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The "Social" as "Symbolic". The Distinction between Public and Private in Contemporary Societies in light of Feminist Thought (and with a digression on Surrogacy Contracts)

Summmary: 1. The enmity between the «Social» and the «Individual» – 2. Beyond Socialism and Liberalism, towards the origin of Feminism: «Les Saint-Simoniennes» – 3. The Social as Symbolic: the missing piece of the dichotomy between Public and Private – 4. Symbolical issues. A digression on the technique of using testimonies of private experiences to push for legislative change – 5. An insidious turn. When the intentional order and the unintentional order collapse into each other – 6. If intentions matter: dropping a bit of spirituality in an over materialistic imaginary.

1. *The enmity between the «Social» and the «Individual»*

In this article, I will try to discuss the distinction between Public and Private in contemporary societies – and its traditional corollaries, as the distinction between Authority and Liberty, or Individual and Society – by rethinking the idea of "social" with the help of Feminist Thought.

The «social» indeed plays a crucial role in that distinction, as it is demonstrated, if it need be, by Friedrich Hayek's complaint against the «abuses of reason»[1], perhaps the most famous twentieth-century narrative about the dualism between Public and Private, Authority and Liberty, Individual and Society.

In Hayek's narrative, "social" is the "collective". So are the general interests which, owned by a «Whole» (the Society), show two distinctive features: *they can be identified with a high level of certainty* (or objectivity) and they *must unfailingly prevail over individual interests*. Since the

[1] F.A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason*, The Free Press, Boston 1952. Hayek's book was firstly translated in Italy in 1952 with the title *L'abuso della ragione*. I am quoting from an Italian translation printed by Edizioni Seam, Roma 1997.

individuals act selfishly, irrationally, and disorderly, the «social» must intervene, realizing a rational and predictable order. It goes without saying that the defender of the Social is the public power, the State, with its laws and economic plans.

Hayek passionately attacks the authoritarian implications of the "social". With the "Communist threat" in mind but also reminiscent of Nazism and Fascism, he carves an analogy between Social-socialism, Authoritarianism, Public, and retraces the origins of all totalitarianism in the idealistic utopias of modern social reformers.

According to him, «social» has always been synonymous with dirigisme, anti-liberalism, scientism (different sides of the same coin) and it has been so since its veritable origin, the Saint-Simonism, the political and social movement which «made a lot of noise» in France especially after the Revolution of July 1830, on the footsteps of the extravagant Count of Saint-Simon and with the aim of planning and putting in practice a complete reform of society[2]. From this congregation of madmen (as Hayek paints them) – arose Auguste Comte, the founder of the most detestable – or the most «socialistic» - among «sciences»: sociology[3].

To the Saint-Simonians, breeders of the entire crowd of authoritarian sustainers of a planned order, Hayek opposes the wise defenders of the spontaneous order.

The formers are culpable of «abuse of reason». As it is typical of the Moderns, they are convinced that the human mind can detect the laws governing society and can use them in a *deterministic way*. Therefore, they reduce human actions, behaviors, choices and preferences to a "given", observable, predictable and determinable with the sole help of entirely positive investigation standards. These are the cost of a model that some have renamed as "intentional order"[4] (an expression that, here in the

[2] R.H. Ely, *French and German Socialism in Modern Times*, Harper, New York 1883, p. 72.

[3] In the electrifying third section of the book (*Comte e Hegel,* p. 287 ff.), Hayek also demonstrates how profoundly Comte was influenced by Hegel's thought. This explains, he argues, the delirious mixture of positivism and idealism which imbues today's social sciences. R.H. Ely, *French and German Socialism*, op. cit., had already maintained that Hegelianism «tinctured» the opinions of many Saint-Simonians, and particularly those of Pierre Leroux, probably the first European intellectual to use the term «socialism» (on Leroux's famous statement, «*notre doctrine n'est pas un parti, c'est une science, c'est la science sociale*», see R. Aron, *Le socialism français face au marxisme*, Grasset, Paris 1971 (Kindle Ed.).

[4] L. Infantino, *L'ordine senza piano. Le ragioni dell'individualismo metodologico*, Armando Editore, Roma 2011, adopts the expression «unintentional order» to name the «spontaneous order» dear to classical economic liberalism. The «intentional order» is its authoritarian, dirigiste counterpart.

following, I will make mine).

Sustainers of the «spontaneous», or «non-intentional order» – exemplified by the economists of the «classical» Scottish School – instead, avoid such an abuse. They do not cultivate the illusion that human reason can identify the permanent laws of society. Therefore, they do not reduce the human conduct to a mere given. They are convinced that individuals – each pursuing what he knows and is able to know (his own individual interests) – do contribute, even unintentionally, to the creation of a spontaneous order, which is by definition a free order, because not based on deterministic assumptions.

From these premises, Hayek's famous pleas to the «minimal state» stem.

Even though they are considered typical of certain liberal and neoliberal orientations, these claims do not exhaust the scope of Hayek's thought; nor they represent the reason for which it has been regarded as inspiring[5]. As the title of his books declares, his «liberal» criticism against the intentional order implies a momentous criticism of Modern Reason. Before Hayek and after him, this criticism has been shared by many other thinkers, though bearers of conceptions and values far different from his.

Let just mention Max Horkheimer, the founder of the Frankfurt School – that generated some of the most profound criticisms of Capitalism. To Horkheimer, the Modern Reason reduces all human experiences at the level of things. It elevates demonstrative rationality to the sole criterion of knowledge and to the sole motive of a legitime action; by doing so, it "reifies" the man, the individual, and his social manifestations[6]. The assumptions of Modern Reason lead in fact to one conclusion: all moral judgements pertain to the «subjective» and to the «private», they are mere «opinions», incapable both of *establishing something common* among

[5] It is exemplary the case of the Italian jurist Alessandro Giuliani (1925-1997), whose research is a clear example of the double-faceted legacy of Hayek's thought (it can be understood only as a mere political plea for economic liberalism, if not for anarcho-capitalism, or also as a challenging philosophical reflection on the limits of modern rationality). On Hayek's «methodological individualism», Giuliani built his vision of law, oriented – against all normativistic reductionism – to re-interpret it as the field of the free human action, and he did so in the name of a fierce criticism of the abuses of Modern Reason (see *Contributi a una dottrina pura del diritto,* Giuffré, Milano 1953). In parallel, however, Giuliani abandoned the purely liberalistic consequences drawn from Hayek's theories by his mentor, the economist Bruno Leoni, which entailed the risk of misunderstanding the legal experience. On Giuliani's contribute to the Italian legal culture see F. Cerrone, G. Repetto, (eds.) *Alessandro Giuliani: l'esperienza giuridica tra logica ed etica*, Giuffré, Milano 2012.

[6] *Eclisse della ragione. Critica della ragione strumentale*, (1947), trad.it., Torino 1969.

human beings and of *authorizing meaningful actions*. Opinions, feelings, desires, ideals, are indeed not empirical neither positive enough to base an «objective» knowledge and a rational motive for choice.

2. *Beyond Socialism and Liberalism, towards the origin of Feminism:* «Les Saint-Simoniennes»

By constructing his dichotomy and fiercely accusing what Wilhelm Roepke will call «the eternal Saint-Simonism» of every public dirigisme[7], Hayek surely simplified the picture of Modernity[8].

Precisely within the Saint-Simonian movement, so stigmatized by Hayek, a "first wave" of feminism originated, from the initiative of a group of young women, who were dissatisfied with both Socialism and with Liberalism.

As the historian Stefania Ferrando recalls in her extraordinary study on this topic[9], the *Saint-Simoniennes* were women who felt profoundly the desire for a new social order, one more just, more free, more equal, wherein they, as women, could find a convenient place. Their profound concern with the issue of the social order was the reason of their encounter with the Saint-Simonians.

The Saint-Simonians had a pioneering awareness of the crucial and completely unprecedented importance that the problem of social order holds in modern times. In this lies the peculiarity of their "socialism".

They saw that the fall of the ancient order (the *Ancien-Régime*) had given rise to a seemingly endless array of new modes of production, lifestyles, and values. In these conditions it was extremely difficult, but

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[7] Referring in its turn to Saint-Simon as «the patriarch of economic dirigisme», the ordo-liberalist thinker famously argued against what he considered the «European Saint-Simonism» (See W. Roepke, *Etica e Mercato. Pensieri liberali*, Armando, Roma 2001, p. 126).

[8] On the accuracy of Hayek's historical account see B. Caldwell (*Introductio*n, in B. Caldwell (ed.) *Studies in the abuse and Decline of Reason, Texts and documents*, Taylor&Francis, 2013), noting for example that «Hayek glosses over the internal rivalry that existed between Comte and the Saint-Simonians in the late 1820s».

[9] S. Ferrando, *La liberté comme pratique de la différence. Rousseau, Olympe de Gouges et les Saint-Simoniennes*, Phd thesis, EHESS de Paris and University of Padova, 2015. All here referred on the *Saint-Simoniennes* is based on Ferrando's work. Ferrando recalls that the *Saint-Simoniennes* movement was deeply studied by Marguerite Thibert in the 1920s: see *Le féminisme dans le socialisme français de 1830 à 1850*, Paris 1926; *A propos de Féminisme. Simple mise au point*, in *La Réforme sociale*, 1926, pp. 541-548.

absolutely urgent, to understand how to determine a social order capable (on the one hand) of *expressing stability* in a world in movement, and (on the other) of helping each individual to *understand their role and position* in the world. Both conditions were essential to achieve the Saint-Simonians' Ideal: Progress.

A *new*, but also *stable and certain*, social order, this was the Saint-Simonians' passion and torment. To their luck, although they dramatically felt the lack of the true laws of society and individual life, they had no doubt that it was possible to discover and to apply those laws. After all, many of them were engineers, graduated from the Polytechnic School. They preached that one day some enlightened prophet would discover (complete and ready for use) the laws governing the social order; he would dictate them to all, and then there would have been nothing else to do but apply these laws. Once an authentic and effective interpreter of collective needs had been found, the problem of the social order would have been happily solved[10].

In the young women who felt attracted by the Saint-Simonian movement, this strange narrative nonetheless raised a question. They wondered: *Who,* if not each of us with her concrete and personal experience, can contribute to shaping the new laws? How could the new social order take shape, if not by springing from us, those who desire it, those who are already trying to practicing it?

In other words, they were not willing to wait for someone else to establish for them what they were and the meaning of what they did. Their idea was that the new social laws should arise from the personal experiences of those who already embodied novelty and change in their concrete lives and in their deepest feelings.

Since the personal experience is by definition plural, complex and in movement, thinking that way implied however putting the laws of coexistence in a condition of perpetual revision; it meant accepting a level of uncertainty, or precariousness, of the laws. This was not to be seen as a problem, the *Saint Simoniennes* argued. It was only the natural consequence of grounding the social coexistence on equality and freedom among individuals.

By reasoning in this way, the *Saint-Simoniennes* did more than distancing themselves from the ambitions of social engineering so dear to Père Enfantin, the most expressive mind of Saint-Simonism. In truth,

[10] Allow me to overlook that for the Saint-Simonians, such an interpreter should have been a couple, composed of the priest and the priestess (an idea for which they were much ridiculed). However, they did not find the woman fitting the task.

indeed, when they complained about being excluded from participating in the elaboration of the laws that should have governed a new, more just and free society, they put in question the fundamental Saint-Simonians's dogma: the possibility of discerning a new social order *without* starting from, and remaining close to, the questions, the doubts, and the knowledges that are tentatively and problematically shaping from individual experiences, within the *consciences*.

The ideas that, on the other side of the fence, individualistic liberals maintained about the making of a social order were even less convincing to them. Scarcely interested in "social" issues, the «liberals» stated: everyone should make their own business and Providence will do the rest. Not only did such an idea not accommodate the profound concern of the *Saint-Simoniennes* for the inequalities and social injustices which, as women, they knew well and from direct experience. Above all, these women did *not* recognize themselves in the basic assumption of the liberal conception.

This assumption lies in the belief that each individual knows and can fully comprehend, firstly: *who he is.* Secondly: *what his interests are.* Thirdly: *how much it is worth* what he brings in the economic and social exchange. All this had very little to do with the reality of our young women. Living in times of tremendous transformations, they had put in question, in their concrete lives, the roles and habits traditionally assigned to the female sex. They deeply felt that they were a novelty, but they were also conscious that the value, or meaning, of their novelty was not yet established nor they were in control of it. They were wondering how to love, work or raise children in a way corresponding to their true aspirations and capable of generating a new and better social order for everybody. But they were *not sure* that they already knew what was suitable, worthy and appropriate for themselves and for the world, what their authentic interests were, who they were and how much they were worth.

One thing they excluded: that an individual could understand all this *by her own*, without the help of others. Instead, they felt that if they wanted to find out what they were, what they really wanted, or what their experiences were worth, they had to let their feelings *circulate*, they had to test them with the points of view of others.

An ambitious project, indeed. Putting it into practice requires being able to *freely express* personal feelings, opinions, ideas, experiences, judgments; and first of all, it requires being able to read clearly and freely *within ourselves*.

The *Saint-Simoniennes* created associations in which women could

work, think and speak together with others: girls' schools or journals, such as the *Tribune des Femmes* or *La femme libre*. These were as many spaces of sociality, that is to say spaces of relationships and exchanges. There, those women met to think, discuss, reconsider («to regenerate» was an expression dear to them), the meaning of their behaviors and that of social institutions, customs and habits, searching the words to name them in a way more authentical and true, closer to their experience.

As Ferrando underlines, in these places of sociality, from which each one took the strength to express herself, they searched to develop a thought and a language valid not for only for themselves, but also for others. A *social* thought, born from the intersubjective exchange, where the individual experience acquires a broader, shared, *common* significance.

They did so, for example, by asking each other: «If I left my husband and I sleep now with someone else, am I a woman of easy virtue, to be condemned, or what else am I? Am I perhaps experiencing a dimension of freedom that society does not yet recognize? Or is it mine a mere whim? Perhaps is it a culpable transgression to something more important than social uses? With what word should then I be named?». Reading carefully a mass of articles, letters and pieces of autobiographies written by the *Saint-Simoniennes* – every page rich of dialogues and of mutual questions posed from a woman to another – Ferrando fascinatingly argues that «Social» were to them *their words and their thoughts*, because they were socially developed, which is to say, developed *in the exchange and negotiation with others*.

Thus, these young women understood that, if they wanted to find a social order, capable to give meaning to their actions, sense to their lives, and orientation to their behaviors, they could not give up subjectivity, which was instead excessively diminished by the socialist perspective privileged by their Saint-Simonians companions. For this reason, they, dissatisfied with the idea of relying on the «laws» of some social reformer, started speaking in the first person. But they also understood that, if a social order was to be achieved, it was necessary not to remain confined to the «private» or pass off individuality as a sort of self-sufficient sovereignty, which already knows all what it needs. After all, it was a new social order they searched for, something going beyond their individuality and different from what was already known. Thus, they understood that their individual experience needed to be shared at a social level, needed to be raised to a level where it could resonate for others. The «personal» had to be exchanged, and even tested, with the thoughts, the words and the experiences of others. To become real, it had to become social.

One could say that the social order they searched was certainly a spontaneous one, but also springing from sincere and profound *intentions* of freedom, justice, equality, that they radically invested in their mutual exchanges, at the social level, with the help of language.

3. *The Social as Symbolic: the missing piece of the dichotomy between Public and Private*

By starting to think «in common», the *Saint-Simoniennes* were teachers of a political practice which some consider specific to the women's movement: the practice of the Symbolic[11]. This practice, although multifaceted, always consists (again in the words of Stefania Ferrando[12]) in the «ability to say and see what emerges from relationships in a certain context, whether small or large, and not only saying and seeing, but also interpreting».

The practice of the Symbolic has been accompanied in the women's movement by an attitude which can be described, and has been described, as «giving credit to reality», or «trusting» in reality.

In fact, what does «Saying, seeing, interpreting what *emerges* from relationships in a certain context» mean? It means putting into words something that is, that exists, that happens, but that *does not yet have a name*. It is thanks to the fact of being named that something already existing, but not yet thought of nor recognized *as existing*, can become aware of itself, and generate consciousness. This was what the *Saint-Simoniennes* did: they felt that, in their new and unknown experience, freedom was *already* at work, but they also knew their freedom needed to be put into words and circulate, in order for it to become real and for everyone to benefit from it. They offered those words to each other, so

[11] C. Zamboni, *Il simbolico e la via del movimento delle donne*, in *Materiali di Estetica* 2/2021, pp. 279-299 (transl. mine). It is worth recalling that, by Feminism of the Symbolic, it is usually meant an Italian feminist movement (also known as Thought of the Difference), that, differently from the rest of the Feminist movements, does not adopt a materialistic perspective. Chiara Zamboni, one of the main exponents of the Italian Feminism of the Symbolic, maintains that Feminism has always and everywhere adopted the political practice of the Symbolic. In this article, also for the sake of brevity, I will follow Zamboni's approach, certainly valid at least if we consider how much the so-called "self-consciousness" practice (deeply intertwined with the practice of the Symbolic) has been important and foundational for the entire Feminism of the 1970s.

[12] On file with Author.

that, vehiculated by language, their individual experience could gain more existence, and, precisely, existence on the social level.

The *Saint-Simoniennes*' experiment corresponds to a belief which is proper to the practice of the Symbolic: women, and their freedom, *already exist and have always existed* (in the actions, in the behaviors, in the choices of each individual). What is missing, is an interpreting word that gives social existence to the individual experience.

This point is of course a bit difficult to understand. In our current mentality, and to jurists especially, to be free means «to have a right» (e.g.: I can speak freely thanks to a right called «freedom of speech»). Feminist thinkers of the Symbolic maintain, instead, that freedom and rights do not coincide. When they talk about freedom, they mean the capability to choose how to act, which is the ability (which could also be considered a need or a desire) of orientating one's actions. This capability to orient ourselves, to give a criterion or a measure to our actions, in itself does not decrease, nor does it increase in relation to the number of choices a person has, by law, «the right» to make. In fact, it does not concern the «legal» dimension of human beings but their moral dimension. To the thinkers of the Symbolic the point is not to ascertain whether people is free (each human being is); the point is that the individual need, capability, or desire of freedom can at every single moment be misunderstood, confused or altered with something else, such as a mere fantasy, or a voluntaristic delirium of omnipotence. Every time this happens, the occasion for individual liberty to exist socially as liberty gets lost.

