User Review Portability: Why and How?

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User reviews of products on the e-commerce platforms are a critical determinant of inter-platform competition, as a large number of consumers base their purchasing choices on the related reviews written by other users. The network effects between the number of reviews and new users give a sustainable competitive advantage to incumbent platforms. While the business literature has recognised the commercial value of the user reviews, legal scholarship has paid little attention to leveling the playing field between incumbents and new e-commerce platforms by exploring the portability of user reviews. This paper bridges this gap. We explore the possibility of porting user reviews through two legal mechanisms—first, traditional Intellectual Property law; second, the new Right to Data Portability (RtDP) as enshrined in the GDPR. After recognizing the limitations of these mechanisms in enabling the portability of reviews, we suggest that pure data aggregators, such as Personal Information Management Services (PIMS), are best placed to make user reviews available to multiple platforms.

Keywords: User Reviews, Reputation System, Right to Data Portability, Article 20 of GDPR, Intellectual Property, Personal Information Management Services (PIMS)

JEL: K21, O34, L81

Introduction

Data portability as a means to ensure users' control over their data has attracted considerable attention. Rather than coming under the more 'traditional' form of protection for intangibles, intellectual property, data portability falls within the auspices of personal data protection. As a part of the General Data Protection Regulation (GDPR), the Right to Data Portability (RtDP, Article 20) comes into effect on 25 May 2018. While it is true that data portability has been primarily seen as a means to empower consumers, so far as their personal data is concerned,[1] it is also true that data portability has the potential to enable unprecedented competition in online markets. Thus, Article 20 of the GDPR is a laudable step in the direction of disrupting the monopoly of incumbent online entities.[2] The existing scholarship has examined how RtDP facilitates user choice and competition in the social media industry.[3] To a certain extent, authors

[1] For an opposing opinion, see for example Peter Swire and Yianni Lagos "Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique" (2013) 72 Maryland Law Review 335.

[2] It is noteworthy that neither the GDPR nor does the working party on Data Portability discuss the effect of data portability on checking the monopoly power of incumbent players.

[3] Inge Graef, Sih Yuliana Wahyuningtyas and Peggy Valcke "Assessing Data Access Issues in Online Platforms" (2015) 39 Telecommunications Policy 375; Inge Graef "Mandating Portability and Interoperability

have also written about the implication of RtDP for e-commerce. This scholarship has looked at porting a user's online purchase history from one platform to another. This certainly has implication for competition, as past choices of consumers determine their future consumption patterns and corresponding offers from competitors. Purchase (or user) history aside, there are additional determinants that have bearing on competition among online players. One critical determinant of competition is user reviews of products, which has not yet been looked at from the standpoint of Article 20 of the GDPR.[4]

On a two-sided platform, a manufacturer/producer is situated on one side, while consumers are on the other side. Very often both manufacturers and consumers multi-home platforms. This means that the same product can be available on more than one platform; at the same time, a consumer may look-up a product on more than one platform. Very often users refer to the reviews of a product generated by other consumers to make an informed choice.[5] A significant amount of research has been dedicated to delineate the importance of electronic word-of-mouth (eWoM) in influencing consumer behavior.[6] It is well established that user reviews are an important mechanism to check information asymmetry and build trust in online markets.[7] For this reason, regulators have also acknowledged and promoted the use of reviews.[8]

This Paper builds upon the economic and business literature that establishes the commercial value of user reviews for platforms and examines the extent to which conventional Intellectual Property laws and the new RtDP as mentioned in Article 20 GDPR can facilitate the porting of

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in Online Social Networks: Regulatory and Competition Law Issues in the European Union" (2015) 39 Telecommunications Policy 502; Barbara Van der Auwermeulen "How to Attribute the Right to Data Portability in Europe: A Comparative Analysis of Legislations" (2017) 33 Computer Law & Security Review 57 at 61-67.

4 In the past, authors have mentioned the benefits of porting reviews from on platform to another. For example, see Randal C. Picker, "Competition and Privacy in Web 2.0 and the Cloud," 103 Northwestern University Law Review Colloquy 1 (2008). See also Yuli Wahyuningtyas "Online Reputation Portability: Does It Legally Matter?" KU Leuven, CiTiP< https://www.law.kuleuven.be/citip/blog/online-reputation-portability-does-it-legally-matter/>. However, to our knowledge this Paper is the first comprehensive analysis of user review portability from different standpoints.

