The ultimate irony in the disruption cycle is that, once the disruptor has eliminated earlier players, it will then want to use regulation to protect itself and reinstate rigidity in the system, which mature industries have historically tried to do, often by using regulatory capture tactics. In Nietzschean terms, the disruptor wants to displace the powerful but then use
technology (as it was used against it, but obviously without success) to keep the weak weak.33

In my above-mentioned 2010 article on techno-regulation, I reviewed another ideology which in short could be called the appetite for regulatory intervention in the realm of ‘business’ writ large.34 This is at play here, with Republicans supporting the absence of regulation for Uber and Democrats seeing it somewhat differently:

Uber is a free-market conservative’s dream: A start-up business making smart use of technology and terrific customer service to out-compete a lumbering taxi establishment giant grown bloated by union influence. But as many Democrats have pointed out, the very purpose of government is to regulate businesses like Uber in order to safeguard citizens.35

Add to this equation that Uber hired David Plouffe, formerly an Obama strategist and speechwriter, as their vice president of policy and strategy, and strategic advisor following that.36

In countries with a greater appetite for regulation – and perhaps also for the preservation of traditions and the status quo – regulators and courts were quick to step in: France introduced a ban which lead to violent demonstrations.37 Yet protecting the taxi industry was not the government’s only concern, as French law requires that those offering transportation for a fee are licensed and have insurance – two requirements that seem neither particularly unfair nor unreasonable. The real question to ask might be why Uber should not have to deal with those regulations. If the answer is simply that it uses an app to connect customers and drivers, this may not be entirely convincing.38

France is not alone. Cities such as Amsterdam and Berlin are trying to block the service, and Korea took it a step further by filing criminal charges against Travis Kalanick, the chief executive of the ride-booking company, on charges that Uber violated local licensing laws.39 Uber has also had to back out of the Spanish market.40

Uber’s ‘arrogance’, built on its technological role as a digital connector, will necessarily fall on the sword of reality because it needs two real-world things to have a worthwhile app and business: cars and drivers. As such, there is no doubt that Uber will be regulated.41 The question, then, is why and how.

**Uber regulation**

The Uber ‘revolution’ can be seen from different regulatory angles. There are two ideological prisms that may modify the perceived need to intervene: first, the Silicon Valley ethos that prefers – and, it may not be excessive to say, feels entitled to – make its own laws as it continues to ‘change the world’. They implore the public trust them. Second is the more traditional neoliberal and conservative
allergy to regulatory interventions. In asking why one should regulate – or why not – one must be aware of the obstacles with which they would be dealing.

For example, data is the currency of Silicon Valley. The most personal data is often the most valuable in generating targeted ads. As Jonathan Taplin put it, we 'somehow trust that [big Silicon Valley firms] will not use [personal] information in ways that can harm us'. This is a problem that goes much further than Uber, although the type of data that Uber captures is, as noted earlier, particularly sensitive. Regulation to protect users' personal data is necessary – even if somewhat controversial – especially in international trade negotiations that attempt to remove barriers to cross-border transfers of personal data.

In contrast, regulation to ‘save’ the taxi industry from Uber’s competition is suboptimal. Business models and businesses have no right to survive. As mentioned above, however, if Uber were to become a dominant player – some might say it already is in some markets – then antitrust laws should be applied.

If the public is to trust Uber cars and drivers, should not both be regulated equally? What is it about an app that connects drivers with customers that means Uber cars are necessarily safe and their drivers trustworthy? The answer to this question amounts to asking why taxicabs and drivers have historically been regulated and whether this is necessary or desirable. For example, can market forces ensure taxis are clean and safe? Regulation can create a floor that is (too) low in this respect, yet in practice it may become a standard. Conversely, one might argue that owners and drivers might realise that if everyone drives in a dirty cab, then the incentive to work harder to provide a better service is reduced. This can likely be measured empirically.

If the question of the need for regulation is answered in the affirmative, then Uber has at least the burden of proving that it should be treated differently. This means that the ‘brick and mortar’ impacts of technological applications are proper regulatory targets, though not if the primary aim is to protect existing business models. The risk otherwise is asymmetric regulation between new technology-based business and the established industries it competes against.