The conclusion is that the individual liberty, in order to exist socially, needs to be *seen* by others: it calls for a «medium» that interprets it as liberty.

It goes without saying that the interpreting word, the word that gives social existence to a private experience, is inevitably missing when the interpreter reads the experience she observes without love, interest and participating reciprocity; or when some objective or goal in her/his mind prevents reality from being seen as it is. According to the practice of the Symbolic there is the need for a «loving» interpretive position in those who «read» the women's actions in order for their freedom to be seen.

For this reason, the women's movement, which recognizes itself as a symbolic practice, has always focused on the relationships between women, assigning them a political value. According to the thinkers of the Symbolic, recognition is produced in every relationship between two women, every time one of them is recognized by the other as capable of offering her the «right mediation» to gain existence in the external world,

while remaining faithful to herself[13]. For example, a simple «go ahead», said from one woman, in whom another woman trusts, can give to this latter the strength to realize a desire that, up until that moment, she felt as impossible or too ambitious[14].

It is easy to understand why Ferrando argues that the *Saint-Simoniennes* are one of the first historical testimonies of the feminist practice of the Symbolic. They gained from other women the strength to bring their desires into the world: they acted socially yet in autonomy from the initiative of any political, institutional, «public» actors and without becoming anything similar to such «social» subjects.

It is now time to retrace the meaning of the word «social» for the practice of the Symbolic. What does that word mean, in that context?

Firstly, the «social» does not coincide with an attribute of Society, a collective and cohesive subject which speaks with one only voice and dictates how it is correct and right to behave or what has value and what has not by establishing habits and customs. Instead, the «social» designates the relational space that makes it possible to question and transform socially given stipulations, existing social norms, while keeping social transformation in touch with *individual* feelings and experiences. Furthermore, as a relational space, the «social» does not require the size of a large group to be established, but even occurs at the most immediate interpersonal level, the dual relationship.

Another aspect of the «social» springs from the mentioned assumption according to which the practice of the Symbolic puts freedom *into circulation* but does not create it, because freedom (in this case women's freedom) already exists and for this reason it is possible to see it, interpret it, name it.

For those who embrace this point of view, women's freedom does not wait to be generated by public institutions yet is capable of generating transformations at a public level, for the simple reason that it exceeds that level, does not coincide with it. The «Social» is anchored to a myriad of inter-individual relationships; it thereby introduces into the Public something that «does not have a precise origin, does not have a specific owner, does not have a cause that determines it» (such as the activity of a certain «pressure groups»). Keeping in mind that the «social» is a space

[13] On this practice, known as "trusting between women", see Libreria delle donne di Milano, *Non credere di avere dei diritti*, Rosemberg&Sellier, Milano,1987.
[14] On these points see A. Condello, S. Niccolai, *The Mothers of Us All. Extracts, with comments, from the Yellow Catalogue published by the Milan Women Bookstore*, paper I, in *Law and Literature*, 2023, paper II and III in print 2024.

which exceeds both the Private and the Public, «it cannot be said: this institution (law, linguistic invention, practical orientation...) comes out of this specific conflict, from this relationship of forces, from this decision, from this strategy, from this situation, because there is always something that sticks out beyond all this», Ferrando explains[15]. This «something that sticks out» is the unexpected, naturally inherent in the free action of human beings, engaged in a mutual and never-ending activity of naming and giving meaning to what happens to them, an activity through which they discover aspects or possibilities of their own being, which, thinking their own, they wouldn't have seen.

Thus, the practice of the Symbolic proposes a vision that opposes to the theories of many supporters of the intentional order, who claim that «liberties» or «rights» are always and only the product, direct and biunivocal, of historical collective movements and processes determined and clearly identifiable[16]. However, it is a vision that is equally distant from the assumption of the «spontaneous order» which maintains that, remaining within the verges of one's own private dimension, each individual can perfectly understand and definitely possess the meaning and scope both of her/ his interests, desires, or wills, *and* of those of others[17].

The implications regarding the distinction between Public and Private aren't irrelevant.

In fact, to the eyes of those who are skilled in the practice of the Symbolic, both these concepts, which have always been considered foundational to the modern political and juridical «theory«, reveal themselves as poor and lifeless.

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[15] On file with Author (the same goes for the following quotations from Ferrando in this paragraph).

[16] In Italy, this position is adopted in Norberto Bobbio's classic study, *L'età dei diritti*, Torino 1991, p. XIII. Against the idea of «natural law» Bobbio claims that all rights are historical (in this sense social), recalling that «religious freedom is the effect of religious wars; civil liberties are the effect of struggles of parliaments against absolute sovereigns; political and social freedom are the fruit of the birth, growth and maturity of the workers' movement», etc.

[17] Sympathy and empathy, the resources of human *sociabilitas* fascinatingly explored by Adam Smith, are certainly important for a practice such as that of the Symbolic, but not if they allude to an individual's pre-political and self-sufficient ability to understand others and their reality without entering into relationships, and if it is the case into conflict, with them and with the way in which others think, feel and suffer. Rather, the Thought of the Symbolic has felt very close to the notion of empathy developed by Edith Stein, for whom empathy is the ability to «experience otherness». See L. Boella, A. Buttarelli, *Per amore di altro. L'empatia a partire da Edith Stein*, Edizioni Cortina, Milano 2000. Also, G. Massa, *L'empatia in Edith Stein*, in *I luoghi della cura*, V/2007, pp. 27-29.

Once again, I get help from Stefania Ferrando, when she observes that: «Private» appears to be «what removes itself or is removed from the social as an exchange, negotiation, elaboration of meaning». The private is what avoids any comparison with others. For this reason, what is «private» can consider itself absolute, can claim to be valid as a norm even for the experience of others.

As for the «Public», it comes down to be a space that arrogantly aspires to condense the social within itself. Aiming to be a cohesive and exclusive expression of the entire social, the "Public" cancels out what exceeds and extends beyond and before it within the relationships between individuals.

4. *Symbolical issues. A digression on the technique of using testimonies of private experiences to push for legislative change*

As the philosopher Chiara Zamboni recently recalled, the symbolic activity is always an interpretative activity and the main vehicle of every interpretative activity is always language.

«The women's movement has practiced the fertile tension between language and lived experience: knowing that the circumvention of the historical roots of experience reduces any concept, which should be a living symbolic form, to a mere exploitable linguistic sign. Therefore, there is nothing arbitrary and instrumental [in] the conception of language which corresponds to the feminist practice of the Symbolic». Referring to the political action of Feminism, Zamboni adds: «we did not enter into the conflict of the Symbolic by bringing a merely reasoned position, but rather a position that had roots in experimented forms of life. For this reason, the circle between the thought and the experience lived with others must be considered fundamental and logically primary. However, this requires declining the meanings already available in common language, to make them flexible in order for them to become capable of meaning something else. In the awareness that the conflict over words and statements has to do with linguistic performativity, but *without having this effect as the primary intention*»[18].

What happens when language is understood in a solely or predominantly performative way as if it contained a strong and precise indication of an «*ought-to be*», of an *end* to be achieved, of a *purpose* or a *goal* that precedes

[18] C. Zamboni, *Il simbolico*, p. 291 and 294, emphasis added.

the interpreted experience and conditions its interpretation? In these cases, we are still facing the work of the Symbolic but not as a practice of symbolical freedom. As everyone knows, and as Ferrando puts it with charming simplicity, one can «interpret in a more or less correct-adjusted, sincere, or instead ideological way, or even in bad faith»[19].

These warnings can be useful, for example, in approaching one of the areas in which today the dichotomies Authority/Liberty, Public/Private, Social/Individual return with greater force in relation to issues that, as prostitution or surrogacy, are very sensitive for Feminism. In these fields, the private stories of women, who say they feel *free* when engaging in prostitution or surrogacy, are often brought on the public sphere in order to support the thesis that the law «must» legitimize sex work or surrogacy contracts. These stories surface or are made to surface in the public debate as proof of the assumption (which a side of Feminism shares[20], and yet many other women strongly oppose) that in these gestures a new and more advanced female freedom is realized and precisely one, that emancipates women from the «social destiny» of motherhood[21].

By resorting to «stories» told by women prostitutes or mothers surrogates, political activists and various social actors aiming to modifying the existing laws, intend to demonstrate that a new freedom is arising, and directly from the experience of individual women; therefore, that freedom entails a «right» that must be recognized by everyone, and in particular by women who consider themselves Feminists, because who, if not the Feminist movement, has given such political importance to the personal experience?

As the political philosopher Valentina Pazé argues in her courageous analysis on the «body between choice and market», it becomes thereby impellent, and precisely from a feminist point of view, to ascertain what value should be given to these testimonies without questioning the subjective sincerity and spontaneity of these declarations[22].

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[19] On file with Author.

[20] That part of Feminism which, contrary to the feminist Thought of the Symbolic, adheres to sociological, positive and historicist assumptions, and is therefore convinced that women's freedom depends on social and public institutions capable of establishing and guaranteeing it.

[21] A few years ago, in a trial before the Italian Constitutional Court, the appellants brought the testimony of a surrogate mother, in order to prove that she personally acted freely and thereby the ban on surrogacy violates the fundamental freedoms recognized by the Constitution. However, the testimony of the woman was not declared admissible by the Court (see ruling n. 33/2021).

[22] V. Pazé, *Libertà in vendita. Il corpo tra scelta e mercato*, Bollati Boringhieri, Milano, p. 53 ff.

A light on this path comes from Zamboni's insights. In the stories told by the happy prostitute[23] and the good mother-surrogate, the interpreting activity and its instrument, language, are exercised in a performative way or, at least, they are used with a performative goal.

This explains why many Feminists do not feel the liberating practice of the Symbolic at work in that type of testimonies: «It is true that the women's movement has brought different concepts into the exchange and conflict of the symbolic (authority, freedom, relational politics, disparity, coincidence of the ends with the means) but this was never done with the performative aim of conditioning behaviors and governing reality»[24].

5. *An insidious turn: when the intentional order and the unintentional order collapse into each other*

The stories of «free and happy» surrogate mothers, or prostituted women, demonstrate that, in some cases, the argument of individual freedom functions as an instrument that works towards the creation of an intentional order. This happens every time the expressions «individual freedom», or «auto-determination», performatively used, serve in practice to convey a determined purpose of «government of society».

Under this point of view, the «freedom stories» of surrogated mothers are symptomatic of the insidious turn that we are experiencing in the present time; surrogacy contracts and the debate they raise express this turn very clearly.

What «turn»? I could describe it like so: today, authoritarian claims grow on both of the famous Hayekian dualism, that is to say both on the side of the unintentional order (the Realm of Private and of the primacy of the «individual freedom») and on the side of the intentional order (the Realm of Public and of the primacy of the «social interests»).

To begin with the side of the «unintentional order», it is easy to realize that the Contract, which is *in principle* the form with which free individual wills dispose of what (also *in principle*) is and remains private, functions

[23] The expression popularized by J.Bindel, *Il mito Pretty-Woman,* Morellini, Milano 2019.
[24] C. Zamboni, *Il simbolico,* p. 294: «It was a matter of bringing to language and therefore potentially to all speakers what was gained in women's practices structured around living and affective relationships. Practices that had the ability to suggest transformative paths for women who cared about freedom and which could also be true and taken up by other women and men who had a taste for a freedom experienced and felt firsthand».

today as the instrument for governing, and in extreme detail, a vast range of social relationships of the utmost importance, namely family, filiation, and personal statuses.

The Contract is shifting from the instrument of the non-intentional order to the instrument of an overly intentional order. Surrogacy contracts – which tell a far story different from that told by some happy gestational mothers – significantly prove this shift.

As the civil law Professor Valentina Calderai brilliantly demonstrates[25], those contracts openly cultivate the illusion, or even the utopia, that all social issues, included anything that is involved in surrogacy (which is to say: family relationships, individual statuses, children rights) is visible, transparent, manageable by the parties involved and, for that reason, subject to private acts of disposition, or in other words to the individual will. An assumption which, if generalized, would destroy the basis itself of social coexistence. While reducing law, in Stefano Rodotà's words, «to a mere container for commercial schemes», the idea of regulating birth and family by commercial contracts legitimates «a private power of control on women and children [potentially: on every human being] that is unprecedented and inconceivable in a legal order that promotes fundamental rights and equality without distinction of sex and personal or social conditions».

What emerges is a proprietary scheme of family relationships that navigates on a course of collision with every «contemporary constitutional law of filiation» which «goes in the opposite direction, that of the control of the power of parents on children». In addition, the archetype of paternal filiation as a standard for determining family statuses is resurging. This, Calderai maintains, «breaks down maternity in its elementary components, literally disintegrates it, and, with skillful labor at the margins of patrilineal parenthood, replaces it with a controlled process». In this light, Calderai conclusively remarks, the suppression of maternity as title for the maternal status is the immediate result of a mechanism which ends up denying maternity as such, «in the difference which is its specific dignity». While another set of "social missions" which symbolically reframe the societal institution «maternity» is promptly established for women (egg donors, gestational carriers, workers of the reproduction) something else happens: the living together, thanks to the reconquered individual sovereignty of the parties of a contract, is degraded to a regime of subordination for everybody[26].

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[25] *Ordine pubblico internazionale e* Drittwirkung *dei diritti dell'infanzia*, in *Riv. Dir. Civ.*, 3/2022, pp. 478-506.

[26] V. Calderai, *Ordine pubblico*, esp. pp. 490 ff., also discussing the famous ruling *Johnson*

Surrogacy then proves to be what it is: a struggle on the social meaning of maternity and thereby on its symbolic meaning, a battle in which the entire idea and the *concrete* possibilities of the living together are at stake because what surrogacy contracts regulate is nothing but the whole of human relationships.

If this is true, it means that in today's «normative» appeals to individual and contractual freedom, this latter, which should be the foundation of the unintentional anti-authoritarian order, function instead as an outpost of a truly "intentional" – and authoritarian - order.

If Contract Law aims to become a means for planning the entire society, the distinctive mark of Contract law has today shifted to one which, in the past, Hayek would have attributed to the Public legislation. That is the authoritarian utopia of the intentional order which relies on the belief that an all-encompassing, completely satisfying regulation of over-sensitive and complex matters can be reached, so to say, once and forever and out of every reasonable doubt, with the help of an ancient acquaintance of Modernity: a bit of calculating, instrumental, purely modern rationality.

This is insidious, but it is only a part of the problem.

The real and major peril that arises from this state of things is that it reinforces, for reaction, the authoritarianism already proper of the intentional order's supporters.

It is a fact that today very often a fundamental and not reassuring assumption of the intentional order is relaunched in the public debate, with the aim or the hope to counter the idea that freedom coincides with «doing what one wants, disposing of oneself and what belongs to any individual according to his or her interests alone».

The assumption that contrasts with this position consists instead in saying that, essentially, freedom does not exist, it is only the limited space of maneuver that Laws recognize to the individuals, distributing to each person their rights and related limits, after having ascertained their correspondence to the general utility or to the social good. In other words, freedom is the mere result of norms established by the Public Powers[27]. In this light,

v. Calvert, 5 Cal. 4th 84, 94 (transl. mine).

[27] These are the traditional arguments of those who, in this way, aim to defend the "social interests" protected by the Italian Constitution, such as the interests of workers, from being exploited in the name of the liberty of contract. See L. Ferrajoli, *La costruzione della democrazia. Teoria del garantismo costituzionale*, Laterza, Roma-Bari 2021 (to be compared with the witty, lucid and provocative positions in favor of the freedom to trade sex and the body argued by V. Zeno-Zencovich, *Sex and the Market. From Infamous Commerce to the Market of Sexual Goods and Services*, second edition, Romatre-Press, Roma 2015).

the ban on surrogacy (or every other legal limitation to contract-law) does not deny liberty and instead, if rightly interpreted, establishes its dimension, as it happens for liberty in general, which always depends on the legal order.

It is a sort of rebound effect. The supporters of the intentional order react to the unintentional order (which actually disguises an authoritarian recipe) by augmenting the authoritarian components of their arguments.

Collapsing into each other, the traditional dichotomies extinguish the idea of freedom which, on the one side, becomes synonymous with «power» and «will», and, on the other, with «law», «rule», «distributive justice».

Two opposed rhetoric are spreading: one, usually described as neoliberal, is aiming to reduce the concept of freedom to the domination of private will and to the exercise of a power over oneself and over others, who "freely" and by choice decide to sell or to rent themselves. The other, which could be called neo-solidaristic, claims that the only liberty a human being can aspire to is already pre-established by the norms of a positive order, in the paramount interest of the "Whole".

On both sides, nothing remains beyond the Contract (the Private) or beyond the Law (the Public), imagined as perfect and self-sufficient regulators of order.

The idea itself of liberty risks being put out of play, when instead it is the indispensable symbolic resource without which freedom has very little, if any, chance of existing practically.

6. *If intentions matter: dropping a bit of spirituality in an over materialistic imaginary*

The practice of the Symbolic is helpful in handling with this treacherous turn.

While sharing the not authoritarian position of the unintentional order, the practice of the Symbolic also helps to understand why this model is not capable of outlining and holding a convincing, and truly non-authoritarian, idea of order, and thereby it almost inevitably shifts towards its opposite, the intentional order.

The point is that the un-intentional model does not take sufficiently into account that every social order, to be such, needs to be supported by individual intentions.

The practice of the Symbolic teaches indeed that *intentions matter*: the intention of freedom of the interpretant and the interpreted is the first root

of the social existence of that freedom. In order to obtain a social order tuned to liberty, the intention of liberty, which is to say the individuals' desire for a freer, more just social order, matters far more than is suggested by the model of the unintentional order, which tends to confuse it with the mere calculation of one's own individual interests.

The practice of the Symbolic also warns that, precisely for them to continue to count, intentions must remain such, they must enter and remain in social exchange as they are. Otherwise, in the name of the unintentional order (and of its banners, the individual freedom and the Contract) something else, namely its opposite, comes into play. This explains the peculiar limits peculiar of the «intentional» order model. Here, intentions are mistaken for will and decisive rationality, for a voluntaristic and performative drive, for the weight of «numbers» or for the strength of the «good reasons».