5 "Fully 82% of U.S. adults say they at least sometimes read online customer ratings or reviews before purchasing items for the first time, including 40% who say they always or almost always do so." Pew Research, Online Shopping & E-Commerce (December 19, 2016) at <http://www.pewinternet.org/2016/12/19/online-reviews/>.

6 The power of user reviews has always attracted attention of regulatory authorities. Writing wrong or misleading reviews by the seller itself may be in violation of the consumer protection laws.

7 C. Dellarocas, F. Dini and G. Spagnolo, Designing Reputation (Feedback) Mechanisms, *Handbook of Procurement*, Nicola Dimitri, Gustavo Piga, Giancarlo Spagnolo, eds., Cambridge University Press, 2006

8 See, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda for the Collaborative Economy, COM (2016), 356 final (June 2, 2016)< https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-356-EN-F1-1.PDF>; Federal Trade Commission (FTC), The "Sharing" Economy: Issues Facing Platforms, Participants & Regulators, An FTC Staff Report (2016)< https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_shari ng_economy.pdf>

user reviews from one platform to another.[9] While the literature has discussed transferring photos, videos, lists of books purchased and status updates from one platform to another, little attention has been given to the transfer of user reviews from one platform to another.[10] It can be seen that, while the former kind of data portability affects social media platforms such as Facebook (how locked-in users are and the advertising that users are exposed to),[11] the latter kind of data has implications for online business platforms such as Amazon that directly connect manufacturers/retailers to buyers. Also, very little has been written on the commercial value of user reviews from a legal standpoint.[12] This Paper attempts to bridge this gap.

The Paper concludes that neither existing intellectual property regimes nor Article 20 of the GDPR facilitate the porting of user reviews, and that a pure data aggregator might be better placed, and have the correct incentives, to ensure user-review portability. Part A of the Paper discusses the economic and business literature to show the importance of user reviews in influencing consumer choice and competition. Part B looks at the treatment of user reviews under intellectual property law. Finally, Part C examines the extent to which Article 20 of the GDPR can enable porting of user reviews. Part D suggests that pure data aggregators, such as Personal Information Management Services (PIMS), may enable users to make their reviews available to multiple platforms.

Part A—The Effect of User Reviews on Competition

Electronic Word of Mouth (eWoM) is a powerful tool for creating trust in the online economy,[13] and has, thus, been referred to as a reputation system.[14] Online feedback helps consumers make

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[9] The authors acknowledge that certain user reviews are "sticky" to the extent that they refer to the platform. This paper is limited to the assessment of non-sticky reviews that only pertain to the product being reviewed.

[10] For example, Inge Graef, Joeroen Verschakelen and Peggy Valcke "Putting the Right to Data Portability into a Competition Law Perspective" (2013) Journal of the Higher School of Economics 53; and Graef (n 3), the author, however, notes, "Social networks would only be one example of a system to which the new right would apply. It will also address other forms of cloud computing and web services." (at 506). See also Chih-Liang Yeh "Pursuing Consumer Empowerment in the Age of Big Data: A Comprehensive Regulatory Framework for Data Brokers" (2017) Telecommunications Policy (in Press) < https://doi.org/10.1016/j.telpol.2017.12.001>; Dan Jerker V Svantesson "Enter the Quagmire – the Complicated Relationship Between Data Protection Law and Consumer Protection Law" (2018) 34(1) Computer Law & Security Review 25.

[11] There is a lot of literature on the collection, analysis and use of personal data for advertising purposes, related privacy concerns, and the use of personal data to "lock-in" users. See ibid.

[12] One notable exception is Eric Goldman, Regulating Reputation, Masum, Hassan and Mark Tovey et al.(eds.) *The Reputation Society: How Online Opinions Are Reshaping the Offline World*, MIT Press, 2012, at 51. Goldman argues that user reviews act as a disciplinary 'invisible hand' in the market and form part of 'mediated reputation systems'.