For similar reasons, labour laws should apply. But how? The fact that the employer is a technology company in principle changes nothing. Human beings are working in the tech environment just as they would in any other, one may argue. Yet as noted above, in some ways the technology interface makes Uber transformative. This does not mean that Uber should or should not be regulated from a labour rights perspective, but any intervention designed to mitigate negative outcomes for drivers should preserve advantages for drivers. Whether the designation of Uber drivers as private, independent contractors (with no right to unionise) is valid is thus a discussion worth having and one which may require a re-evaluation of labour laws in the age of the uberrisation of ‘everything’, as this chapter’s epigraph mentions.
An important element of the regulatory analysis is that Uber has not reduced services available to the public – other than users with disabilities. Uber drivers typically drive their own cars, which are not necessarily accessible for all. Other transport services may choose to own or have to adapt vehicles in order to comply with regulation, whereas Uber drivers (those who are driving on a part-time basis or even casually) may simply drop the job. How Uber will deal with regulation in this area is a matter that deserves further scrutiny.

Meanwhile, Uber has increased other available services and demand for such services. Many factors may be at play, including, most prominently, accessibility of the service using the app, but also anecdotal data about better vehicles, friendlier drivers, faster service, lower fares (in some cases), and ease of payment. Assuming this is correct, there is no major social welfare loss and no destruction of a public good (such as public transport systems), at least not at this stage. This is technology-fueled capitalism en marche.

By contrast, when a new technology-based business model risks the welfare of certain groups by destroying something that is hard or impossible to get back, then an intervention may be warranted. This appropriate parallel here is environmental damage and extinction of species, which regulation can prevent even if it reduces profits or otherwise slows down business entities. The question is, then, around regulating ‘businesses like Uber in order to safeguard citizens’ if and when necessary.

If the building blocks for a regulatory model contained in this chapter are valid, presumably they would be robust enough to apply beyond Uber. This could be true of any disruptive technology, for example in areas like energy. To port Uber regulatory lessons to other contexts, one could posit that the following three mobilising principles should apply (presented in Rawlsian lexical or serial ordering priority: that is, there is one paramount principle and two that apply subject to the first):

(i) Paramount principle: No regulatory intervention should be designed to preserve existing businesses or business models. Then:

(ii) When an internet-based technology has ‘brick-and-mortar’ impacts, those impacts should be subject to legacy regulation unless the new entrant can show that they should not be. This should prompt a reconsideration of whether the legacy scheme was in fact justified;

(iii) Significant risks of welfare losses (including ‘extinction’, understood as a loss that can be irretrievable) are a proper reason for a regulatory intervention but the burden of justification should be on the regulator.

A corollary of the paramount principle is that the agency tasked with regulating the business that the new technology-based business model is competing against should have jurisdiction prima facie. In Uber’s case, a transportation commission
Intellectual Property and the Regulation of the Internet

should, therefore, require licensing and safety qualifications of the vehicle and driver, unless the contrary can be established.

While it seems difficult to oppose a requirement that drivers have adequate insurance coverage and background checks, a disruptor such as Uber could lead policy-makers to weigh the actual safety impact of licensing – touted as the main regulatory target and benefit – against the costs. In the words of Professor Morris Kleiner:

Occupational licensing has been among the fastest growing labor market institutions in the United States since World War II. The evidence from the economics literature suggests that licensing has had an important influence on wage determination, benefits, employment, and prices in ways that impose net costs on society with little improvement to service quality, health, and safety.

**Principal regulatory vehicles**

Given the use of Uber as the mortar for the analysis, the well-known term *regulatory vehicle* is apt to describe the options available to regulators once the appropriateness of a possible regulation intervention has emerged. There are three main options:

(i) Specific legislation (including regulation)
(ii) Specialised agency or bureau (including antitrust/competition)
(iii) Courts (based on civil or criminal complaint)

Much has been written about these modes of intervention in administrative law and regulatory theory work. I will only give a very brief overview here.

**Legislation**

Legislation that applies to an industry against which a new technology-based business competes may apply, if a court interprets it that way, to the new entrant. The effect of the new entrant and the public’s reaction to the service may, as in Uber’s case, demonstrate that the existing legislation was inadequate to begin with. The quick rise of Uber in markets that had a significant taxi industry may be used to argue that, unshackled from such inadequate regulation, transportation services will do better.

Should the adoption of specific regulation forcing the business model to behave within narrow parameters be a last resort? Probably. There is a risk that legislation will set rules in stone and prevent the use of a more nimble regulatory vehicle. The pace of legislative reform may thus appear incongruent with the speed at which technology and related social norms develop.