To sum up: in the light of the practice of the Symbolic, both the intentional and the un-intentional order reveal to be flawed by their inability to think and treat *intentions as intentions*, as simple ways of *tending towards something*, as movements that bear a quality, which tries to impress itself on reality, without aiming to direct and predetermine it and without claiming intrinsic merits in the name of which to impose its own affirmation and recognition.

What both the models of the intentional and the unintentional order fail taking into account is the role played by subjective intentions which address the external reality, aiming to make some immaterial goods (such as freedom, justice and equality) present in it. Goods which are essential for the creation of a social order capable of truly operating as an order in the sense of being felt as meaningful to those, who live within it.

One could say that, in a nutshell, the practice of the Symbolic reminisces that individual, subjective intentions are often aimed at intangible, immaterial goods, which are nonetheless essential to the existence of society. It is easy to realize that these goods are nothing but the «transitive concepts» against which, according to Marcuse, the Modern Reason has fiercely fought.

Actually, the practice of the Symbolic conveys assumptions, that have been shared by many critics of Modern Rationality, especially by those (I have already mentioned Max Horkheimer; I could mention Simone Weil or Iris Murdoch[28]) who have cultivated their criticism without the

[28] I have argued this point more in depth in *Principi del diritto principi della convivenza. Uno studio sull*e regulae iuris, Napoli 2022. There I trace an analogy among anti-positivistic conceptions of law, the Thought of the Symbolic, and the wide wave of thinkers, among

performative goals that are the profound flaw of Hayek's analysis. It is not by chance if this latter, loaded as it is with blatant political ends, while claiming to fight against utopias paradoxically ends up generating its own: the libertarian and over-rational utopia of the minimalistic State.

What are then the assumptions that other critics of the Modern Reason (the Thinkers of the Symbolic included) more disinterested than Hayek share?

Firstly, *a bit of anti-materialism*. Just enough not to renounce to the idea of transcendence, which is to say, to the ability or need which should be considered proper of the human mind, to make «things» that are neither definable nor objectifiable, as the Good or the Just, present and thereby real. Secondly and consequently, *the sense of the reality of reality*. According to many critics, what appears to be lost in modern thought is the sense that reality *is* real, because Modern Reason ignores its two basic preconditions. One is the capability of accepting that reality *is independent* from the human beings, that it is not entirely disposable to their pure will. The other is the capability of acknowledging that, this notwithstanding, reality still is the target of the human desire for being and is thereby participated by the individuals through their actions and their words that qualify the reality, making it what it is. Thirdly, the importance of *subjectivity*, devalued and side-stepped in a modern framework of thought where, even if the subjective survives or resurfaces, for example as the venue of knowledge, it does so at the cost of being the object of a constant work of purification from the contagion of other people's opinions and from the approximations of language. At this regard, it suffices to recall that on the contrary, the work of the Symbolic bets precisely «on the fact that what we read as true in the experience we live has a 'a value of truth' for others. Not because others have experienced it, but because what is grasped bears a meaning that is not only subjective but prospective of a context, of a world. Getting out of subjectivism, while talking about first-person experience, means entering into the shared language in which there are ongoing conflicts about the way of understanding reality. There the conquered portion of truth is brought and this inevitably involves a criticism to other readings of reality»[29].

It is in consideration of these ideas that the practice of the Symbolic offers us back a simple consciousness, that otherwise risks getting lost: «society nourishes souls, it is the passage towards something that transcends givenness»[30].

The spiritual component of the social is the missing piece to the

those many jurists, and many women, who have criticized the Modern Reason.

[29] C. Zamboni, *op. loc. cit.*

[30] S. Ferrando, on file with Author.

dualism (after all, an entirely modern construction) between Public and Private, Authority and Liberty, Individual and Social, that prevents these categories from being of aid in granting a convenient place to freedom.

Only by recognizing that the «social» holds something spiritual and that subjectivity is its living passer-by it is possible to emancipate the idea of social from coinciding with a material complex of power relations, or with an indistinct solidarity where individuality loses meaning and freedom is compromised. In other words, it is possible to liberate the «social» from being the signifier of an authoritarian discourse without relegating it to a secondary and boring component of the human experience, or even to an obstacle for its «free» development.

Hence the possibility of restoring space, breath, credibility and meaning to the idea of freedom, as a movement that does not end in the Private, and even less in the Public; as a perpetual «before and beyond» that cannot be captured by rigid determinations of Will (the Contract or the Law) but is generated, and always provisionally, in the concrete relationships between human beings. This is the gift of the Symbolic: by denying to each of the two opposing ideas of order – Private/Public, Individual/Social, Authority/Freedom – the claim to absoluteness and self-sufficiency, it gives us back the reason to participate in first person to the practical imagination of a better order. And this means, after all, putting a bit of liberty in the crude reality.

Abstract

According to Hayek's classic distinction between Private and Public the one would correspond to a space of freedom and to a spontaneous (or unintentional) order, the other to a space of authority and to a planned (or intentional) order; the one to Liberalism, the other to Socialism. Recalling the case of surrogacy contracts, the article argues that, today, this distinction is collapsing. The Private and the Contract have ended up expressing an authoritarian logic of planification of the social world: the pleas to individual freedom and self-determination are used performatively, disguising a purpose of governing the entire society which is purely intentional. By reaction, the supporters of the planned order have sharpened their authoritarian arguments: people can claim no freedom, if not that recognized by laws in the general interests. How to escape from such a dead end? With the help of Feminist Thought and by recalling the pioneering experience of the Saint-Simoniennes, the article maintains that the dualism between Public and Private has always been too poor. In fact, it does not take into account that the social has a political and spiritual, i.e., symbolic, dimension, which exceeds both sides of that traditional alternative.

Keywords: Public; Private; Feminism; Social; Symbolic; Saint-Simonism; Surrogacy Contracts.

Sara Rigazio

Surfing Children: on-line services, family's private choices and public controls. The case of geo-location tracking applications on children

Summmary: 1. Introduction – 2. The *normalization* of surveillance. From caring to controlling: the *datafied* family. The geo-location tracking applications – 2.1. Parental responsibility – 2.2. Autonomy of the child – 2.3. What role for the State and the institutions? – 3. The English experience: the U.K. Age-Appropriate Design Code – 4. The European and the Italian background: and yet it moves. Imitation and circulation of models in the matter of children's protection – 5. Conclusions.

1. *Introduction*

The use of geo-location tracking applications on children has rapidly increased in the last few years. The most popular ones such as Life360, FindMyIPhone, Tiles, AirTag, CircleHomePlus, are all family locator applications which allow parents or other family members - but mainly parents - to pin-point exactly their kids' location and whereabouts or other people in the family circle[1]. There are different types of applications depending on the users' needs: some, for example, come with a so-called geo fencing option, that enables parents to mark concrete locations on the map and to turn them into safe-zones, so that the child is allowed to stay in those areas. This implies that if the child exits the safety zone, parents are immediately notified.

The most sophisticated ones even tap into the US National sex

[1] These applications are among the ones with growing popularity and reputation in the market of family locator service applications. In this respect, see J. Mavoa-S. Coghlan-B. Nansen, *It's About Safety Not Snooping: Parental Attitudes to Child Tracking Technologies and Geolocation Data*, in 21 (1) *Surveillance & Society*, 2023, pp.45-60. In particular, with regard to the application Life360, see B. Simpson, *Tracking Children, Constructing Fear: GPS and the Manufacture of Family Safety*, in 23 *Info. & Comm. Tech. L.*, 2014, p.273. See, also, S.S. Lim, *Transcendent parenting: Raising children in the digital age*, Oxford 2020.

offender database and alert parents when the child is close to a registered sex offender. Some of the most advanced devices have become so discrete that they go completely unnoticed by the child: this means that parents can use these apps without the child even knowing. This is the case, for example, of BzT's, an app which comes in the form of a washable tracker patch and chipset that can be put on a t-shirt, with an alarm that goes off every time the child wanders away, to notify the parents.

The reasons why the use of these instruments has become so frequent are many and diverse and depend on a variety of elements. Nevertheless, a common factor emerges and is that children are being *datafied* every day. According to the Children's Commissioner for England, «children growing up today are among the first to be datafied from birth»[2] and, we add, even *before* birth. This phenomenon is included in the wider one of *datafication*[3]. As it will be explained in detail, this process consists of a massive and systematic monitoring, recording and transformation of social actors' everyday practices - that are both on line and off line - into on line quantified data, thus allowing for real-time tracking and predictive analysis. Originated as a business model, it has evolved over time, going beyond the market. As a matter of fact, nowadays, it is completely ordinary using applications that track the behavior, the health, the habits of our children: this is exactly what Shoshana Zuboff has defined as the time of *surveillance capitalism*. This expression, coined in 2015, refers to a systematic and one-sided reduction of the human experience, considered in its entirety, to the status of a raw material - free - to be converted into information, i.e. data[4]. This data is then collected as predictive products and literally sold on the global market to traders who will exploit it for their own purposes.

In the specific context of minors, the *datafication* process is the result of two different actions: one, that consists of the direct engagements of children with digital media; the other, of the data generated and shared by their parents, other family members or third parties, by a number of Internet connected devices.

Among the many factors that concur to the datafication of children –

[2] Children's Commissioner for England, *Who knows what about me? A Children's Commissioner report into the collection and sharing of children's data* (2018). www.childrenscommissioner.gov.uk/ wp- content/ uploads/ 2018/ 11/ who- knows- what- about- me.pdf.

[3] J. van Dijck, *Datafication, dataism and dataveillance: Big data between scientific paradigm and ideology* in 12 (2), Surveillance and Society, 2014, pp. 197- 208.

[4] S. Zuboff, *Big other: surveillance capitalism and the prospects of an information civilization*, in 30 *Journal of Information Technology*, 2015, pp. 75-89; Id., *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power,* London 2019.

including the domestication of the Internet (meaning that the presence of many connected devices at home changes the relationship itself between family members and social actors into the domestic environment) – the *mediatization* of parenthood has particular relevance.

Indeed, this element plays a critical role for the topic here addressed, since it implies that the parenthood performance is now 'evaluated' and 'assessed' through the digital media.

It is sufficient to think of all the web forums addressed to new parents or parents-to-be where the parenting capacities – especially the mothers' ones – are at stake and literally judged on the web, according to the web's parameters. In the same direction goes the quite recent but very common practice by parents known as *sharenting*, which is the semi-public sharing of family pictures and videos on social media or through the use of parenting applications. The idea of «good parenting» seems to be directly related to the amount of data entered and shared online: the paradox is that the more you monitor and supervise your child, the better (?) you demonstrate your (good?) parenting skills.

This context has paved the way to a state of *hypervigilance* by parents on their kids that, needless to say, didn't go unnoticed by the market and the business operators. And consequently, a wide variety of surveillance and tracking devices have been developed to the market and offered to parents. Some of these devices are designed to ensure children's online safety; others to limit their screen time online and others, as a matter of fact, to give specific information regarding the children's precise location.

This essay explores exactly the tension that arises between parents, children and the State or the institutions, when using geo locations tracking applications on children, in the wider context of *surfing* children and their protection in the digital environment. After a brief analysis on how the digital dimension has shaped and influenced the dynamics within the family, the paper considers the use of these specific tools from the parents, the children and third parties' perspectives.

Through the study of the UK Age-Appropriate Design Code as well as of the recent initiatives by the European Commission in the same direction, the paper advances the argument that a child-centered approach, conducted through the design discourse, seems to be appropriate one in the matter at stake. Indeed, for the first time the actors involved (parents, institutions and business operators) 'are forced' to adjust to the children's needs and dimension, giving, finally, legal traction to the concepts of the best interest and the evolving capacities of the child.

2. *The* normalization *of surveillance. From caring to controlling: the* datafied *family. The geo-location tracking applications*

The datafication of the relationships and the mediatization of roles within the family unit represent two key moments in order to understand the context within which this issue pertains. The process of datafication implies, as mentioned, that any aspect of people's daily lives becomes quantifiable, thus measurable and, in general, traceable as much as possible to predetermined categories (so-called data templates). Think of what happens in user profiling: based on choices and habits, drawn from data entered into the network, each consumer receives a personalized ad calibrated exactly to his or her needs and purchase expectations; at the same time, similar needs and expectations are 'cataloged' and grouped by classes of consumers with similar preferences, «to establish links and relationships, which are used mainly for economic purposes, to carve out from the person what the market is interested in»[5].

Within the family circle, this process has distinctive nuances and takes place when the steps that define the different temporal stages of the lives of its members - expectation, birth, growth, more or less happy or significant events - are classified as 'data' and, as such, put on the net to be literally 'consumed', in the same way as any other good. The process of datafication is closely linked to the mediatization of roles: one, it could be said, cannot stand without the other. If, in fact, emotions and family experience become information, it is also because the members of the household- first and foremost the parents-take on and interpret their roles according to parameters and expectations that are peculiar to the digital dimension and its users. It is not only a matter of sharing confidential moments - a practice that was unimaginable until a few years before anyway - but of building, step by step, one's parental or family figure, relying, literally, on the digital dimension.

This can be done either through the well-known practice of sharenting, involving other users and sharing their experiences, or through the use of a range of applications. The latter, for example, have become an integral part of child management: they are used to check and note changes in the infant's habits (e.g., in sleeping or feeding) or monitor his or her health status and immediately notify him or her of any changes. As the child grows, they respond to different needs related to the child's activities in

[5] S. Rodotà, *Il diritto di avere diritti*, Laterza, Bari 2012, p. 395 who underlines the process of *extracting* information from individuals: "per stabilire nessi e relazioni, di cui ci si serve soprattutto per finalità economiche, per ritagliare dalla persona quel che interessa il mercato".

and out of the digital dimension, as in the case of geolocation. This is what some scholars have called "intimate surveillance" or «caring dataveillance»[6]: here the critical element consists of control (masked as care), implemented through the use and exchange of data[7].

Data, however, do not remain confined to the family context, but circulate and are transmitted, like any other type of information becoming, therefore, economically relevant, exactly as theorized by Soshana Zuboff in the surveillance capitalism. In the context we have described there is a further element that contributes to accentuating the peculiar character of this process: the pervasiveness of the idea of surveillance, the perception that it has become essential to the life of each individual, almost 'institutionalized' and normalized, to the point of being 'embedded' in what has been called the «surveillant habitus»[8].

Hence, surveillance receives outright legitimacy: for example, consider, among others, the practice, which has now become common in the United States of America, of monitoring student activities by educational institutions, even outside school hours, through digital devices provided by the institutions themselves[9]. Or to the recurrent use by public administrations of computerized databases as veritable tools for citizen management and control or, furthermore, to the continuing requirement to have to authenticate through credentials to access any kind of service[10].

[6] *Caring dataveillance* is the result of the combination between data and surveillance, preceduti da *caring*, ovvero prendersi cura di. On the topic, see T. LEAVER, *Intimate surveillance: Normalizing parental monitoring and mediation of infants online*, in *Social Media + Society*, 2017, n. 3(2), pp. 1-10; P. LUNT-S. LIVINGSTONE, *Is "mediatization" the new paradigm for our field? A commentary on Deacon and Stanyer (2014, 2015) and Hepp, Harvard and Lundby (2015)*, in *Media, Culture & Society*, 2015, n. 38(3), pp. 462-470.

[7] This is the phenomenon known as *over-parenting*, *parenting out of control*, *helicopter-parent*. See. M.K. NELSON, *Parenting out of control: Anxious parents in uncertain times*, NYU Press, New York 2010.

[8] D. LYON, *The culture of surveillance: Watching as a way of life*, London 2018.

[9] D. KEATS CITRON, *Under their eye: the surveilled student*, in 76 *Stanford Law Review*, 2023; B. FEDDERS, *The Constant and Expanding Classroom: Surveillance in K-12 Public Schools*, in *N.C. L. Rev.*, 2019, n.97 (6), pp. 1673-1692; L. BECKETT, *Under Digital Surveillance: How American Schools Spy on Millions of Kids*, THE GUARDIAN (Oct. 22, 2019), https://www.theguardian.com/world/2019/oct/22/school-studentsurveillance-bark-gaggle.

[10] O. H. GANDY JR., *The Panoptic sort: a political economy of personal information*, Oxford, 2019; S. IGO, *The Known citizen. A history of privacy in modern America*, Cambridge (US), 2018; W. HARTZOG, *Privacy's Blueprint: the battle to control the design of new technologies*, Cambridge, 2018; D. LYON, *Surveillance Studies: an overview*, Cambridge, 2007; Z. BAUMAN, D. LYON, *Liquid surveillance: a conversation*, Cambridge, 2012; J.B. RULE, *Private Lives and Public Surveillance. Social Control in the Computer Age*, New York 1974.

Gary Marx identifies four phases in the social process of normalization of surveillance: an initial latent phase in which it becomes less obvious but no less effective and pervasive; a subsequent expansion phase in which it, precisely, extends to new subjects and includes new activities; a further phase in which it is the surveillance action itself that responds and adapts to social changes; and a final phase in which it gives rise to a series of determined social behaviors[11].

In this regard, Marx observes that a new form of surveillance is taking place «invisible, involuntary, often integrated into routine activity»[12]. And indeed, as it has been observed, it has become almost «mundane, every-day, commonplace»[13]. This is what Woodrow Hartzog introduces as «a new theory of privacy nick» i.e. a slow but unavoidable erosion of privacy, operated at multiple levels, justified and promoted in particular by the legal and judicial formant, and which, on the level of the protection of fundamental rights, entails the constant renegotiation of the limits and standards relating to the right to privacy, to the obvious detriment of the community as a whole[14].

It is exactly in this current environment of normal hyper vigilance that geolocation devices find extensive application. In general, as mentioned, these are tools that allow to pinpoint the geographic location of an individual or inanimate object with extreme precision. The technology behind them allows such detection to occur through a discovery, as in the case of gps systems or wi-fi networks, or through an inference, as in the

[11] G. T. Marx, *Windows into the soul; surveillance and society in an age of high technology*, Chicago 2016, 114.

[12] G.T. Marx, *"What's new about the new surveillance?": Classifying for change and society*, in *Surveillance & Soc'y*, 2022, n.1 (9), p. 15.