[13] FTC (2016) (n 8)

[14] Paul Resnick , Ko Kuwabara, Richard Zeckhauser and Erick Friedman, Reputation Systems (2000) Communications of the ACM 43(12) 45-48; and Goldman (n 12).

a more informed choice "and ha[s] managed to provide remarkable stability in otherwise risky trading environment[s]".[15]

The online feedback mechanism is not only useful for consumers, but also businesses need this mechanism for brand building, customer acquisition and retention, product development and quality control, and supply chain quality assurance.[16]

There are three ways consumers can review products. First, on the manufacturer's website. Second, product-review platforms such as Reevo.[17] These are referred to as review platforms.[18] Third, on the website of the platforms where manufactures or retailers sell their products, such as Amazon, Zalando and Alibaba Group. This article only deals with such platforms where reviews relate to products/services being sold on that very platform.

A 2013 web survey by the European Consumer Centres' Network found that 82 % of respondents read consumer reviews before shopping. More than half of UK adults use online reviews.[19] There are other surveys as well that highlight the importance of user reviews. For instance, one survey in the UK revealed that, while 88 % of consumers consult reviews, 60 % were more likely to prefer a website that has user reviews.[20] In 2016, the UK Competition and Markets Authority (CMA) estimated that £23 billion a year of UK consumer spending is potentially influenced by online reviews.[21] A more recent survey shows that 85 % of consumers trust online reviews as much as personal recommendations.[22] It is also noteworthy that, not only do consumers take note of average star rankings, they also read and respond to reviews.[23]

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15 Chrysanthos Dellarocas, "The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms," (2003) Management Science, Special Issue on E-Business and Management Science 49(10) 1407-1424, at 1408.

16 See in general Ibid.

17 Reevo < https://www.reevoo.com/shopping>. There are other specialized platforms as well. Yelp provides review of services or businesses, not of products. Likewise, Angie's list is a specialist platform for home services that reviews local businesses and contractors. Tripadvisor is a popular travel and restaurant website that provides hotel and restaurant reviews. Other websites that fall in this category are Trustpilot and Google My Business that review online businesses.

18 "Review platforms are sites, sections of sites or software tools (e.g. apps) which publish reviews about a range of goods, services or businesses and whose predominant audience are consumers seeking product or business information to inform a prospective purchase", Australian Competition and Consumer Commission (ACCC)<https://www.accc.gov.au/system/files/Online%20reviews%E2%80%94a%20guide%20for%20business%20and%20review%20platforms.pdf>

19 European Parliament, "Online Consumer Reviews: The Case of Misleading or Fake Reviews", Briefing (October 2015)< https://www.eesc.europa.eu/resources/docs/online-consumer-reviews---the-case-of-misleading-or-fake-reviews.pdf >

20 Ibid.

21 Competition Market Authority (CMA), "Online reviews and endorsements: Report on the CMA's call for information" 19 June 2015, CMA41.

22 Bright Local, Local Consumer Review Survey (2017)<https://www.brightlocal.com/learn/local-consumer-review-survey/>

23 Judith A. Chevalier and Dina Mayzlin, "The Effect of Word of Mouth on Sales: Online Book Reviews) (2006) 43(3) Journal of Marketing Research 345-354.

Consumer reviews have immense commercial value for businesses. A research by Anderson shows that if a hotel increases its review score by 1 point on a 5-point scale, the hotel can increase its price by 11.2 % and still maintain the same occupancy or market share.[24] Further, an increase in a hotel's online reputation (as measured by scores given by reviewers on major online review sites and online travel agencies) has a positive effect on hotel pricing power, consumer demand, and revenue performance.[25] In other words, better reviews lead to higher prices.

All other things being equal, it is unlikely that consumers would refer to reviews on one platform and make their purchase on another. Empirical findings by Chevalier and Mayzlin support this intuition. These researchers show that favourable reviews on one site result in an increase in the sales of a book on that site relative to another site.[26] This shows that free-riding of reviews does not happen. The authors attribute the relative sales of a book across the two sites to differences across the sites in the number of reviews for the book and in differences across the sites in the average star ranking of the reviews.[27] The authors go on to observe "[b]ecause Amazon.com has many more reviewers than rivals and because, on average, its reviews are lengthy and positive, it seems plausible to speculate that the total number of books sold at Amazon.com is higher than it would be without the provision of customer review features."[28]

Consumer protection bodies have expressed their concerns about the authenticity of consumer reviews. They expect platforms to be open and transparent about the consumer reviews, and require the platform to adopt such practices that would reflect the true opinion of the reviewers about products/services.[29] Realising the power of consumer reviews in enabling informed choice, the Australian Competition and Consumer Commission (ACCC) has acted against misleading testimonials.[30] While the authenticity of reviews falls in the domain of consumer protection agencies, we look at reviews from the standpoint of competition.