There is always the risk of capture, of course. As a US Senate document noted many years ago, this is nothing new:
Every Senator always must endeavor to avoid the appearance that the Senator, the Senate, or the governmental process may be influenced by campaign contributions or other benefits provided by those with significant legislative or governmental interests.\textsuperscript{56}

Legislation may be used in a different way, however, namely to set adequate parameters for a specialised agency’s possible intervention:

Legislation directing agency action (e.g. rulemaking or law enforcement) defines the scope – sometimes narrowly – of the agency’s authority to act. Some have written on the need for legislatures to implement ex ante statutory constraints to curb ex post opportunism by regulators.\textsuperscript{57}

Finally, it is probably worth noting also that the potential worldwide nature of any internet-based technology poses a geographical challenge. It may make legislation a difficult option in smaller/local jurisdictions. This would apply in particular to regulation of the central ‘hub’ that operates the technology:

The scope of protective legislation is smaller, and mobility means that affected competitors can leave the jurisdiction, thereby eliminating the advantage a special interest can obtain through protective legislation. This concept applies only to territorially limited jurisdictions, however, for specialized agencies actually facilitate rent-seeking.\textsuperscript{58}

**Specialised agency**

One of the main comparative advantages of a specialised agency is, rather obviously, its purported specialised knowledge of the regulatory target. ‘Specialized agencies are most likely to have comparative advantages over courts in understanding the facts of an issue when highly technical matters of evolving science are at issue’.\textsuperscript{59} Indeed, this is the basis for much of the deference shown by courts, including the United States Supreme Court in this context.\textsuperscript{60} This may be particularly true when complex scientific data comes into play.\textsuperscript{61}

An agency may also be able to perform regular reviews of the regulation’s operation. An agency may thus have jurisdictional (because it has ‘permanent’ jurisdiction) and functional advantages over civil courts:

Congress determined that these advantages of concentrating control of enforcement proceedings in the hands of a specialized agency outweighed the greater speed and flexibility obtainable through private actions in diverse forums.\textsuperscript{62}

There is a flipside to this coin, however. The specialised knowledge that guides the agency, its expertise and its established practices, constitutes a form of legacy thinking that may impede the agency’s ability to adapt fully to the ‘new reality’ generated by the technology. Uber is not ‘just an app’; it has transformed the
industry it seeks to replace. While the work of the agency is guided by legislation and the delegation of authority, if couched in vague terms (e.g. determination of ‘unfair practices’), any existing slant or bias in the agency’s approach could have significantly negative outcomes.\textsuperscript{63}

Agencies have another advantage over courts and legislation. They can review and oversee without making any decisions. This is the notion of ‘agency threat’, developed by Tim Wu. This is flexibility in the extreme, compounded by the ability of at least some agencies to decide on the appropriate timing of an intervention. The legislative process is a heavier vehicle, typically slower and harder to change once adopted. Courts are normally tied to the need for a party to file a case unless they have ongoing jurisdiction (e.g. under an antitrust decree).\textsuperscript{64}

When comparing specialised agencies to legislation, two other forces that operate in tandem but which are often in tension should be mentioned. First, agencies ‘have features that affect political control, including limits on plenary presidential removal, bipartisan membership requirements, and fixed and staggered terms.’\textsuperscript{65} The force at play here aims to remove or partially shield the agency from political intervention. Yet there is a countervailing force that suggests there ought to be political control by elected officials. This is further complicated when agencies are created by different branches of government that are subject to constitutional ‘checks and balances.’\textsuperscript{66} According to Professor Lisa Bressman, this is the type of balance that the US Supreme Court has tried to achieve:

\begin{quote}
The Court is operating more as lawyers tend to think, as trying to forge the best rules for agency action. Yet it does not view the Court as confined to the pursuit of typical legal values. Rather, it understands the Court as cognizant of strategic political interests. In interpreting administrative procedures and forging administrative law more generally, the Court has accommodated the practical needs of politicians to control agency action within a broader constitutional system of checks and balances. The Court thus has positioned itself as mediator of the political branches in the administrative process.\textsuperscript{67}
\end{quote}

**Courts**

Interventions by courts typically depend on private parties or an administrative agency filing a case, as has in fact happened with Uber. Courts can intervene under two different scenarios. First, they may be asked to review an agency’s decision, as discussed earlier. Second, they may be asked to apply legislation or common-law rules – in the context of this chapter, this would mean general or specific rules and principles applicable to a new technology-based business.