[13] S. Byrne, *The Banality of Surveillance*, in *Surveillance & Soc'y*, 2022, n.20, p.372, secondo la quale "surveillance is ordinary work done by ordinary people".

[14] W. Hartzog - E. Selinger - J. Gunawan, *Privacy Nicks: How the Law Normalizes Surveillance*, in *Washington University Law Review*, 2023, p.101. The authors argue how, especially in the U.S. context, in the face of massive action on the part of institutions and courts in affirming and defending the right to privacy, in the event of manifest and very serious violations, we are witnessing, on the contrary, a dangerous trend, whereby not only do the consociates become accustomed to constant vigilance but, even, judges and legislators encourage such acclimation. The theory of *privacy nicks* «posits that lawmakers are systematically normalizing surveillance by ignoring smaller, more frequent, and more mundane privacy diminutions». The normalization action also legitimized by the courts is demonstrated by the authors through reference to copious case law. Notable among the numerous cases cited are, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *United States v. Knotts*, 460 U.S. 276, 281-82 (1983); *People v. Harris*, 949 N.Y.S.2d 590 (Crim. Ct. 2012).

case of an IP address or past web search activities. In turn, geolocation can occur in real time or deferred time. As is easily assumed, the possibility of real-time localization is the most attractive feature for these tools, which drives the market for so-called location-based services[15].

It should, moreover, be noted how these instruments were born and were initially used in emergency cases: to locate survivors following natural disasters, in the case of major air crashes. Life360, one of the first and most well-known geo-locators on the market, was created in 2008 in the aftermath of Hurricane Katrina to reunite the missing and their families. Certainly, in that case it was an emergency context; however, Life360 as well as all other similar devices, is designed for regular use in an everyday context that is far from exceptional. Among the various models on the market, those built, designed and offered for the needs of families have become increasingly numerous, to the point that the forecast for 2030 is an increase in market share of about 6.5%[16].

To get a concrete idea of what we are talking about, just think that these devices can be inserted into digital watches or games used daily by children, or they can be applied on clothing or objects, without the child noticing[17]. As already mentioned, the use of these tools involves a number of considerations from different perspectives of investigation, which will be addressed in the following paragraphs.

2.1. *Parental responsibility*

A first reflection draws from the perspective of the parental responsibility. A study on children's use of the Internet, conducted in 2020 by a research team from the London School of Economics, in 19 European countries found that the parents surveyed considered the use of geolocation devices on their children to be an expression of their parental duty[18].

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[15] K. Michael - R. Clarke, *Location and tracking of mobile devices: Uberveillance stalks the streets*, in 29 *Computer Law and Security Review*, 2013, p.216.

[16] See the report by Dataintelo, written in 2022, entitled «Global Kids GPS Tracker Market, By Type (Real-time Location, Regular-time Location), By Application (Girls, Boys) And By Region (North America, Latin America, Europe, Asia Pacific, Middle East & Africa), Forecast From 2023 to 2031», in https://dataintelo.com/report/global-kids-gps-tracker-market/.

[17] A. Siibak, *Digital parenting and the datafied child*, in T. Burns & F. Gottschalk (Eds.), Educating 21st century children. Emotional well-being in the digital age, 2019, pp.103-118, OECD Publishing.

[18] D. Smahel - H. Machackova - G. Mascheroni - L. Dedkova - E. Staksrud - K.

This belief is shared by parents of children in different age groups[19]. The main motivation given regarding the use of these tools lies in the need to 'protect', to 'keep safe' their children, in the idea that knowing exactly their movements, on the one hand, gives the possibility to intervene in case of need, on the other hand, it represents a kind of reassurance, comfort, showing an almost blind trust in the technology itself[20].

In terms of the benefits of these devices, there is no doubt that they represent an additional tool available to the parent to ensure, at least within certain limits, the safety of their child. Recent events in the news show how the activation of the geolocation application has actually made it possible to intervene and rescue children in distress and, in some cases, even save lives[21].

Beyond this clear fact that, moreover, confirms the original mission of these instruments as referred to above, the key element that would be appropriate to dwell on is related to the meaning of *protection*. In this respect, both the international legislation of the UN Convention on the Rights of the Child[22] and the national legislation, confirm the duties in charge of parents or guardians to care for and educate the child.

Ólafsson - S. Livingstone - U. Hasebrink, *EU Kids Online 2020: Survey results from 19 countries. EU Kids Online*, in https://www.lse.ac.uk/media-and-communications/research/research-projects/eu-kids-online/eu-kids-online-2020. EU Kids Online is an international research network whose goal is to improve the degree of knowledge and awareness among European children about opportunities, risks and safety in the digital environment. Through the use of a multidisciplinary approach, the project aims to map the online experience of children and parents, in constant dialogue with national and European policymakers and stakeholders.

[19] In relation to the issue of geolocation, the report analyzes age ranges between 9-11; 12-14; 15-17.

[20] M.B. Rutherford, *Adult supervision required: Private freedom and public constraints for parents and children*, Rutgers University Press, New York 2011.

[21] There have been numerous cases reported in the news, most recently that of the attempted suicide of a 15-year-old girl who, thanks to the geolocation app activated on her cell phone by her father, was located and rescued before she took her own life. See, https://corrieredibologna.corriere.it/notizie/cronaca/23_settembre_24/appena-ha-visto-la-testa-della-ragazzina-si-e-tuffato-cosi-il-carabiniere-ha-salvato-la-quindicenne-dal-torrente-2c8a0b47-dd66-4951-b442-2091826e0xlk.shtml.

[22] The Convention on the Rights of the Child (CRC) A/RES/44/25 was approved by the United Nations General Assembly in New York on November 20, 1989 and entered into force on September 2, 1990. To date, it is the international document with the highest number of ratifications by states, with the sole exception of the United States. For the text of the Convention on the Rights of the Child see https://www.datocms-assets.com/30196/1607611722-convenzionedirittiinfanzia.pdf. About the lack of ratification by the U.S. see S. Sonelli, I <<*Children's rights*>> *nel diritto statunitense tra Costituzione e Convenzione mancata*, in *Riv. critica del diritto privato*, 2019 (3), p. 415.

Articles 3 and 5 of the Convention repeatedly call parents and legal guardians to the duty to ensure the pursuit of the child's best interests, in accordance with the development of the child's capacities (evolving capacities), and to provide adequate means for the exercise of the child's rights. The international legislator further confirms the duty of parents to protect their child and, when (Art. 9) parents fail in this duty, entrusts states with the duty to supervise and, where appropriate, intervene, if the child suffers mistreatment by the parents. Finally, Article 18 is in continuity with the other provisions of the Convention in which parents are required to ensure decent living conditions as well as adequate levels of education, and it particularly emphasizes the profile of responsibility. This provision entrusts, in fact, both parents with the common task of raising and educating the child, evoking, at the same time, the intervention of the institutions called upon to accompany, through specific support actions, the family along this path.

In the national system, reference should certainly be made to Art. 30 of the Constitution and Art. 147 of the Civil Code, which sanction the right and duty of both parents to take care, in various respects (material, educational and moral), of their children, while taking into account their aspirations and abilities in the educational path.

As mentioned above, the right-duty of parents to protect their children clearly emerges but, on closer scrutiny, this protection is accompanied by an additional element. In the U.N. Convention it corresponds to the progressive development of the child's capacities (the so-called principle of the evolving capacities of the child); in Article 147 of the Civil Code it is substantiated by the wording regarding respect for the child's capacities and aspirations. This makes it possible, therefore, to decline the 'protection' required of parents not in the sense of 'control,' but in the sense of care, education, promotion of his rights and gradual empowerment of the child. This reading, moreover, is further endorsed by the very notion of parental responsibility.

The latter, as is well known, introduced by the European legislator as early as 1984 with a recommendation on the matter of family custody, and later taken up by the Brussels II bis Regulation of 2005, certainly consists of a series of rights and duties, which, however, are included in the educational path, in which parents and children participate, together - each respecting their own roles - and which represent the evolution, in a dynamic sense, of the concept of parental prerogative[23]. It is in this

[23] G. Ballarani, *L'affidamento condiviso e l'interesse del minore*, in AA.VV., *Commentario del codice civile Scialoja-Branca*, *Libro Primo Delle persone e della famiglia*, a cura di S. Patti-

perspective, therefore, that the parental role is entrusted with a protective function: not, therefore, a protection that is an expression of a mere desire - albeit sometimes humanly understandable - for control and surveillance, but rather a protection that is an accomplished expression of the child's entrustment to the parent, who, consistently with the level of maturity attained by the child himself, will have to accompany him (not control or supervise him) in the course of his educational choices[24]. Following this line is therefore important to look at the child's perspective.

2.2. *Autonomy of the child*

In the issue addressed here, the perspective offered by the child plays a central role.

According to the English study referred to above, the minors interviewed clearly express their willingness to be asked and involved, assuming that this type of device is used on them. The research shows a general awareness, in all age groups considered, with respect to the need for one's own consent before the potential use, by others, of geolocation devices.

In this respect, therefore, the following are relevant: in general, the self-determination of the minor - understood as the progressive acquisition of autonomy, according to the level of maturity demonstrated and, specifically, the right to be heard. Both of these elements, strongly interrelated, are recognized and regulated by international and national legislation, with different nuances, related to the idea of capacity and agency[25].

L.R. Carleo, Bologna 2010, 97; E. Bellisario, "Parental Responsibilities*": i lavori della* Commission on European Family Law, in *Minori e Giustizia*, 2007, 61; P. Vercellone, *La potestà dei genitori: funzione e limiti interni*, in *Trattato dir. fam.,* directed by da P. Zatti, II, *Filiazione,* a cura di G. Collura, G. Lenti, M. Mantovani, Giuffrè, Milano 2002, 962. On the process of the Europeanization of family law, and especially on the complexity and difficulties encountered on this tortuous path see M.R. *Marella, The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law, in European Law Journal, 2006, 12(1), 78-105; M.R.* Marella, *La specialità del diritto di famiglia nella scienza giuridica e nella comparazione, in* M.R. Marella- G. Marini, *Di cosa parliamo quando parliamo di famiglia,* Laterza, Bari 2014, p. 39. On the project of the Common Core of Family law, see A. Pera, *Searching for a common core of family law in Europe, in 1 Opinio Juris in Comparatione, 2018,* p. 51.

[24] J. Fortin, *Children's rights and the developing law,* Cambridge University Press, Cambridge 2009, p. 40, who appropriately points out that the expression protection does not mean, however, subjection of the child to the adults' decisions.

[25] Among the many Authors who addressed this theme, see P. Rescigno, *Capacità di agire* in *Noviss. Dig. It.,* II, Torino 1958, pp. 862 ss; Id, *Capacità di agire* in *Digesto Civ.,*

Article 5 of the UN Convention provides that in the care and upbringing of the child, parents or legal representatives must take into account the development of the child's capacities. The distinguishing feature of this provision is, therefore, to make the child personally responsible for the exercise of the rights accorded to him or her under the Convention, and this, regardless of the specific age reached[26]. While on a first reading the rationale behind the provision in question would seem to be that of maintaining a substantial balance between the rights of the child and those of the parents, without adding any particularly innovative elements, a closer reading reveals that the provision of Article 5 is, in fact, central to the understanding of the normative framework of the Convention[27].

This provision, indeed, recognizing the principle of the evolving capacities, introduces a turning point: as the child's level of maturity increases, as the social circle he or she attends widens beyond that of the family, and as he or she develops a range of emotional sensitivities, he or she is equally entitled to an increasing level of responsibility, agency and autonomy in the exercise of the rights recognized in the Convention. At the same time, family and institutions are called upon to provide adequate (appropriate)[28] direction and guidance so that this exercise can take place. It is in this sense that article 5 entails «a transfer of responsibility in decision-making processes from the adult to the child, provided that the latter demonstrates adequate maturity and willingness to assume such responsibility»[29]. In this respect, as repeatedly emphasized by the UN Commission charged with monitoring the status of implementation of the Convention in each state, article 5 is participatory in nature and inherently 'enabling' functional to the progressive acquisition of capacities and competencies (agency) of the child[30]. The notion of evolving capacities,

II, Torino 1988, p. 213 ss; A. Falzea, "Capacità (teoria gen.)", in *Enc. Dir..,* VI, Milano 1958, p. 8 ss. Also, see. C. Ruperto, *Età,* in *Enc. Dir.,* XVI, Milano 1967, in the sense that age constitutes solely a formal factor regardless of any substantive assessment. See, also, F. Busnelli, *Capacità ed incapacità di agire del minore,* in *Dir.Fam.Pers.,* 1984, p. 55.

[26] *General Comment* n.7, *Implementing Child rights in early childhood*, paragraph 17, where it emphasizes the concept of maturity unrelated to age so to have "*individual variations in the capacity of children of the same age*".

[27] *Ex multis*, G. Lansdown, *The evolving capacities of the child*, Firenze 2005.

[28] G. Lansdown, *The evolving capacities of the child,* cit., 5, who affirms that «By inserting the word "appropriate", art. 5 removes any suggestion that parents or other caregivers have carte blanche to provide whatever direction or guidance they happen to believe suitable».

[29] G. Lansdown, cit., 4.

[30] CRC Committee, General Comment n.7, *Implementing Child rights in early childhood*, paragraph 17: «evolving capacities should be seen as a positive and enabling process, not an

on the other hand, also possesses a protective function, entrusted to the institutions and the family, which is expressed whenever the child is charged with responsibilities that exceed his or her capacities[31], that is, depending on the nature of the right to be exercised and the concrete situation in which he or she finds himself or herself. The concept of capacity, in fact, carries within it an idea of dynamism and relativity: it depends on and is influenced by environmental and cultural factors, by the diversity and complexity of each child's growth path.

To provide a concrete dimension to this concept, Gerison Lansdown suggests applying some of the criteria that are typically employed in the context of medical consent, to ascertain the patient's level of understanding. Thus, the author invokes: the ability to understand and communicate relevant information, to think and choose independently, to assess risks and benefits, and, finally, the achievement of a sufficiently stable set of values. This approach, which is also shared by the UN Commission, combines the recognition of a progressive autonomy of the child with the protection-in the terms mentioned above-to which the child is nevertheless entitled[32].

Linked to Article 5 is, as mentioned, Article 12 of the Convention, which recognizes and upholds the right of the child to actively participate in all decisions affecting him or her, with a view to the healthy and balanced development of his or her personality, in relation to the maturity experienced in the child. The international legislator has not restricted this

excuse for authoritarian practices that restrict children's autonomy and self-expression…».

[31] See, in this regard, the Recommendations carried out by the Monitoring Commission on the Status of Implementation of the Convention on the Rights of the Child, charged by the UN with verifying that states introduce adequate measures to support and protect the child (among others, in the areas of labor, conscription and voluntary participation in the armed forces and marriage). It should be noted, moreover, that a large part of the Recommendations and comments carried out by this commission focus, on the one hand, on the need to ensure the constant protection of the child while avoiding its exploitation (especially in the areas mentioned above) and, on the other hand, on the need to ensure at the same time respect for the principle of the evolving capacities of the child itself, with the aim, albeit arduous, of achieving an acceptable balance between protection and promotion of the child. In particular, this need becomes more evident in health matters, where the committee requires that informed consent by the minor «*closely reflects recognition of the status of human beings under the age of 18 as rights holders in accordance with their evolving capacity, age and maturity*». Così afferma la *Committee on the Rights of the Child*, in *General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child,* CRC/GC/2003/4, United Nations, Geneva 2003.

[32] *General Comment* n. 12, *The right of the child to be heard*, paragraph 85 e *General Comment* n. 20, *On the implementation of the rights of the child during the adolescence*, paragraph 20.

to a mere statement of principle, but has precisely indicated that the child's opinion be received, in the appropriate instances, through the procedure of hearing[33].

Moreover, this is a provision that is fully consistent with the basic idea that permeates the entire structure of the Convention, namely that of a child who is the holder (from subject to the person Rodotà)[34] of rights and the protagonist of his or her own choices[35].

In the national legal system, scholars have recognized for some time now not only the necessity but also the opportunity to grant the child a gradual space of autonomous decision-making in existential choices, according to the level of maturity achieved and demonstrated[36].

Multiple factors have made it possible to achieve this result. Among them, the process of constitutionalization that has affected the family has certainly played a leading role, contributing to the realization of a model in which both the personal and family-relational dimensions of the individual find space and protection. It is precisely the recognition of the existence and coexistence of both these dimensions that is the key to a modern

[33] Article 12 of the Convention states that «States Parties shall guarantee to the child who is capable of discernment the right freely to express his or her views on any matter affecting him or her, the views of the child being duly taken into account taking into consideration his or her age and degree of maturity. To this end, the child shall, in particular, be given the opportunity to be heard in any judicial or administrative proceedings concerning him or her, either directly or through an appropriate representative or body, in a manner compatible with the rules of procedure of national law». See, E. Brems, *Children's rights and universality* in J. Willems, Development and Autonomy Rights of Children, Intersentia, Antwerp 2002; J. Munby, *Making sure the child is heard* in *Family Law*, 2004, 338, n. 34. Regarding the procedural aspects connected to art. 12, see, A. Barrat, *The best interest of the child – Where is the child's voice?*, in S. Burman, Legal decisions on children in the New South Africa, Juta Law, Lansdowne 2003, p. 45.

[34] S. Rodotà, cit., p. 149, who underlines the relevance of the person referring to «*al libero sviluppo della personalità*», as declined in the Constitution.

[35] W. Vandenhole - G.E. Turkelli - S. Lembrechts, *Children's rights. A Commentary on the Convention on the rights of the child and its protocols*, Northampton 2021; S. Detrick (edited by), *A commentary on the United Nations Convention on the Rights of the Child,* Kluwer Law International, The Hague 1999; P. Alston - J. Tobin, *Laying the foundations for Children's rights*, UNICEF, Firenze 2005; R. Hodgkin - P. Newell, *Implementation handbook for the Convention on the Rights of the Child,* UNICEF, 2007; D. McGoldrick, *The United Nations Convention on the Rights of the Child* in *International Journal of Law and the Family,* 1991, 132, n. 5.

[36] P. Stanzione, *Capacità e minore età nella problematica della persona umana,* Jovene, Napoli 1975, 299, who affirms that "avere minore età non significa aver minor valore rispetto agli adulti"; P. Stanzione – G. Sciancalepore, *Minori e diritti fondamentali,* Giuffrè, Milano 2006.

reading of family law, which, on the level of the relationship between parents and children, is reflected in the formulation of Articles 155 sexies and 147 of the Civil Code[37].