A dominant platform has more traffic and users. Naturally, this platform will commensurately have a greater number of user reviews. Other things being equal, users will prefer a platform

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[24] Chris Anderson, "The Impact of Social Media on Lodging Performance" (2012) Cornell Hospitality Report, 12(15), 6-11, Page 7.

[25] Ibid.

[26] Chevalier et al (n 23)

[27] Ibid

[28] Ibid

[29] For instance, see ACCC "Online Reviews - A Guide for Business & Review Platforms" (3 December 2013) <https://www.accc.gov.au/publications/online-reviews-a-guide-for-business-review-platforms>.

[30] "In 2011, the ACCC took action against removalist business Citymove for misleading online reviews. Citymove admitted to having made representations on its website www.movingreview.com.au that purported to be testimonials by genuine consumers when they were not. Citymove paid a $6,600 infringement notice." ACCC "Online reviews - a guide for business & review platforms" (3 December 2013) <https://www.accc.gov.au/publications/online-reviews-a-guide-for-business-review-platforms>.

that has a larger number of reviews.[31] Consequently, this leads to network effects that increase the utility of that online platform for new users.[32]

The intention behind the reviews is most often to review the quality of a product. The intention of reviewers is, therefore, to help other users to make an informed decision about a product. Thus, if the same product were listed on a lesser-known/new platform, consumers would find this platform more appealing if the reviews of the product were available there as well.

High entry barriers characterise markets where data is a crucial component of business model.[33] This is because collection, storage, processing and analysis of consumer data require substantial fixed costs and low or negligible marginal costs. Additionally, these markets also experience economies of scale and scope. These two phenomena together result in higher concentration and lower competition in data-driven markets.[34] This means that big firms already have an advantage over small firms because of the specific nature of data in the online market. Moreover, it is socially wasteful for a competing platform to have to re-create such data. In smaller and/or niche markets, this data might not be easily reproducible. Thus, a suitable mechanism to facilitate user review portability will engender competition in online markets. In

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[31] There is a 'tipping point', where each additional review does not add any (or much) extra value, as users cannot read all reviews; Goldman (n 12) at 57.

[32] This has been addressed with respect to data and social media. See Jan Krämer and Michael Wohlfarth "Market Power, Regulatory Convergence, and the Role of Data in Digital Markets" (2017) Telecommunications Policy 42(2), Pages 154-171, Page 165; The authors note "superior data may not only temporarily lead to a dominant market position, but—due to the increased user interaction that results from the better service—enables the dominant firm to improve the quality of its data basis faster than potential competitors and may thereby lead to a permanent advantage. In other words, this could result in entry barriers, which again challenge the assumption that digital markets are contestable, and thus, may indeed constitute market power". See also, Cedric Argenton & Jens Prüfer, "Search Engine Competition With Network Externalities" (2012) Journal of Competition Law & Economics 8(1), Pages 73-105; see also, Graef et al. (n 3), The authors note, "For establishing itself, an online platform, for example a social network, needs to achieve a critical mass on both sides of the platform. Demands on one side of the platform depend on whether or not there are sufficient demands on the other side. Without a user base, the social network will not attract advertisers, on which it relies to make the platform profitable. The advertisers will join the platform that has the most solid user base, since they have an interest in displaying their products or services to as many users as possible. Once one social network has achieved a critical mass, it may be hard for a competing platform to gain a foothold on the market. It needs a strong user base itself before advertisers will be interested in joining the new network, as they can already reach users through the social network that has established itself first. Due to direct network effects, it could be difficult to attract users. Since a social network with an installed user base is also more beneficial to users, users that are new to the social network environment are therefore likely to join the system that has the most users. Due to network effects, the market is very concentrated and competition is harder to achieve. Because of the network effects and economies of scale, only a few social network providers will be able to survive. Multi-sided markets are therefore often referred to as 'winner-take-most' or 'few-winners-take-all' markets …" This is analogously the case with e-commerce platforms and review data.

[33] Ibid.

[34] CMA, "The commercial use of consumer data: Report on the CMA's call for information" (June 2015) CMA 38, page 75<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf>

the following sections, we analyse two possible legal regimes, Intellectual Property law and Article 20 of the GDPR, that may facilitate user review portability.