When reviewing a decision by a specialised agency, the level of deference and the existence of legislation guiding the agency’s action will determine the scope of the
court's intervention. Courts in the United States typically review agency decisions to make sure they are not 'arbitrary and capricious'. A court may, however, be at its best when applying general principles of law and equity. Courts have a high degree of flexibility: they can apply general principles of law and even import them from other areas of law, as has happened in environmental law, for example.

What other advantages can a court bring to this discussion? First, because judges tend to be generalists, they can perform a translation function in exercising oversight authority over agencies:

Although courts are not scientists themselves, they are well-versed in the broader process of understanding the facts presented and the logical 'links'. Even if the agency and court both get science 'right', an opinion that sufficiently explains the science and policy at issue provides valuable information highlighting the proto-, meso-, and metapolitical aspects of the case [...].

Second, in a typical rule of law courts are probably more likely to be (perceived as) free of direct political influence.

Courts may be disadvantaged by the requirement of stricter rules of evidence than an administrative agency would be. This includes the obvious limit that the evidence will be adduced by parties. Third parties may have important information that could illuminate the public interest impacts of the decision, which they could provide in response to a call for comments or proposal made by an agency. To provide similar information in a court case they would have to have known about the case and be allowed to intervene as amicus curiae or otherwise. There is also a fundamental difference between agencies who typically make decisions reflecting the public interest and courts and those who refer to the public interest only occasionally, for example when deciding whether to issue an injunction. Even in situations where an agency weighs evidence presented by third parties, it often does so in the light of the public interest. This rule varies in different legal systems, however.

Uber copyright reform

Are there lessons one can learn from the boom of major online intermediaries who provide access to digital content, including analog content that has been digitised?

From Uber to authors

To transition from Uber to copyright policy, a brief historical account is in order. In its most succinct version, a history of copyright might be told in the following way. The type of material typically protected by copyright is not always meant for the marketplace, but some is. The original policy goal of copyright (as one finds it in the Statute of Anne, for example) was to prevent market failures, allowing
book publishers to take chances on new books and recoup their investment, creating profit from books that sold well. Authors and publishers had a mutual interest in generating income, though they had diverging interests in the sharing of the revenue. Authors by and large let the commercial exploitation to the publisher, who operated in the marketplace as a rightsholder (typically, assignee or exclusive licensee). The author retained some rights, including the moral right, unless ‘forced’ to waive it. Publishers sometimes owned distribution channels but in almost every case they could use physical scarcity to enforce simple supply and demand-based market rules. This simple description of the system was basically accurate from the 17th century until the late 1990s.

Then Napster happened. It showed that the internet’s potential to make digital files easily available worldwide was very real. Napster was based on a central server architecture and it was easy for federal judges in California to dismantle it. By the time the injunction was issued, Napster had managed to get two-thirds of active internet users in the United States to sign up. Yet the proverbial demand genie for the new service that Napster had provided – access to almost all recorded music on any computer – was out of the box. It will never go back in, nor should it.

Next there was file-sharing. Its decentralised nature makes it impossible to stop. Individual files can be removed using notice and take-down; individual websites (such as The Pirate Bay or Megaupload) can be shut down but eventually reemerge, often as cyberlockers or similarly hard-to-detect technological platforms. Users are asking why they are not allowed access to content they know is available. Scarcity-based business models operated by traditional rightsholder companies such as record companies or film studios are adapting at a painfully slow rate. Are they the taxi drivers? Is file-sharing the Uber app?

It is a little more complicated than this analogy suggests, but a parallel can be drawn nonetheless. First, the arrival of non-rightsholder intermediaries is a game changer. In the same way Uber is changing the relationship between the connector (the Uber app) and drivers, internet intermediaries are changing the relationship between authors and users. They have made traditional rightsholders to whom authors entrusted the exploitation of their works both less powerful and less relevant.

The interests of the new intermediaries are different. Their first function is to sell advertisement, which means they must maximise the number of users, whether online or on mobile devices, and the amount of time users spend using their site, app, etc. This in turn means maximising available ‘content’ – users are searching for content, not ads. There are normative arguments that support maximum availability, such as when material that is no longer easily available is uploaded or when books and other text-based material is converted to digital form and made word-searchable.
Non-rightsholder intermediaries have overlapping interests with users. They do not want to have to pay for content unless it is absolutely necessary (hence the push to remove or reduce any regulation, including copyright, that may force them to pay) and they want to avoid the intrusion (for example reporting requirements; limitations on use) that having to transact with copyright holders might entail. Their interests are thus essentially opposed to those of traditional rightsholders, who are seeking both payment and at least some degree of control. Non-rightsholder intermediaries very much live by the ethos of the connectors, the ‘content rights do not concern us’ approach that Uber has used to defend against its impact on the real world of the taxi industry. Après moi le déluge.