The concern of the Italian legislator with respect to the promotion of the protection of the child can also be seen in the recent legislative intervention (so-called Cartabia reform) of 2022, which, among the many areas, has regulated in a more punctual and complete manner also the procedure of the hearing of the child. Particularly indicative, for the profile that is of interest here, is the Illustrative Report to the decree, in which, the legislator's desire to "protect the self-determination and personality of the child, which designates the individual's unique self to be identified not only in the natural capacities and inclinations but also in the expectations" of the child is expressly recognized[38].

Recognizing, therefore, that especially at the level of the legal formant, the gradual acquisition of the autonomy of the child, who has reached and demonstrated an adequate level of maturity, is now an established fact and also regulated, both in the international and national frameworks, what needs to be highlighted is how this autonomy is declined. In this respect, in fact, the genuinely 'revolutionary' trait of the Convention and the national provisions lies in having literally overturned the perspective from which to investigate childhood without betraying, diminishing or confusing either the peculiarity of the latter or, even less, the fundamental role entrusted to the family. Autonomy of the child does not, therefore, mean being free to indulge and justify one's whims, but consciously exercising one's rights by assuming the responsibilities related to them.

2.3. *What role for the State and the institutions?*

A further perspective from which to observe the use of geolocation devices relates to the circulation of data generated and transmitted by these

[37] M.R. Marella, *La rilevanza costituzionale della comunità familiare*, in M.R. Marella- G. Marini, *Di cosa parliamo quando parliamo di famiglia*, Bari 2014, 10. Sull'evoluzione storica della famiglia in Italia, v. P. Ungari, *Storia del diritto di famiglia in Italia (1796-1975)*, Bologna 2002; F. Caggia, *Capire il diritto di famiglia attraverso le sue fasi*, in *Riv. dir. civ.*, 2017, 1573.

[38] Relazione illustrativa al decreto legislativo 10 ottobre 2022, n. 149: «Attuazione della legge 26 novembre 2021, n. 206, recante delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata», 52, in Suppl. straordinario alla Gazzetta Ufficiale n. 245 del 19 ottobre 2022 - Serie generale.

tools. This is a very complex topic, which involves a plurality of issues and which, for obvious reasons, it is not possible to address in detail here. Therefore, I would like to focus on a single profile that I think is relevant: the role that the state and, more generally, institutions can (or should) play in protecting the data of people involved in the use of these tools. In this regard, I would like to refer to a 2017 decision by the Norwegian Consumer Protection Authority, which, following an investigation of a number of devices (smart watches) used by children and their families, equipped, precisely, with a geolocation and movement-tracking application for children, highlighted a number of problematic profiles[39].

The authority challenged the lack of security in the management of the data collected and in the way it was transmitted and, in particular, noted a glaring deficiency in terms of the protection of privacy and freedom of movement of both minors and other subjects involved.

The report showed, in fact, how completely unrelated users were able to infiltrate the software, listen to the conversations of minors and all those close to them, even converse with the minors themselves, watch them through the installed video camera and, indeed, know in detail all their movements and places visited. In this respect, the authority expressly identified the violation of the rights enshrined in the Convention on Children and Article 16 on the right to privacy. Additionally, the investigation noted, on the one hand, the possible distorting effects that continuous surveillance can have on the child's growth process and, on the other hand, the false sense of security[40] that such tools instill in parents who, on them, rely on them.

The authority, therefore, deemed it essential to refer the matter to the competent national privacy and market protection bodies, stressing the particular degree of seriousness of the violations in view of the specific situation of vulnerability[41] of the recipients of the products, recalling

[39] Norwegian Consumer Council, *#Watch Out. Analysis of smart watches for children*, in https://consumerfed.org/wp-content/uploads/2017/10/watchout-report.pdf, October 2017.

[40] K. Gabriels, '*I keep a close watch on this child of mine*': *a moral critique of other-tracking apps*, in 18 *Ethics Inf Technol*, 2016, p. 175.

[41] There is no time here to delve into an analysis of the concept of vulnerability. It is only worth pointing out here how it should be looked at according to a broad taxonomy, which considers multiple and different factors. In this respect, the distinction between inherent and situational vulnerability is considered essential as is, likewise, the character of multidimensionality that characterizes the concept of vulnerability itself. In this regard, see C. Mackenzie, W. Rogers - S. Dodds, *Introduction: What Is Vulnerability and Why Does It Matter for Moral Theory?* in W. Rogers, C. Mackenzie, S. Dodds (eds.), Vulnerability. New Essays in Ethics and Feminists Philosophy, Oxford University Press, Oxford 2014,

similar positions taken by both the Children's Ombudsman and the National Data Protection Authority.

The Norwegian example highlights the inevitability of 'presiding over' the protection of personal data, in a reality in which continuous technological advances transform the entire social organization-determining that «social divide between increasingly transparent individuals and increasingly opaque powers» described by Rodotà[42].

In the case of geolocation devices, this means first and foremost guaranteeing and maintaining the conditions of freedom of the person-in this case, the child-that only adequate action to protect privacy can sustain. And it is exactly in this respect that institutions should act, so that the person is not considered merely an inexhaustible source for data mining, and the technological tool solely a control and surveillance device to increase social vulnerability[43].

The data of minors, generated by the use of geolocation devices represent, indeed, the digitalization of the actions and events of their lives, their «electronic body»[44]. It should, moreover, be noted that the concern for the protection and defense of fundamental rights in the context of data circulation, is also a priority element in the most recent legislative interventions at the European level. Most recently, the new Regulation on Fair Access to and Use of Data (the so-called Data Act), approved in November 2023 by the European Parliament and Council, expressly recalls the protection of fundamental rights as the leitmotif underlying the principle of data circulation and as the foundation for their proper and democratic use[45].

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p.1, p.29; M. Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in *20 Yale Journal of Law and Feminism*, 2009, p. 23; G. Marini, *Intersectionality: geneaology of a legal method*, in *Rivista Critica del Diritto Privato*, 2021 (4) p. 472, p. 475; A. Mendola - A. Pera, *Vulnerability of refugees: Some reflections on definitions and measurement practices*, in *International Migration*, 2021, p. 1.

[42] S. Rodotà, *Il diritto di avere diritti*, Bari 2012, p. 337, who urges on a new action «*che metta al centro una vera e propria reinvenzione della privacy*».

[43] S. Rodotà, cit., p. 339 in relation to data base «*concepite per meglio garantire la sicurezza, si trasformano in strumenti che rendono invece possibili aggressioni proprio alla sicurezza delle persone*».

[44] S. Rodotà, cit., p. 159 «*la vera realtà è quella definita dall'insieme delle informazioni che ci riguardano, organizzate elettronicamente. Questo è il corpo che ci colloca nel mondo*».

[45] See, UE 2017/2394. At the time of this writing, the regulation is waiting to be published in the Official Journal with the final numbering. At the same time, negotiations on the more famous A.I. Act (regulation on artificial intelligence) seem to have come to an end with the approval of a text shared by member states. However, as is well known, one will

A similar approach can be found in Italy, where the Italian Data Protection Authority has undertaken a series of initiatives-sometimes leading the way with respect to Europe and beyond- aimed at (re)affirming the primacy of the protection of the person and his dignity, as opposed to the indiscriminate exploitation of personal data[46].

What has been said confirms, therefore, the 'public' dimension of the circulation of data, whose protection, clearly, also requires an assumption of responsibility by the institutions.

3. *The English experience: the U.K. Age-Appropriate Design Code*

Over the past few years, there has been increasing attention to the (broad and complex) issue of child protection in the digital environment. In the face of this, also in the light of the observations made, there still seems, however, to be a lack of an overall vision that truly takes into account not only the legitimate need for protection by parents but, also, the equally legitimate aspirations and expectations of minors, in the ways that I have described above. The case of geolocation devices is emblematic in this respect since it highlights how a single digital tool can be observed and evaluated from different perspectives.

As pointed out, in fact, dialogue and participation are essential in the decision-making process between the child and those exercising parental responsibility, but it is also necessary that institutions - given their public responsibility - and, in general, all stakeholders participate in this process.

still have to wait months to know its official text. For this reason, while recognizing the significance and importance of this milestone, we have chosen to look at the Data Act, which, although less famous, seems destined to play a prominent role in EU life because it deals with a multidimensional and cross-cutting issue with respect to EU competencies, namely the governance of data circulation. See the text at https://data.consilium.europa.eu/doc/document/PE-49-2023-INIT/it/pdf, points 8, 56 and 101.

[46] The Italian Data Protection Authority, the first in the world, acted in April 2023, blocking the well-known artificial intelligence system Chat GPT created by Open AI in an emergency measure. Among the alleged violations, the Authority pointed to the issue of age verification for accessibility by minors and the collection of user data in the absence of disclosure. The measure, predictably, elicited opposing reactions. Merit of the Italian decision, at any rate, was to open the debate internationally on this issue. See https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870832. See, more generally, the 2022 report carried out by Authority President P. Stanzione, on July 6, 2023, entitled The Power of Innovation and Digital Solitude. Data protection to protect the individual.

A significant example in this regard is the UK Age-Appropriate Design Code (UK Children's Code), an innovative British experiment to look at with interest[47].

It is, in fact, a code of conduct drafted and approved in 2020 by the UK Information Commissioner Office (ICO), with which any company offering online services, which are (likely to be accessed) by children, must comply. The Children's Code came into force in 2021, and the national data protection authority (UK Data protection Authority) will have to take it into account whenever it verifies compliance with the UK GDPR as well as the Privacy and Electronic Communications Regulations (PECR). The courts will also have to do the same.

The Children's Code, in fact, is a statute and, therefore, occupies and plays a prominent role in the system of the hierarchy of sources. The subject would require an in-depth study that is not possible to carry out here, however, it should be noted that the English Code fits into that vein which, since the 15th century has characterized the evolution of direct legislation in English common law[48]. From informal instructions in which broad discretion was allowed, in fact, statutes evolved into detailed directions to which the courts had to adhere scrupulously. The curious paradox that has always characterized statutes is that of formal supremacy and substantive subordination to the common law. If this has been the image, for a long time recurring among common lawyers themselves, that has constituted the classical systemological view, at the same time, as it has been observed, it must be recognized that statutes «have been crucial to the very formation of the whole intellectual scheme of the common law»[49] so that "for almost a century now common law has entered the age of statutes"[50]. This

[47] https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/age-appropriate-design-a-code-of-practice-for-online-services/executivesummary/.

[48] It was in the Tudor period that common law legislation took on its modern character. Indeed, legislative production increased as never before, but this was not only a change in quantitative terms. Statute, in fact, also changed its character by becoming a precise analysis of the cases envisaged. On this point, see U. Mattei, E. Ariano, *Il modello di common law*, Torino 2018, p. 27, who point out that, as early as 1563, there was a legislative form typical of the present day, the consolidating act. On this point, see, among others, T. Plucknett, *A Concise History of the Common Law*, 5th ed., Boston 1956; M.S. Arnolds, *Statutes as Judgements: The Natural Law Theory of Parliamentary Activity in Medieval England*, in *126 U. Pa. L. Rev.*, 1977, p. 329.

[49] C.K. Allen, *Law in the Making*, 7°ed., Oxford 1964.

[50] The expression is by G. Calabresi, *A Common Law of the Age of Statutes*, 1982, Cambridge-Mass.

is further confirmed today by the imposing presence of written law, which, especially with the advent of the welfare state, has increased by virtue of the new demands associated with it, and the Children's Code is certainly one of them.

The code consists of 15 standards aimed at ensuring the safety and promotion of children's rights online. The innovative and certainly relevant feature is that the entire statute is designed and modeled on the principles of the UN Convention on the Rights of the Child. Each standard is drafted incorporating as guiding principles the concepts of best interests and evolving capacities, as well as the child's right to privacy. One of the standards is specifically dedicated to geolocation devices.

In particular, the ICO recalls, on the one hand, the special attention that must be paid to children's data and, on the other hand, the consequences, in terms of vulnerability, that can result from improper use of these devices. In addition to the risks of physical safety, psychological violence and harassment, there is, in fact, what a persistent sharing of geographic location can cause in the child's psyche, namely, a sense of insecurity, invasion of one's space and privacy and difficulties in the development of one's identity. And it is precisely in this respect that the text recalls the UN Convention.

The standard becomes relevant as it provides a set of concrete guidelines to ensure transparent conditions that are in line with the rights of the child. It requires, in fact, that the geolocation device be turned off by default (by default) and be activated only if the pursuit of the best interests of the child requires it. Furthermore, and this is the critical point, the minor must be constantly informed and aware of the fact that the device has possibly been activated. Finally, it is required that the minor must always be enabled to manage his or her personal data. On closer examination, therefore, the child is not only placed at the center of the action but, at the same time, is empowered, exactly as envisaged by the principle of the evolving capacities in the UN Convention.

It should, moreover, be noted that the provision of deactivation by default cannot and should not be relegated to a simple technical-informatics gesture. As has been argued, it is, instead, a matter of choosing to protect the fundamental rights of the person and, therefore, to prepare a system of shared responsibility, by the institutions, the family and, certainly, also by the other stakeholders who, in various ways, are involved in the process[51].

[51] In this regard, it seems pertinent-in terms of institutional accountability-to recall the order of the U.S. Federal Trade Commission (FTC), which on December 19, 2023, challenged a distorted and discriminatory use of facial recognition techniques in security video surveillance operations against the well-known distribution company Rite Aid. As

The value of the Children's Code lies, as a matter of fact, in having identified a series of actions and indications – concrete – that, although primarily addressed to commercial operators, necessarily imply the involvement of the child, those who exercise parental responsibility and those who, more generally, play an active role in this context. And in fact, in this regard, it is worth recalling that institutions, associations representing children's rights and hi-tech companies participated and collaborated in the phases relating to the drafting of the code with the aim – in the design and development of online services – of pursuing the best interests of the child[52].

This is precisely in line with Article 3 itself of the UN Convention, which, as is well known, expressly calls for the intervention of «public or private social welfare institutions, courts, administrative authorities or legislative bodies»[53].

Particularly relevant is the penalty system activated by the ICO itself: in case of violation, large sums of money are to be paid[54].

In a different respect, the UK Children's Code fits into a more general trend that, in the last few years, has attracted attention and curiosity from

a result, the company was prohibited from using the technology for a duration of five years. The FTC contends that "Rite Aid's reckless use of facial surveillance systems left its customers facing humiliation and other harms, and its order violations put consumers' sensitive information at risk." In essence, women and people of color were allegedly discriminated against solely on the basis of their gender and skin color, identified as 'potential shoplifters,' and, because of this, humiliated and discriminated against in the presence of other customers by the surveillance officers. SEE https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without.

[52] A very important role in the drafting of the code, for example, was played by the 5rights Foundation, a charity established at the behest of Baroness Beeban Kidron who, since 2018, has been an active spokeswoman for an intensive campaign to protect and promote children's rights in the digital dimension. To date, the foundation represents one of the main interlocutors on the subject, not only in the UK but also in the international context.

[53] The bibliography on the best interest of the child is very extensive and it is not possible to give an exhaustive report here. In particular, on the concept of best interest in the different language versions see C. Focarelli, *The New York Convention on the Rights of the Child and the concept of «best interest of the child»* in *Riv. dir. int.*, 2010, p. 981. Among the authors, see M.R. Marella, *Fra status e identità. The interest of the child and the construction of parenting*, in AA.VV., Liber Amicorum Pietro Rescigno, Napoli 2018, vol. II, 1213 ff; L. Lenti, *The interest of the child in the jurisprudence of the European Court of Human Rights: expansion and transformation*, in *Nuova giur. civ. comm.*, 2016, p. 148.

[54] https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/age-appropriate-design-a-code-of-practice-for-online-services/enforcement-of-this-code/.

the scholars, namely the design discourse. This is a true cultural movement that, born in the 1990s in the context of organizations, has gradually expanded into numerous other fields of interest, including law, in the sense of legal design. The underlying leitmotif is: act before, not after. In other words, it requires that any regulatory action taken put the needs of the individual at the center and, moreover, that such action be thought out and designed in advance. Among the various applications of this innovative approach, the technological field has proved particularly fruitful so that, especially in this field, the scholars have developed a number of reflections: among them, that on privacy by design, responsible innovation, and participatory design[55]. The hallmark of the design discourse remains, however, that of responding concretely to the needs of the user - with full respect for his or her rights and dignity as a person - as demonstrated by its already numerous applications: the UK Children's Code is one of them.

4. *The European and Italian background: and yet it moves. Imitation and circulation of models in the matter of children's protection*

The Children's Code experience seems to have, indeed, paved the way for a number of initiatives that, more or less intensively, have already incorporated, or show intent to incorporate, the English model. Overseas, on September 15, 2022, the California State Assembly approved the California Age-Appropriate Design Code (CAADC)[56], while on July 13, 2023, the group of European experts that will be tasked with drafting the European Age-Appropriate Design Code[57] met for the first time. It should, moreover, be noted that even earlier, in 2021, a European state, the Netherlands, approved the Code voor Kinderrechten[58], expressly recalling the British Children's Code. The Dutch text contains guidelines

[55] A. Cavoukian, *Privacy by Design: The 7 Foundational Principles*, *https://www.ipc.on.ca/wp-content/uploads/Resources/7foundationalprinciples.pdf.;* D.G. Hendry, B. Friedman, S. Ballard, *Value sensitive design as a formative framework*, in 23 *Ethics and Information Technology*, 2021, pp. 39-44; L. Bygrave, *Security by Design: Aspirations and Realities in a Regulatory Context*, in 8 *Oslo law review*, 2021; W. Hartzog, *Privacy's Blueprint: The Battle to Control the Design of New Technologies*, Cambridge, 2018.
[56] AB2273 California Age-Appropriate Design Code, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2273.
[57] https://digital-strategy.ec.europa.eu/en/policies/group-age-appropriate-design.
[58] https://codevoorkinderrechten.nl/wp-content/uploads/2021/03/20210311_Code-voor-Kinderrechten_v1-1.pdf.

for companies offering online services that are also accessible by children, recalling the principles of the UN Convention and requiring the adoption of a series of behaviors inspired by the approach by design.