Are internet intermediaries also at loggerheads with authors? Not necessarily. First, while most authors want attribution, not all expect payment – far from it. Academics and scientists are aiming for maximum impact and dissemination, and even reputational bumps from publications. They are paid a salary for work that includes publishing. Due to their connector ethos, internet intermediaries may have an issue with accepting any legal obligation to attribute authorship, and to that extent they clash with authors, whether or not they expect payment. Yet this strikes me as theoretical, because users will often search for content by an author’s name, so providing the moral right of attribution indirectly as a form of metadata useful to users is rarely an issue.78

How about authors who do expect payment? As noted above, internet intermediaries differ in their approach from traditional rightsholders who seek not just payment but control. Professional authors, those who expect payment when their works are commercially successful because it is their main or only source of income and the source of their ability to take the time to create and hone their craft, typically do not much care about controlling commercial exploitation. Hence they may well be happy to work with the new intermediaries if they can get paid. Unfortunately, at this point it seems the new intermediaries are just instrumentalising authors in a way that differs from previous ones, but with little, if any, benefit for authors.

**UberReform of copyright?**

Applying the three principles identified earlier, a number of suggestions can be made:

(i) Current business models such as record companies have no right to survive and no right to expect a regulatory intervention to allow them to do so.

(ii) However, an argument can be made that authors’ attribution interests should be protected for their own benefit as well as that of users.
looking for information, even if this imposes a modest cost on internet intermediaries.

(iii) The harder question is that, if financial flows to authors who depend on financial compensation for their work are disrupted, is there an irretrievable loss?

On the last question, I argue that it is much too dangerous to face extinction of professional authors by shutting financial flows to them. I will simply not comment on suggestions that authors can sell T-shirts on eBay instead; for no one can make the case that this is either desirable or workable. An optimal solution would allow the new entrants to provide maximum access to content, thus meeting their needs to maximise ad revenue, but recognise that there is a class of content that would not exist but for professional authors and, hence, we need to find ways to ensure viable and adequate revenue flows to such authors, reflecting the market response to their works.

This is exactly the opposite of what is happening, and the music industry is a good illustration of this. The legacy businesses have now (reluctantly) acknowledged reality: the internet is not easy to control and has moved from song-by-song download models with tethered DRMs (the model closest to the sale of CDs in stores) to subscription-based models. They still must face the fact that this has been the reality for over a decade online (with file-sharing) so the challenge is to move users from a free system with no control of use to a paid system with some control of use (number of devices, territorial limitations, etc.). The public's slow uptake on Spotify's paid (subscription-based) version shows that this is no easy task. Yet the diminishing revenue pool has also led legacy businesses to effectively monopolise income. In reality, paid business models are no better for most authors than file-sharing.79

The application of Uber principles to general copyright should lead regulators to ask whether the current use of the theoretical exclusionary powers that copyright law provides is used to foster the public interest.80 One can see the current debate as a lutte à finir, a battle royal between new intermediaries and traditional copyright industries, where victory is unlikely for the latter. The other option is to foster public interest in preserving the interests of those without whom much of the content we enjoy will in all likelihood no longer be created.

The most obvious solution is either to license systems that ensure fair distribution, as is the case, for example, for the non-interactive digital transmission of sound recording licence in the United States Copyright Act, which basically provides a 50/50 split between performers and record companies.81 There is, however, a risk in casting a solution – any solution – in the stone of a statute. My own preference (this will come as no surprise, in light of my previous research) would be for a collectively managed pool of rights, licensed to any and
all intermediaries who so wish, with reasonably limited reporting requirements, and supervised by a regulatory agency able to set and modify bot rates and 'splits' among authors and other categories of rightsholders. This agency should have the ability to perform its own research and analysis and thus not be limited to a quasi-judicial role, looking only at evidence submitted by parties to a rate-setting procedure. This broader perspective would more likely reflect the public interest considerations at play. Such a system should work at least for music and text-based material.

We should find a way to make the internet and its extraordinary powers work for everyone. Unless, of course, we want all professional authors to become Uber drivers.

Notes:

4 Ibid.
5 Of, indeed, merchandise and packages, as taxi drivers occasionally do. Uber and others have begun offering this service in certain markets. Uber calls its delivery service 'Rush'.
6 Counting the horse-drawn, for-hire hackney carriage services as the industry precursor. See Walter Gilbey Early Carriages and Roads (Vinton, London, 1903) at 26-29. According to Gilbey, the first hackney carriages waiting for paying passengers at stands in London date back to 1634. Interestingly, in 1635 Charles I issued a proclamation limiting the number of carriages (to approximately 60 for the entire city), something reminiscent of the 'medallion' system in New York City (only vehicles bearing a 'medallion' licence can operate as yellow cabs). See Jennifer Surane 'New York’s Taxi Medallion Business Is Hurting, Thanks to Uber and Lyft’ Skift (15 July 2015) <https://skift.com>.
7 Leo Mirani 'The secret to the Uber economy is wealth inequality' Quartz (16 December 2014) <http://qz.com>.
10 Leonard, above n1.
11 This could lead one to describe the internet as a platform of platforms.
13 Ibid.
14 Ibid: 'The regulatory woes seem to be never ending for the newest wave of tech start-ups [...] Why have these companies run into so many problems?'
15 See the chapter by Estelle Derclaye in this volume and, for a more complete narrative (from a biological evolutionary perspective), see Yuval Noah Harari Sapiens: A Brief History of Humankind (New York, Harper, 2015).

Ibid.

Ibid.


Ibid.


Mirani, above n 7.


Gervais, above n 2, 677–679.


See Ibid.


Relatedly, there is some criticism that Silicon Valley is spending too much of its research and development resources on low-hanging fruit of app-development at the expense of more ‘serious’ research, thus greatly reducing the potential rate of true innovation and human development. See Michael S. Malone ‘The Purpose of Silicon Valley’ *MIT Technology Review* (30 January 2015) <www.technologyreview.com>.


45 See Gervais, above n 2, 681–682.

46 See Manjoo, above n 8.

47 See Strochlic, above n 24. Uber did start to offer some services for users with disabilities following a lawsuit. See Megan Rose Dickey ‘Uber gets sued over lack of services available to people with disabilities’ TechCrunch (May 9, 2017) <http://tcrn.ch/2eqgyyG>

48 See Blodget, above n 20.

49 See Frumin, above n 35.

50 The regulator must decide that the new business is similar enough to another that is regulated.

51 Some agencies are required to do cost–benefit analyses. Without an obligation to perform empirical analyses this cost–benefit analysis obligation has little teeth.


54 Naturally, these options are interlinked: an agency may apply specific legislation and/or may use courts to enforce its decisions or applicable laws.


56 Senate Select Committee on Ethics ‘Investigation of Senator Alan Cranston’ (S Rep No 223, 102d Cong, 1st Sess, 1991) at 11–12.


63 A specific example would be the determination of ‘unfair labor practices’: see Amazon Cotton Mill Co v Textile Workers Union of America 167 F 2d 183 (4th Cir 1948) at 188.

64 As is the case with Performing Rights Societies in the US, which are governed by (to this author’s knowledge) the only extant antitrust consent decrees that do not automatically sunset (expire). See Daniel Gervais ‘The Landscape of Collective Management’ (2011) 24 Columbia Journal of Law & the Arts 423 at 435.


66 See ibid, at 1806–1812.

67 Ibid., at 1821.

68 Administrative Procedure Act 5 USC s 706(2).


70 Hammond Meazell, above n 61 at 781–82.


72 See eBay Inc v MercExchange LLC 547 US 388 (2006) (mentioning the public interest as one of four factors to weigh before issuing an injunction in intellectual property cases).

73 See M2Z Networks Inc v Federal Communications Commission 558 F 3d 554 (DC Cir 2009).

74 For example, in China courts have broad powers to get evidence from third parties. See Jianhua Zhong and Guanghua Yu 'Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?' (2004) 13 Journal of Transnational Law & Policy 393 at 402.

75 See Gervais, above n 55.

76 See Peter S. Menell 'This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age' (2014) 61 Journal of the Copyright Society of the USA 235.


80 What metrics may be used to determine this is a hard question, of course. Inquiries into the public interest (especially in court cases) sometimes seem arbitrary. There are frequently elements of a policy that are beneficial/positive and others that are costly/negative. Hence, sometimes, the balancing of costs and benefits to the public interest is not so clear.

81 17 USC s 114(g)(2). There have been, however, major issues with the way in which rates are set under the current US system. See Gervais above n 64 at 423.