Like its U.K. counterpart, the CAADC is primarily aimed at online service companies, which might be used by children, and prescribes a number of guidelines for business operators to comply with. Particularly relevant among these are those related to profiling, data minimization and geolocation activities, as well as data protection impact assessments (DPAs). By April 1, 2024, the state data protection authority (California privacy protection agency), in collaboration with a group of experts in juvenile law, must publish guidelines for companies. The CAADC text not only explicitly calls out the British model but, likewise, suggests that companies themselves look to what their British counterparts have put into practice «for guidance and innovation...when developing online services». In addition, it is interesting to note that the concept of the best interests of the child is mentioned several times, and this becomes even more significant when considering that the United States is the only country that has not yet ratified the UN Convention on the Rights of the Child.

Also with regard to the European Union, as mentioned, the intention is to draft a code that, based on the provisions of the Digital Services Act and the General Data Protection Regulation, can guarantee greater privacy and security for children online. The European initiative is the result of a path undertaken by the EU institutions starting in 2012 and which has gradually gained relevance – also in terms of increased awareness – especially thanks to the contribution of nongovernmental organizations working in the field of children, traders and experts, as well as representatives of the EU institutions . And in fact, the group that is to be responsible for drafting the code includes academics, digital industry insiders, and representatives of civil society[59].

In Italy, as mentioned above, the Guarantor Authority has been pursuing for some time a series of initiatives aimed at sensitizing and empowering users – both minors, parents and, more generally, all those who use digital tools and, in particular, social networks – to a more conscious and appropriate use in compliance with the European reference legislation on data protection. The activity of the Garante has focused, on the one hand, on substantive measures such as, for example, the blocking of Chat Gpt, the chat box Replika and Tik Tok; on the other, on projects

[59] https://digital-strategy.ec.europa.eu/en/news/members-special-group-eu-code-conduct-age-appropriate-design.

and proposals, as in the case of revenge porn or cyberbullying, often implemented in collaboration with educational institutions, which aim to spread generalized digital civic education[60].

What has been said provides an element that I believe is relevant for the purposes of this contribution: to a common problematic – that of protecting the child online (in the ways and in the declinations that have been described) – similar or, at any rate, certainly shared answers are obtained from different legal systems. In this respect, therefore, the transposition of the English Children's Code would seem to refer back to the phenomenon of the circulation of legal models which, as is well known, has always occupied a prominent place in the reflection of legal comparison. Without any pretense of delving into a topic on which influential scholars[61] have measured themselves and which, moreover, would be beyond the specific object of this contribution, what I feel it is important to emphasize is that the takeover of the Age-Appropriate design code model could, indeed, represent a way to achieve the goal of real protection for online child users.

In this respect, therefore, we would be witnessing that phenomenon according to which, in areas that present very similar issues and problems to be solved, the acquisition of models already tested in other realities would facilitate a 'virtuous' process of reforms and, in a certain sense, could convince national and international actors, to adopt such models[62]

[60] A. Ghiglia, *Educazione Civica Digitale*, Roma 2023.

[61] A. Watson, *Legal transplants: an approach to comparative law*, Edinburgh 1974; Id, *Law and legal change*, in 38 Camb. L. J., 1978, p. 313; Id., *TwoTier Law, an approach to law making*, in *Int. & Comp. L. Q.*, 1978, p. 552; Id., *Legal change: sources of law and legal culture*, in 131 *Un. Of Pennsylvania L. Rev*., 1983, p. 1121. On some critics to Alan Watson, see O. Kahn-Freund, *Book Review, Legal Transplants*, in *91 L.Q.R*., 1975, p. 292; W. Twining, *Diffusion of law: a global perspective*, in *Journal of Legal Pluralism*, 2004, p. 49; Id., *General jurisprudence: understanding law from a global perspective,* London, 2009; P.G. Monateri, The 'Weak Law': Contaminazioni e culture giuridiche (Borrowing of Legal and Political Forms), 2008. On formants and the circulation of models, see, R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in *The American Journal of Comparative Law*, 1991, I, 39, pp.1-34; R. Sacco, A. Gambaro, *Sistemi Giuridici Comparati*, Torino 1996, 4; R. Sacco, *Circolazione e mutazione dei modelli giuridici*, Digesto civ., II, Utet, Torino, p. 365. See, also, U. Mattei, *Why the wind changed. Intellectual leadership in western law*, in 42 *Am. J. Comp. Law*, 1994, p. 195; A. Watson, *From legal transplants to legal formants*, in *American Law Journal of Comparative Law*, 1995, 43, 3, 469; P. G. Monateri, *Black Gaius*, in *Hastings L.J.*, 2000, 51, 510.

[62] M. Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge, Theoretical Inquiries in Law*, 2009, (10) 2, p. 693. Si veda, inoltre, in materia di protezione ambientale, B. Pozzo, *Modelli notevoli e circolazione dei modelli giuridici tra in campo ambientale: tra imitazione e innovazione*, in *Studi in Onore di Antonio Gambaro. Un giurista di successo*, Milano 2017, p. 351.

that are similar to each other and, therefore, also achieve a certain level of 'spontaneous harmonization' of standards of protection and fundamental principles[63].

And indeed, while recognizing that the issue of children's rights confronts – at least in some respects – specific social, cultural and legal contexts, at the same time one cannot but admit the global and universal nature of many underlying issues, especially in a dimension – such as the digital one – which, by definition, transcends any boundary and which, as the issue of geolocation has highlighted, requires common responses.

5. *Conclusions*

The analysis on the use of geolocation devices that has been carried out shows how the tension between the child, parents and institutions can, in fact, be reduced and contained where we choose to put the child at the center, adopting a genuinely child-centered perspective.

This is not an easy task: a context in which everyone accepts normal daily surveillance while at the same time being subjected to it, combined with a still low awareness of and sensitivity to the recognition of children's rights, means that even institutions struggle to adopt such a perspective. Resistance, moreover, coming from some stakeholders, such as large I-tech groups, certainly adds to the difficulties. Reality thus presents us with a picture that is in some ways worrying: the recent Chat Gpt affair – and all the other lesser-known but equally serious episodes that occur on a daily basis-are proof of this. However, as we have tried to argue, it is the principles underlying the Convention – of evolving capacities, of listening and, of course, of best interests, that represent – always and in any case – the keys to achieving the goal of genuine protection of the child and, moreover, the tools by means of which to assess the concrete case.

In this regard, the criteria indicated by Gerison Lansdown with reference to the principle of evolving capacities mentioned above – ability to understand and communicate relevant information, to think and choose independently, to assess risks and benefits – well could represent the discrimen to be used by all the actors involved. And thus, those exercising parental responsibility should use the digital tool of geolocation only when it actually serves the best interests of the child and not, instead, to satisfy a

[63] See, G. Benacchio, *Diritto privato della Unione Europea*, Milano 2016.

selfish need for control.

On the other hand, depending on the level of maturity demonstrated, the child will have to be placed in a position to exercise his or her autonomy, which, it should be remembered, does not mean indulging his or her whims. Finally, institutions and civil society will have the task – in this case, yes, to supervise – so that the extreme hypothesis of the «dictatorship of the algorithm» hypothesized by Rodotà does not occur, in which the personal dimension of the decision disappears and the latter is entrusted exclusively to automated procedures, as happens, in fact, in the default settings (by default) of geolocation devices[64].

In this respect, one of the merits of the British Children's Code was to prepare a model that, with regard to the decision-making and drafting process, involved a range of operators and stakeholders with very different positions, but equally decisive in the specific context. This modus operandi could be-and indeed already is, at least for the phenomena of code imitation-a useful suggestion in regulatory hypotheses involving different centers of interest.

Certainly, the Children's Code will not solve the entire complex of issues that have only been hinted at here. However, it should be noted that, perhaps for the first time, institutions, civil society and stakeholders have had to adapt to the juvenile dimension when, instead, the opposite has always been the case. The standards contained in the code, by operationally indicating to business operators, families, and the minors themselves what is necessary to protect the child, aim to bridge the gap between law in the book and law in action[65].

Whether they will succeed in practice is too early to tell, but it can be evaluated in the coming years.

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[64] S. Rodotà, cit., p. 401.

[65] J.L. Halperin, *Law in books and law in action: the problem of legal change*, in *64 Me. L. Rev.*, 2011, p. 45; R. Pound, *Law in books and law in action*, in 44 *Am. L. Rev*. 1910, p. 12; D. Nelken, *Law in action or living law? Back to the beginning in sociology of law*, in 42 *Legal studies* 1984, pp. 157-174. P.G. Monateri, *Morfologia, Storia e Comparazione. La nascita dei "sistemi" e la modernità politica, in Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, Frankfurt 2018, pp. 267-290; R. Scarciglia, *L'Oggetto Della Comparazione Giuridica (Objects and Legal Comparison),* in R. Scarciglia (edited by), *Introduzione al diritto pubblico comparato*, Bologna 1966, pp. 47-68; G. Ajani, B. Pasa, D. Francavilla, *Diritto comparato: lezioni e materiali*, Torino 2018; A. Somma, *Giochi senza frontiere: Diritto comparato e tradizione giuridica*, in *Boletín mexicano de derecho comparado*, 2004, n. 37, pp. 169-205.

Abstract
The process of datafication has now pervaded every aspect of our lives, including family dynamics. This process also affects the way one's role and function within the family unit, whether as a parent, child or institution, is performed, understood and evaluated in and by the social community. The case of the use of geo-location tracking applications on minors represents, in this respect, an interesting opportunity to reflect on the complexity but, at the same time, the need to ensure a balance between the participatory rights of the child, the parental responsibility and the role attributed to the institutions, with a view to constantly guaranteeing and pursuing the best interest of the child. Recent legislative interventions in some countries contribute to cast a light in this analysis.

Keywords: Geo-Location Tracking Applications; Self-Determination; Parental Responsibility; Human Dignity.

Giuseppe Rossi

The Fading Boundaries between the Law of Copyright and the Regulation of Media Markets

Summmary: 1. The latest episode: The project of a European Media Freedom Act (September 2022). A copyright-law based definition of "press" – 2. Is directive 2019/790 a piece of copyright legislation, or of market regulation? – 3. 1990s – 2000s: Is the copyright/market regulation commingling really new? – 4. Early XXth-Late XIXth centuries: copyright law facing music recording and film-making – 5. The public dimension of copyright and of its contracts – 6. 1787-1789: the copyright clause in the US federal Constitution – 7. 1709-1710: The Statute of Anne as a piece of market regulation – 8. The law of copyright and the public/private law divide.

1. *The latest episode: The project of a European Media Freedom Act (September 2022). A copyright-law based definition of "press"*

The EU Commission's proposal for a regulation establishing a common framework for media services in the internal market ("Media Freedom Act")[1] is the first attempt to draft a UE wide regulation of media markets, including rules protecting media pluralism and editorial freedom of media service providers, as part of a much wider strategy of regulation of heterogeneous aspects of the digital economy. The enforcement of such principles, though enshrined in the EU Charter of Fundamental Rights at art. 11, par. 2, up to now was a matter for state laws. For example, according to the EU regulation of mergers "plurality of the media" is a "national legitimate interest" on which states may ground "appropriate measures" with reference to mergers with EU relevance[2]. This was a consequence of

[1] European Commission, Proposal Proposal for a Regulation of the European Parliament and the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM (2022) 457 final, of September 16, 2022.

[2] "Yet, the intrinsically transnational nature of broadcasting services implies that media freedom, media concentration, and media independence issues can hardly be addressed only at a national level. In addition, recourse to competition law may address only some

the assumption that media markets were national, due mostly to language barriers and cultural factors. Recent developments, linked mostly to the diffusion of digital technologies, cast doubts on such assumption. Following the experience of the EU regulation of electronic communications, the proposal recognizes the existence of European markets for media services. Furthermore, recent national pieces of legislation aimed at strengthening political control on the media[3] induced the Commission to introduce new EU-wide instruments, to make the protection of pluralism effective against state measures which are completely beyond the area of application of competition law, or the economic sphere generally[4].

The Commission's proposal includes a copyright law-based definition of "press." According to art. 2, "media service" means "a service … where the principal purpose of the service or a dissociable section thereof consists in providing programmes or press publications to the general public, by any means, in order to inform, entertain or educate, under the editorial responsibility of a media service provider". "Press publication" means "a publication as defined in Article 2(4) of directive 2019/790/EU". This article defines "press publication" as "a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which: (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine; (b) has the purpose of providing the general public with information related to news or other topics; and (c) is published in any media under the initiative, editorial responsibility and control of a service provider".

Directive 2019/790/EU is namely a piece of copyright statutory law.

aspects of those issues": R. Mastroianni, *Freedom and pluralism of the media: an European value waiting to be discovered?*, in *MediaLaws*, 2022, pp. 100-110, 105.

[3] C. Holtz-Bacha, *Freedom of the media, pluralism, and transparency. European media policy on new paths?*, in *Eur. J. of Communication*, 2023 (available online: https://journals.sagepub.com/doi/epub/10.1177/02673231231176966, last access January 2024) highlights the link between the proposal and developments in Hungarian media laws from 2011 onwards, aimed at strengthening governmental control on media outlets. V. Iaia, *The regulatory road to the European Media Freedom Act: opportunities and challenges ahead*, in *MediaLaws*, 2023, pp. 221-240, 237 recommends "a granular approach, based on the level of media freedom ensured in each Member State, considering that some stronger measures would not be necessary for those States where the media market operates well."

[4] The legal basis for an EU statutory intervention on the protection of media pluralism and freedom of expression is highly controversial. See, e.g., V. Zeno-Zencovich, *The EU regulation of speech. A critical view*, in *MediaLaws*, 2023, pp.11-18, 16, who defines the proposal "the summit of Commission's invasion of the field of freedom of expression."

The Commission's choice to refer to a copyright-law provision to define such a consolidated notion like that of "press" may seem odd, arbitrary, or just the outcome of some bureaucratic coil. This holds true insofar as we assume that there is no link between the law of copyright and that of market regulation, since copyright belongs to private law, ad its function is *ad singulorum utilitatem* only. Following this perspective, of course, the *singuli* whose interests are protected by copyright are the authors, or the right-holders generally. Such a position may seem a bit too far-fetched, or at least outdated. It has been a while since copyright openly trespassed into the domain of public law, for example through the introduction of administrative procedures of intellectual property rights. Anyway, the focus was still on the interests of right-holders, which benefited from more efficient, faster, and cheaper tools than the usual court procedures. Such administrative means of enforcement aim, of course, mostly at contrasting online piracy, whose technical features often make resort to judicial enforcement scarcely practicable.

Administrative enforcement of IPRs is not, of course, a form of market regulation. The European Media Freedom Act undoubtedly is. The fact that this piece of market regulation borrows a copyright-based notion of "press" suggests that the existence of a product-service such as the "press," with those specific features which entitle it to the copyright protection provided for by directive 790/2019/EU, is a constituent element of the legal configuration of the market which the law-maker intends to regulate[5]. Such features, according to the above-quoted definition, are the "journalistic nature," the "periodicity" of the publication, its informational function, and, mostly, the "initiative, editorial responsibility, and control of a service provider," which is the right-holder on the publication. The same reasons which ground the granting to publishers of press publication of copyright protection "for the online use of their press publications by information society service providers," according to art. 15 of directive 790/2019/EU, stand behind the regulatory choices of the new bill. The proposal for a European Media Freedom Act does not aim at protecting freedom of expression as a general principle, but at safeguarding a specific way of producing and disseminating information on matters of public interest, which can be summarized by reference to the notions of "journalism"

[5] A critical reading is offered by J. Barata, *Protecting Media Content on Social Media Platforms*, in *Verfassungsblog – On matters constitutional*, 2022, available at: https://verfassungsblog.de/emfa-dsa/ (last access: January 2024). The author highlights the risk of discrimination against non-professional information providers, like citizen-journalists, also with reference to case law of the European Court of Human Rights.

and "newspaper publishing." This is clarified by recital 7 of the proposal, which states that the definition of "media service": "should exclude user-generated content uploaded to an online platform unless it constitutes a professional activity normally provided for consideration (be it of financial or of other nature). It should also exclude purely private correspondence, such as e-mails, as well as all services that do not have the provision of audiovisual or audio programmes or press publications as their principal purpose, meaning where the content is merely incidental to the service and not its principal purpose, such as advertisements or information related to a product or a service provided by websites that do not offer media services. The definition of a media service should cover in particular television or radio broadcasts, on-demand audiovisual media services, audio podcasts or press publications. Corporate communication and distribution of informational or promotional materials for public or private entities should be excluded from the scope of this definition." The qualifying aspect of information provided by media services is its "professional" nature[6]. Moreover, such information must be supplied to the public in a context which has providing information as its main purpose. This implies that the public recognizes such context as a source of information on matters of public interests. Forms of communication functional to further and different purposes, such as corporate communication, including advertising, are therefore excluded[7]. Within this model, the "journalist" is

[6] Recital 16 mentions "journalists" and "editors" as "the main actors in the production and provision of trustworthy media content, in particular by reporting on news or current affairs," and it adds that the notion of "journalists" should encompass journalists "operating in non-standard forms of employment, such as freelancers." On the contrary, persons who collect information and disseminate it in a non-professional manner, such as social network users, current affairs bloggers etc. are excluded.

[7] It is not clear whether the definition of "media service," and the subsequent definitions, including that of "press," include media outlets and journalists working on a not-for-profit basis (e.g.: organizations funded by grants or donations). The definition of "press" in directive 790/2019 makes no reference to the for-profit on non-profit purpose of the publisher, being sufficient that the publication "has the purpose of providing the general public with information related to news or other topics," and "is published in any media under the initiative, editorial responsibility and control of a service provider." The inclusion of non-profit professional information in the scope of application of the Media Freedom Act seems consistent with the purposes of the proposal, considering the role played by non-profit media in contemporary society, provided that their providers comply with professional standards, and adhere to journalistic codes of ethics. See E. Brogi *et. al.*, *The European Media Freedom Act: media freedom, freedom of expression and pluralism*, study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels, 2023, p. 46, available online: https://www.europarl.europa.

a person having specific skills and responsibilities in fact-finding and fact-checking, who operates within a hierarchy, having an editor-in-chief at its top level. This hierarchical editorial staff operates within the entrepreneurial organization of a publisher, which, according to the EU statutory wording, takes "the initiative, editorial responsibility, and control" of the publication. In the Media Freedom Act, alongside the definition of "press," there is a definition of "programmes," patterned upon that of directive 2010/13, on the provision of audiovisual media services[8]. The "editorial responsibility," meaning the power of a service provider to make choices on the content of the audiovisual service, is the central element of these definitions as well[9]. It is now clear, after decades of development of heterogeneous forms of web-based non-editorial information, that this "classic" model is not the only possible way of producing and disseminating information. In the EU lawmaker's view, nevertheless, such a "classic" model must be preserved, and this requires a multilevel statutory intervention, since cultural, economic, and technological forces are considered not sufficient, if not openly hostile[10]. This policy objective is expressly stated by recital n. 11 of the proposal: "In order to ensure that society reaps the benefits of the internal media market, it is essential not only to guarantee the fundamental freedoms under the Treaty, but also the legal certainty which the recipients of media services need for the enjoyment of the corresponding benefits. Such recipients should have access to quality media services, which have been produced by journalists and editors in an independent manner and in line with journalistic standards and hence provide trustworthy information,

eu/RegData/etudes/STUD/2023/747930/IPOL_STU(2023)747930_EN.pdf (last access January 2024).

[8] Directive 2010/13/EU of the European Parliament and of the Council, of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[9] Recital n. 8 of the proposal distinguishes media service providers from "providers of video-sharing platforms or very large online platforms", since the latter, unlike the former, although they "play a key role in the content organisation, including by automated means or algorithms […] do not exercise editorial responsibility over the content to which they provide access." Providers of platform services are governed by the different provisions of the Digital Services Act: Regulation 2022/2065/EU of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[10] Of course, this approach is highly controversial. See, e.g., the critical remarks by D. Tambini, *What is journalism? The paradox of media privilege*, in *Eur. Human Rights L. Rev.*, 5, 2021, pp. 523-539, according to whom the proposal envisages an unjustified "media privilege". See also V. Zeno-Zencovich, *The EU regulation of speech*.

including news and current affairs content." According to these statutory wordings, "press publications" protected by directive 2019/790, and the informational content included in audiovisual media services, governed by directive 2010/13, are "quality media services," properly because they comply with legal standards provided at both EU and national level, as well as with ethical rules governing journalism.

The overall effect of directive 2019/790 and the forthcoming Media Freedom Act should be to protect: i. the economic value of "press publications," thanks to copyright protection granted to the publishers vis-à-vis online use of such publications by information society service providers; ii. their editorial freedom, against undue interventions by states (art. 4 of the Media Freedom Act); iii. their access to the public via "very large online platforms," preventing the latter from arbitrary suspension of "the provision of its online intermediation services in relation to content provided by a media service provider" (art. 17)[11].

[11] "Article 17 is a very relevant provision because it recognizes the value of professional information by subjects who bear editorial responsibility for the contents they select, produce, and disseminate. The basic idea is that VLOPs should not be allowed to supervise traditional media providers that abide to journalistic standards and principles. As such, Art.17 provides a regulatory response to the dependency MSPs face vis à vis the VLOPs when it comes to distribution of media content, and it contributes to defining a new "status" of media service in the digital environment" (E. Brogi *et al.*, *The European Media Freedom Act*, p. 60). The authors note the parallelism between the debate on art. 17 and the lengthy discussions on art. 17 of directive 790/2019, alongside the risk of overlaps with the responsibility regime of very large online platforms provided for by the Digital Services Act. See also J. Barata, *Problematic aspects of the European Media Freedom Act – old and new*, The London School of Economics and Political Science, 2023, https://blogs.lse.ac.uk/medialse/2023/05/02/problematic-aspects-of-the-european-mediafreedom-act-old-and-new/ (last access: January 2024).

2. *Is directive 2019/790 a piece of copyright legislation, or of market regulation?*

From a strict copyright law point of view, the definition of "press" in directive 2019/790 is superfluous. Even before the directive, there were no doubts, both in EU case law[12] and in member states' law[13], that a writing dealing with current affairs was copyrightable, provided it was the original expression of the author's view[14]. Of course, the journalists' and the editor-in-chiefs' copyrights can be assigned to press publishers, with the sole exception of moral rights. From the point of view of copyright law, a journalistic writing is simply a writing. On the other hand, according to the last sentence of art. 2, n. 4) of directive 2019/790: "periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive." Such an exclusion is clearly out of focus, from a copyright law point of view, since academic and scientific works, published in "scientific journals," are copyrightable writings, just like any other writing[15]. Of course, copyright is completely independent from both the nature/content and the purpose of a writing, provided that such writing meets the general copyrightability requirements. Therefore, the definition of "press" in directive 2019/790 is both superfluous and insufficient, if we look at it from a purely copyright law perspective[16]. But both the definition, and the very use of copyright

[12] See the *Infopaq* decision – EU Court of Justice, 16 July 2009, case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening* - at n. 44: "As regards newspaper articles, their author's own intellectual creation, referred to in paragraph 37 of this judgment, is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression. In the main proceedings, moreover, it is common ground that newspaper articles, as such, are literary works covered by Directive 2001/29."

[13] See art. 2, par. 8 of the Berne Convention, stating that "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." There follows that the protection is granted to journalistic writings which are not "mere items of press information," insofar as they express personal views of the author.

[14] In US law, see *International News Service v. Associated Press*, 248 U.S. 215 (1918), pp. 234-235.

[15] See art. 2, par. 1 of the Berne Convention: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."

[16] For a critical reading of the definition, see E. Czarny-Drozdzejko, *The Subject-Matter of Press Publishers' Related Rights Under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market*, in *Int'l Rev. of Intellectual Property and Competition Law*, 51, 2020, pp. 624-641. The author underlines, inter alia, the ambiguity of the notion of "journalistic nature," absent any EU law definition of "journalism," and considering different definition in domestic laws.

entitlement, in the scheme of the directive, aim at purposes which are far beyond the realm of copyright, and impinge into market regulation. There is a perfect continuity between the directive and the proposal for a Media Freedom Act.

Directive 2019/709 defines "press" to provide "publishers of press publications" a two-years exclusive right on the "online use of their press publications by information society service providers." Such an exclusive right is tailor-made on both sides, that of the rightsholders (the press publishers) and that of the targeted users (the information society service providers). The rightsholder is not the author of the journalistic work[17], but the newspaper/periodical publisher, compliant with the classical "editorial" business model. The targeted users are not "online users" as a whole, but "information society service providers" only, while the right "shall not apply to private or non-commercial uses of press publications by individual users," as stated by art. 15 par. 1. The rulemaker's task, therefore, is not to set up a new IPR, but to regulate the market relationship between publishers and information society service providers (including online content-sharing platforms, subject to the best-efforts obligations provided for by art. 17 of the directive), in a specific market situation characterized by high transactional costs and unbalances of contractual power, to the detriment of publishers. This is clarified by recital n. 58: "Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments. In the absence of recognition of publishers of press publications as rightsholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient." Of course, the very notion of "licensing" implies that there exists some right to be licensed. Therefore, even prior to the directive press publishers had some right to license (the rights assigned to them by authors). Moreover, it remains unexplained how the new "recognition of publishers" as rightsholders should simplify or speed up enforcement procedures. Anyway, the directive goes one step further, and regulates the whole value chain journalists-publishers-information society service providers. According to the final paragraph of art. 15: "Member states shall provide that authors of works incorporated in a press publication [shall] receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information

[17] Whose rights are left intact and unaffected by art. 15 par. 2 of the directive.

society service providers." In other words, the idea of the rule maker is that the economic value of press publications should be fairly shared between their authors, their original publishers and the entities which exploit them online. The notion of "fair share," or "fair compensation," is not new for the law of copyright, which often employs it to simplify the creation and exploitation of works, for example within the music recording and audiovisual industries. The new element, within directive 2019/790, is that the content producer, whom, within the usual scheme, is obliged to pay fair shares, alongside some categories of users (e.g.: radio and TV broadcasters), becomes the beneficiary of an entitlement to fair shares, which is functional to strengthening up its contractual chances vis-à-vis third-party exploiters, such as online platforms.

Anyway, within directive 2019/790 copyright for press publishers is a part of a wider scheme of market regulation, as it is apparent from the very structure of the directive itself. Title III is headed "measures to improve licensing practices and ensure wider access to content," and it is made up of three chapters. The first deals with out-of-commerce works and other subject matter, with a view to facilitating public access to them. The second ("measures to facilitate collective licensing"), aims at speeding up licensing, with a view to market efficiency and public access to copyrighted works. The third ("access to and availability of audiovisual works on video-on-demand platforms"), aims at facilitating licensing as well, through independent mediation. The very nature of directive 2019/790 as a piece of market regulation, anyway, is expressly stated by the heading of title IV, which includes both art. 15, on the copyright of publishers of press publications, and art. 17, on the duties of online content-sharing platforms. Title IV is headed: "measures to achieve a well-functioning market for copyright." While the first and second chapter of title four deal mostly with the intermediate segments of the market (the relationships between press publishers/other rightsholders and online content outlets), the third chapter regulates the upper segment, i.e.: the relationships between authors/performers and undertaking which exploit their works, including publishers and music or audiovisual producers. Arts. 18 and ff. of the directive introduce the general principle that authors and performers should get an "appropriate and proportionate remuneration," alongside their right to "claim additional, appropriate and fair remuneration," and their further right of revocation of transfers of rights in case of lack of exploitation.

Although the directive 2019/790 is headed "on copyright and related

rights in the Digital Single Market", it deals with copyright not in itself, but as an element of a wide scheme of market regulation, where the key issues are the protection of the economic value of copyrighted works, the distribution of such values along the different segment of the value chain (starting from authors, and going downstream to content producers/ publishers, and third-party online outlets), and the grant of adequate access of the public to the works, and, vice-versa, of works to the public[18].

3. *1990s-2000s: Is the copyright/market regulation commingling really new?*

Directive 790/2019, which has been a very long time in the making, is but one of the outcomes of the thirty-years-or-so long copyright v. access debate, which has accompanied the diffusion of the World Wide Web, and the development of technologies - services facilitating content reproduction/sharing/distribution (peer-to-peer platforms, social networks, audio and video streaming, etc.). Digital technologies lowered the cost of reproducing and distributing copyrighted works, to the point of leading to copyright being seen as a barrier to the circulation of knowledge, rather than an incentive to its generation and dissemination, as it was traditionally. Digitalization of contents set to the foreground the necessity to look at copyright, and to regulate it, not abstractly, but within a given market context, heavily shaped by technologies themselves. Thus, regulation of copyright became mostly a matter of balancing between different market forces: that of rightsholders (publishers and producers), on one side, and that of tech undertakings, including online intermediaries, on the other, with the authors and the public in the middle.

It is worth to note that art. 17 of the Media Freedom Act proposal somehow overturns the terms of the access problem. According to the usual formulation of this problem, it is the online intermediaries who claim access to copyrighted works, to the indirect benefit of the public. Art. 17,

[18] "[…] the problem of platform appropriation of journalistic snippets must be tackled in a balanced composition of the conflicting interests of publishers (remuneration), platforms (offering search services). Now, this contrast is not merely 'private': there is another stakeholder involved, the general public, bearer of a legitimate interest – of constitutional rank – to a wide, plural, and rapidly accessible flow of information" (G. Ghidini, F. Banterle, *Copyright, news, and "information products" under the new DSM copyright directive*, in *Studi di diritto commerciale per Vincenzo Di Cataldo*, Giappichelli, Turin 2021, I, pp. 245-258, 255).

on the contrary, grants rightsholders a protection against barriers to access to the public which may be erected by "very large online platforms". The digitalization did its work, shifting power from the rightsholders to the platforms, as it is clear also from parallel pieces of EU legislation, such as the Digital Markets Act[19], with its emphasis on "digital gatekeepers," and the Digital Services Act, with its provisions on "very large online platforms." If we turn back to the early reflections on the relationship between Internet and copyright, at the turn of the century, this may appear quite unexpected[20]. There was quite a widespread feeling that the web would increase the authors' chances to reach the public, to the detriment of producers and intermediaries. Following this view, authors, tech undertakings and the public should be allied in the "fight" against publishers, and the music and film industry, for the removal of artificial barriers to the circulation of works which had been erected in the analogue world, somehow endorsed by copyright legislation. Quite the opposite happened. The "new" internet intermediaries are much more powerful than any producer of intermediary of the past, vis-à-vis all the other market actors, including "traditional" content producers. Nevertheless, copyright still stands in the turmoil of a question of access, which equals to a problem of market regulation.

During the last decades, on the one hand, statutory law progressively extended and differentiated the authors' rights, to adapt them to technological developments. On the other hand, case law dealt with the problem of balancing these "new" rights with conflicting interests of the audiences, first analogue, then digital[21]. The copyright-access question somehow

[19] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[20] See, e.g., the reference work by L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, London, Penguin 2004. Along the same line of thought: S. Vaidhyanathan, *Copyrights and Copywrongs: The rise of Intellectual Property and how it threatens creativity*, New York, New York University Press 2001.

[21] Think, for example, of the long series of decisions by the EU Court of Justice on the contents and limits of the right of communication to the public. "[…] it follows from recitals 3 and 31 of the Copyright Directive that the aim of the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and, on the other, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest (judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644,

pre-dated digitalization, or at least it surfaced at its very beginnings. The antitrust relevance of copyright / libraries of copyrighted works became apparent in some media merger cases since the 1990s/2000s[22], in which antitrust authorities realized that control of large libraries of copyrighted works could foreclose competitors' access to downstream markets, and that the market power of a media entity (a publisher, film producer etc.), could impair the ability of both authors and users to negotiate fair terms for licensing[23].

These developments where, somehow, harbingered by the *Magill* case, at the end of the Eighties, when digitalization was still in the future. In that case, which raised quite an impression in the European copyright and antitrust milieu[24], the EU Commission (1988)[25], the Court of First Instance (1991)[26] and the Court of Justice (1995)[27] held that a refusal to grant a license on a copyrighted work (although of a peculiar kind: the lists of programs of TV stations), could amount to an abuse of a dominant position, with no harm to the "actual substance" of copyright. On a formal plan, the case stated that exclusivity is not the "actual substance" of copyright, which does not grant a full *ius excludendi alios*, since exclusivity can be limited on grounds of public policy. The most important aspect of *Magill*, in my opinion, is that it clarified that copyright cannot be thought separately from the markets in which copyrighted works are created and distributed. Although it is possible, theoretically, to keep copyright law and market regulation separate, such a distinction hardly works in practice.

paragraph 31, and of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 32 and the case-law cited)". (EU Court of Justice, 22 June 2021, cases C-682/18 and C-683/18, *Peterson v. Google*, n. 64).

22 See, e.g., the Commission's decision in the *AOL / Time Warner* case (COMP/M.1845, of 11 October 2000), n. 85.

23 See the recent investigation by the Commission in the *Vivendi/Lagardere* merger case.

24 H. Jones, C. Benson, *Publishing Law*, 2nd ed., London – New York, Routledge 2002, p. 297; T. Doherty Reagan, *The Ascendancy of European Community Law – The Implications of the Court of Justice Decision in Magill on the Balance between National and EC Intellectual Property Law*, in *Ga. J. of Int'l and Comp. L.*, 25, 1996, pp. 681 – 705; A. Frignani, M. Waelbroeck, *Disciplina della concorrenza nella CE*, 4th ed., Turin, Utet 1996, p. 839.

25 Commission Decision 89/205 EC of 21 December 1988, relating to a proceeding under Article 86 of the EEC Treaty, 1989 O.J. (L78).

26 EU Court of First Instance, 10 July 1991, case T-69/89, *Radio Telefis Eireann v. Commission*.

27 EU Court of Justice, 6 April 1995, cases C-241/P and C-242/91P, *Radio Telefis Eireann*.

4. *Early XXth-Late XIXth centuries: copyright law facing music recording and film-making*

There is a clear temptation to link this blurring of the distinction between law of copyright and market regulation to recent and contemporary developments, such as the digitalization, or the increase in power of online intermediaries. This assumption may not be correct. Copyright is traditionally seen as an entitlement, or a *droit subjectif*, of an absolute nature, granted to its holder against the world at large. The very idea of "intellectual property" stands on this ground. The heart of ownership as *ius excludendi alios* is that the owner has a full power to keep others outside, or to prevent any third-party interference with the object of their right. Insofar as no-one interferes with what is mine, my right of ownership is self-protected, and self-enforced. This does not really hold true with copyright, which has a kind of an inherent contractual nature[28]. Insofar as copyright implies the contract, it implies the market. It is very unlikely that any authors can exploit their rights by themselves, since practically any copyrighted work, to reach the audience, needs dissemination, e.g. in the forms of reproduction and distribution, and therefore it requires the intervention of third-parties, based on contracts with the author. This is very clear in the original, English version of copyright, which was born exactly in the form of an entitlement (granted to the authors by the Statute of Anne), to enter into a contract for the publishing of their works. Within the continental European tradition as well, specific rules on publishing contracts are present in most of copyright legislations. At times, the statutory rules governing publishing contracts include mandatory provision, aimed at striking a proper balance between the interests of the author and those of the publishers, under the implied assumption that the latter may abuse of their contractual power.

In late XIXth – early XXth century, the diffusion of music recording, radio broadcasts, and film-making lead to copyright-like entitlements ("connected rights") being granted to subjects other than authors, such as record or film producers. These undertakings, in some cases, exercise the authors' rights, alongside being rightholders on their own. Such statutory choices aimed at making these technologies legally practicable, limiting copyright pitfalls which could impair their development and diffusion, without, at the same time, giving up on basic principles of protection

[28] "[…] what copyright and other IP law does is create property rights in information, after which normal rules of contract and property law determine who uses that information." (F.H. Easterbrook, *Contract and Copyright*, in *Houston L. Rev.*, 42, 2005, pp. 953- 973).

of creativity and artistic skills underpinning copyright entitlements[29]. Although the notion of "market regulation" was not known yet, these were pioneering forms of market regulation, aimed at enhancing market efficiency, in form of copyright law provisions.

In the same historical period, associations of authors – artists and, in some cases, publishers were founded, to advocate copyright protection and manage collectively their members' rights. In many European states (Italy, France, Belgium, Germany), such entities progressively became state-managed, and/or were regulated by ad hoc provisions, granting them prerogatives (monopolies) and duties, including competences in copyright enforcement. Collecting societies symbolize both the horizontal (agreements between rightholders) and the vertical (agreements with users) contractual dimension of copyright. They imply clear market regulation issues, as clarified first by national regulations, and much later, at EU level, first, once again, by antitrust case law, and then by the Barnier directive (2014/26)[30].

5. *The public dimension of copyright and of its contracts*

In less than a century, it became clear that practically all contracts involving copyright have effects that go beyond the spheres of their parties, and touch upon broader interests. Publishing-licensing contracts have effects on the diffusion of works, the remuneration of authors, and the incentives to investments/profitability of publishing companies, and music or film producers. Agreements between authors, or interpreters, and record or film producers have consequences on the legal practicability of technologies. Agreements setting up collecting societies and governing their

[29] "[…] the specific patterns of copyright's structures pertaining to authorship were formed during the nineteenth century in the context of emerging economic changes and particular social relations of power. The process was shaped by the demands of an increasingly commodified publishing industry, the interests of business corporations and other employers, and the rise of the media or content industries and other copyright-related industries such as advertising. The resultant framework of copyright bears the marks of those forces and interests:" O. Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, in *Yale L. J.*, 118, 2008, pp.186 -271, 268. The author denounces the "ideological" nature of the idea of original authorship, considered a "mystification".

[30] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

operations have effects on access of the public to works, remuneration of authors, and the operations of intermediaries such as radio and TV broadcasters. Contracts between collecting societies and users have consequences on effects on access of the public to works and remuneration of authors.

Copyright law cannot disregard these external effects of contractual activities of rightholders and third parties, and it did not. In a sense, the link with external interests, and to public interest, is somehow connatural to copyright itself. Let me just mention 1878 Victor Hugo's passionate plea for intellectual property at the Congrès littéraire international of Paris, a few years before the Berne Convention (1886): "*La propriété littéraire est d'utilité générale. Toutes les vieilles législations monarchiques ont nié et nient encore la propriété littéraire. Dans quel but ? Dans un but d'asservissement. L'écrivain propriétaire, c'est l'écrivain libre. Cette propriété inviolable, les gouvernements despotiques la violent; ils confisquent le livre, espérant ainsi confisquer l'écrivain. De là le système des pensions royales. Prendre tout et rendre un peu. Spoliation et sujétion de l'écrivain. On le vole, puis on l'achète. Effort inutile, du reste. L'écrivain échappe. On le fait pauvre, il reste libre. Qui pourrait acheter ces consciences superbes, Rabelais, Molière, Pascal?*"[31] Intellectual property is a matter of general interest because it protects the writers' freedom against interferences by despotic governments. But the problem, according to Hugo, is wider. It is the need to protect creators against the risk of poverty, of being deprived of the value of their works by anyone who tries to steal it, or to "take anything and give back just a little." Absent copyright, the public interest to the creation of new works, the diffusion of new ideas, and the fostering of the cultural debate, would have no defense but the "supreme conscience" of the artists, or their will to protect their freedom, and express themselves, at any costs. Clearly, this can be a bit too much of a sacrifice for those people who have creative talents, but, unlike Rabelais, Molière, or Pascal (at least in Hugo's view), are not particularly inclined towards sacrifice. Then, copyright is a means to deal with the creation and distribution of wealth, not just metaphorically, but literally[32]. These are the problems that market regulation deals with.

[31] The text is available online: https://chmcc.hypotheses.org/8627 (last access: January 2024).

[32] "It is undisputed that in the case of aesthetic and intellectual creations the social benefits of protection are not limited to the promotion of industrial activities (publishing, and later broadcasting, music recording, and so forth). Actually, when authors and creators of copyrightable works become independent from political power, because they can count on some market remuneration for their creativity, they are enabled to offer an essential contribution also on a different, but not less important, plan, that of the formation of the public opinion and of the development of a plurality of points of view, which is

6. *1787-1789: the copyright clause in the US federal Constitution*

The link between copyright and the public interest is apparent also in the wording of art. 1 – sec. 8 of the US federal Constitution: "the Congress shall have power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The power of the Congress is functional to the specific public interest to the "progress of science and useful arts." On the other hand, the constitutional provision makes express reference to a balancing of the rightsholders' interest with the public interest to access to protected works, insofar as it clarifies that the authors' and inventors' exclusive rights should be secured only "for limited times." In no. 43 of *The Federalist* James Madison claims that "the copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law ... The public good fully coincides in both cases with the claims of individuals."[33] Madison's statement is not really precise. In *Donaldson v. Becket* – 1774[34] the House of Lords had ruled that authors had no perpetual right on their works under common law, and therefore, they could rely only on the time limited right granted by the Statute of Anne[35]. Anyway, the position of English law was fully coherent with the US constitutional provision. Of course, the problem of online access to copyrighted works was still in the far future, that of the distribution of wealth was in the background, and the emphasis was on the positive effect of copyright protection on the production of works. The American constitutional provision clarifies that the public dimension belongs to

really indispensable for the development and the strengthening of democratic forms of government (someone thinks that such form are strictly linked to economic growth in the long run)": M. Ricolfi, *La tutela della proprietà intellettuale: fra incentivo all'innovazione e scambio ineguale*, in *Riv. dir. ind.*, 51, 2002, pp. 511- 525, 512 (my translation).

[33] Available online: https://avalon.law.yale.edu/18th_century/fed43.asp (last access: January 2024).

[34] (1774) 4 Burr. 2408.

[35] In US law *Wheaton v. Peters*, 8 Pet. 591, 33 U. S. 661-662 (1834) clarifies that the protection given to copyright is only statutory, and remedies for infringement are only those provided by Congress: Thompson v. Hubbard, 131 U. S. 123, 131 U. S. 151 (1889). But see, in the opposite sense, C.C. Langdell, *Patent Rights and Copy Rights*, in *Harv. L. Rev.*, 12, 1899, pp. 553-556, who maintains that there is a "natural right" of the "author, musical composer, artist, or inventor to the unlimited use and enjoyment of his literary, musical, or artistic creation, or his invention." Such a right would be forfeited by the publication of the work, unlike the "monopoly right" conferred by statutory provision, which is independent from the allegedly preexisting property right under "natural law."

copyright from its very beginning. According to a well-established line of Supreme Court decisions: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." Moreover: "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly."[36]

What changes with time is the perception of the different aspects of the relationship between the rightsholders and the public, via the different categories of intermediaries. The difference between Hugo's words, the American constitutional provision, and the contemporary epiphanies of EU law, which dangle between the law of copyright and market regulation[37], lies only in the way the public dimension of copyright is perceived and regulated, not certainly in the very existence of this dimension. This was already present, and clear, since the very early days of copyright[38].

[36] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), 429, quoting *Fox Film Corp. v. Doyal*, 286 U. S. 123, 286 U. S. 127, and *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 334 U. S. 158 (1948).

[37] Some scholars defined the US Copyright Act 1976 a "regulatory regime": J. Liu, *Regulatory Copyright*, in *North Carolina L. Rev.*, 87, 2004, 129-131; P. Menell, *Envisioning Copyright Law's Digital Future*, in *New York L. Sch. L. Rev.*, 63, 2002, pp. 194 - 197.

[38] *Contra* S. Balganesh, *Copyright As Legal Process: The Transformation of American Copyright Law*, in *Univ. of Pennsylvania L. Rev.*, 168, 2020, pp.1101-1180. In a lengthy essay, the author maintains that US copyright law evolved from a private law conception, focused on the interests of the author, and wider leeway for common law doctrines and court discretion, to a public law one, enshrined in the Copyright Act 1976, under the influence of the "legal process" line of thought.

7. *1709-1710: The Statute of Anne as a piece of market regulation*

Let me move one more step backwards, to the very beginning of the law of copyright, i.e.: the Statute of Anne. The heading of the act reads: "an Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned." The authors' entitlement is functional to a double public interest goal: i. granting incentives to the creation of new works[39], and ii. protecting the publishers (whose previous exclusivity, assured by a royal grant, had expired) against competition, including – to a limited extent - imports by foreign rivals. The act disregards the distributive aspects, insofar as it includes no rules aimed at granting authors a fair remuneration[40]. On the other hand, the act cares about such aspects, as it provides for a detailed regulation of prices of books. The preamble of the act sounds quite like the above-quoted words by Victor Hugo: "Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted [...]." In the words of the statute, the risk of exploitation of writers does not come from public powers only, but also from illegal publishing of works. "Authors" and "proprietors" (licensed publishers) are on the same plan, and this further confirms that the regulation of the author-publisher relationship is not within the statutory focus[41].

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[39] This aspect is emphasized by R. Deazley, *The Myth of Copyright at Common Law*, in *Cambridge L.J.*, 62, 2003, pp.106- 133, 108, who criticizes the theory which claims that there were pre-existing rights on authors' works at common law: "The legislators were not concerned with the recognition of any pre- existing right, nor were they primarily interested in the regulation of the bookseller's market, but rather secured the continued production of useful books through the striking of a culturally significant social bargain, a trade-off involving the author, the bookseller and the reading public."

[40] According to J. Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, in *Publishing History*, 8, 1980, pp. 19-44 the act was a victory of the publishing industry, which gained recognition of an exclusive right, through the authors' assignments, and forms of protection against piracy. Actually, some provisions of the act do not meet the interests of Londonese publishers (see below in the text).

[41] "For a long time, the effect on the author's economic status and the publisher-author relationship was minimal and limited to exceptional cases. Ordinarily, publishers kept

The sanctions provided for in case of infringement of the prohibition to print or import books "without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses" shed further light on the nature of the statute. The offender "shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask, and make waste paper of them." The task of such a provision is to have the illegal prints destroyed, with no specific regard to the position of the rightsholder. Moreover, the offender "shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of her Majesty's courts of record at Westminster". This was, basically, a pecuniary penalty, which benefited the treasury and the "person that shall sue," with no actual reference to the amount of the profits made by the infringer, or the damage caused to the rightsholder. The purpose of the provision is to incentivize suits, and therefore the discovery of illegal printing and imports, rather than protecting the rightsholders, including the authors. The Statute of Anne opens a long series of criminal law provisions included into statutory pieces of copyright law, within practically any legal system. The criminal law side of copyright rules, though present from the very beginning, is often overlooked, as if it were a secondary aspect of a system focused on the protection of the individual interests of authors. On the contrary, the focus of copyright law, from the real outset, has been on the market, on the production and dissemination of works, and the articulation of the value chain, even more than on the individual position of the authors.

This is further clarified by the presence, in the Statute of Anne, of a real system of regulation of the prices of books. According to the statute: "… if any bookseller or booksellers, printer or printers, shall … set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable … it shall and may be lawful for any person or persons, to make complaint thereof [long list of authorities] who, or any one of them,

acquiring the full copyright in books for a lump sum paid to the author at the outset, just as they did under the old system" (O. Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, in *Berkeley Tech. L. J.*, 25, 2010, pp. 1427-1473, 1439).

shall and have hereby full power and authority … to examine and enquire of the reason of the dearness and enhancement of the price or value of such book or books … and if upon such enquiry and examination it shall be found, that the price of such book or books is enhanced, or any wise too high or unreasonable, then … have hereby full power and authority to reform and redress the same, and to limit and settle the price of every such printed book and books, from time to time, according to the best of their judgments, and as to them shall seem just and reasonable". The statute gives no hint about how the "reasonable" prices should be fixed, although the references to "increases" in prices induce to suppose that the basic idea was that the new system should leave the prices of books unaltered (the new entitlement granted to authors should protect the market position of publishers, without granting them chances to increase the prices). If the aim of the statute was to protect printers/publishers from the unfair competition brought by illegal printing and imports of books, according to the statutory wording such protection should not generate any detrimental side effect to the public[42]. Thus, the statute shows the features of a piece of market regulation[43].

There is at least one more provision of the Statute of Anne worth remembering, about the classics and books in foreign language: "[…] nothing in this act contained, do extend, or shall be construed to extend to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas; anything in this act contained to the contrary notwithstanding." A similar suggestion was included in John Locke's 1694 "memorandum."[44] This limitation left open the possibility to import into England books written in foreign languages (including Latin, which was, at the time, one of the international languages of the cultural community), and printed abroad. The task of such a provision was to minimize the barriers that the new entitlement may erect to the circulation of foreign works (and ideas) in England. Once again, there is a balancing between the conflicting positions of publishers (as assignees of the authors' rights), looking for protection against competition, including that coming from abroad, and of the

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[42] There is no clear historical evidence about the effectiveness of such system of ex post price control (D.W.K. Khong, *The Historical Law and Economics of the First Copyright Act*, in *Erasmus L. and Ec. Rev.*, 2, 2006, pp. 35–69, 58).

[43] This aspect is emphasized by L.R. Patterson, *Copyright in Historical Perspective*, Nashville, Vanderbilt University, 1968, p.150.

[44] J. Locke, *Memorandum,* in *The Life and Letters of John Locke*, ed. P. King, London, 1884, pp. 202–209.

public[45], which is interested in having the highest possible number of works available, and, consequently, in having access to the widest plurality of ideas. Just like the act tried to avoid any negative side effects on the level of prices, it cared about the risk of shortcuts in the production/circulation of new works, by leaving untouched the competition to English publishers brought by works in foreign language, printed overseas.

8. *The law of copyright and the public/private law divide*

This path backwards shows that the commingling between the law of copyright and market regulation is not a new issue at all. In a way, copyright was born, in the early XVIIIth century England, within a statutory scheme of market regulation, characterized by an important role of pecuniary sanctions (rather than common law remedies, including actions under the law of torts) and by recourse to instruments of control of prices and prevention of shortcuts in offer. Later on, it never lost its connection with the public interest. Statutory changes adapted the law of copyright to technological and market developments, during the XIXth and the XXth century, always considering the need to make the protection of rightholders coherent with a more general regulatory frame, within which the efficiency of the markets, and the interests of the public, were central aspects. The public/private law divide makes little sense in the domain of the law of copyright. Private law provisions, such as those governing the entitlements, the object of the protection granted, the remedies granted to rightholders cannot be kept separate from public law rules, which are present in practically all copyright legislations, such as those governing criminal sanctions, or the performance of public interest tasks by entities such as collecting societies, or public administrations charged with copyright enforcement tasks.

[45] "Given that foreign language works made up around ten percent of the output of the London trade in 1709, the exception allowing the importing of such works printed abroad, and not just those printed "originally beyond the seas", represented a potentially substantial inroad into an otherwise lucrative market. In relation to the rest of that market there was also the introduction of an external control upon the price of books and the fact that three times as many books as before had to be supplied under the new library deposit provision." (R. Deazley, *Commentary on the Statute of Anne 1710*, in *Primary Sources on Copyright (1450-1900)*, L.Bently & M. Kretschmer, (eds), 2008, www.copyrighthistory.org, available online – last access January 2024).

The public law/private law divide is very comfortable, it helps apportioning university chairs, and leads to the reassuring idea that it is always possible to separate public from private interests, and to set up hierarchies and different means of protection. In the field of copyright, public and private interests are not always distinguishable. The interests of the rightholders may coincide with those of the public, as clarified by provisions such as art. 1, sec. 8 of the US federal Constitution. At the same time, defects in copyright law, mostly when they are not updated to technological innovation, or when they are not inspired by fair balancing criteria, may lead to impairing the widest diffusion of works, to the detriment of the public[46]. The emphasis of recent UE law on the need to facilitate and speed up licensing processes is another example of the need to prevent inefficiencies, though safeguarding the fundamental assumption of copyright law, i.e.: that authors need the values of their creative work to be recognized and protected. Even the link, suggested by the recent Media Freedom Act proposal, between copyright and protection of media pluralism, as a specific task of market regulation, is not really that new. The Statute of Anne itself cared to avoid the risk that copyright entitlements could lead to restrictions in the circulation of ideas, by leaving the freedom of importing foreign language books printed overseas untouched. The new issue is not the link between copyright and freedom of expression/protection of pluralism. Rather, it is the need, felt by the new EU proposal, to protect the industry which produces copyrightable pieces of information, against possible abuses by technological gatekeepers. The proposal suggests that copyrightable pieces of information, and the value chain which produces them (journalists, news media editors-in-chiefs, and their publishers), are not an eventual element, but a necessary condition of pluralism.

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[46] "[…] time has come for a kind of a Copernican revolution in the law of intellectual property, shifting the attention on the balance between contents and limitations to exclusive rights, and therefore attributing a central importance to all cases of fair use in any area of intellectual property": M. Ricolfi, *La tutela*, p.523 (my translation). EU law of copyright followed only partially this suggestion, uttered some twenty years ago by an outstanding scholar. Although no real reform of rules governing fair use was carried out (and this leaves the problem of "transformative uses" largely unsolved), some provisions aimed at facilitating access of the public to works were introduced, for example with reference to "orphan" works, out-of-commerce works, collective licenses, use of works in digital teaching activities, etc.

Abstract
The paper investigates the hybridization between copyright law and the regulation of media markets, fostered by the recently enacted Media Freedom Act of the EU (a proposal at the time of writing).
From its very beginnings, the law of copyright has been in a kind of an intermediate space between the domains of public and private law. The Statute of Anne was a reform of the regulation of the printing industry and of the books trade. The underlying philosophy of the copyright clause of art. 1.8 of the US Constitution emphasized the link between the exclusive right granted to authors and the public interest task to "promote the Progress of Science and useful Arts".
Although intellectual property is generally considered private law, statutory law of copyright often includes criminal law provisions, and sets up entities empowered with public law prerogatives, aimed at granting efficient enforcement and management of rights.
The need to adapt copyright law to digital technologies led to reforms inspired by a market regulation approach, like EU directive 2019/790, whose title IV reads "measures to achieve a well-functioning marketplace for copyright". Although the directive is a piece of copyright legislation, it clearly aims at regulating market relationships, such as those between publishers of "press publications" and information society service providers, right-holders and web-based distribution platforms, content producers and authors/performers, with a primary view to public interest targets.

Keywords: Copyright; EU Media Freedom Act; Market Regulation.