In theory, competition law can also step in to mandate licensing.[35] However, refusal to license intellectual property or data does not necessarily mean abuse of dominant position. Competition law only intervenes with the licensing of intellectual property or data in exceptional circumstances and it remains practically impossible in view of the stringent requirements imposed by case law.[36] As other authors have already analysed the viability of the EU competition law framework to facilitate data portability at length,[37] we focus our attention on the intellectual property framework and Art 20 of the GDPR.

Part B—Intellectual Property: Incentives and Market Regulation

Consumer/user reviews are a strange kind of information. They are not created by firms/companies, but consumers/users. However, unlike other user data, they are by nature not secret, but published. These features affect the incentives for the creation and collection of

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[35] This has been discussed with respect to access of user data for social media platforms, and data compilations used for profile for advertising purposes; e.g. Graef et al (n 3); Graef (n 3); Van der Auwermeulen (n 3); and Björn Lundqvist, "Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition law in an Internet of Things" (2016) Stockholm Faculty of law Research Paper Series 1 at 15-22.

[36] For example, in Europe, as per the exceptional circumstance test. In Joined Cases C-241 & C-242/91 P *Radio Telefis Eireann & Indep Television Publ'ns Ltd v Comm'n* [1995] ECR I-743 ("Magill"), under EC Treaty, art 86 (now art 82), the European Court of Justice (ECJ) stated that "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct" (at [50]). The Court held that the refusal to licence copyright in television weekly programme listings was held to be an "abuse of dominant position" (at [54]-[56]) Similarly, in Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-05039, the ECJ held (in relation to the refusal to licence the intellectual property in a databank) that refusal to licence intellectual property could constitute abuse of dominant position if: Firstly, "the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand"; Secondly, "the refusal is not justified by objective considerations"; and, thirdly, "the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market" (at [52]). See also Case T-201/04 *Microsoft Corp v Comm'n* [2007] ECR II-3601 (Ct First Instance); Case COMP/C-3/37.792 *Microsoft Corp* [2007] OJ (L 32) 23 (24 March 2004, Commission Decision). In contrast, the latest US case law makes no mention of "exceptional circumstances" and makes action against refusal to license intellectual property rights virtually immune to antitrust application. See, *Verizon Communications, Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398 (2004). On the US essential facilities doctrine; see Zachary Abrahamson "Essential Data" (2014) The Yale Law Journal, 124(3) 867; and Donna Patterson Robert Pitofsky Jonathan Hooks "The Essential Facilities Doctrine Under United States Antitrust Law" (2002) 70 Antitrust L.J. 443-462.

[37] For example, see Graef (n 3) at 507; Damien Geradin and Monika Kuschewsky, "Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue" (2013) SSRN Working Paper. Available at ⟨http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088; C.S Yoo (2012).When antitrust met Facebook. George Mason Law Review, 19(5), 1147–1162; see also Graef et al (n 3); and Lundqvist (n 35)

reviews, and how a platform can protect them, making them quite different from patentable inventions, trade secrets, databases or even copyright works.[38]

It should be clear that user reviews (or their accumulation) cannot constitute patentable inventions. Their public nature also prevents them from being protected by trade secrecy or similar regimes.[39] A collection of reviews might be protected as a database or copyright, depending on the jurisdiction. Highly more likely and more important is the potential copyright in individual reviews.

Whether there can be copyright in individual user reviews is dubious due to their relatively short length and, related to this, their questionable originality.[40] That being said, the subsistence of copyright depends on the review itself. Not all reviews are written in the same manner, which means that there might be copyright in one review, but not another. Subsistence also depends on the jurisdiction, as the standard of originality is by no means harmonised, complicating matters in the globalised online world. That is, there might be copyright in one jurisdiction, but not another. For example, the standard of originality in common law jurisdictions is famously low, whereas it is a harder standard to overcome in civil law jurisdictions.

One can also have copyright in the selection or arrangement of data, if the selection or arrangement reaches the threshold for originality. However, the protection only extends to the selection/arrangement, not to the individual works or pieces of information. Some jurisdictions (though not many) protect industrious collections, where it does not matter that the selection/arrangement of collocation is not original. Protection is awarded for the investment/work involved in putting it together (or example, a phone book).

The EU also has *sui generis* database protection.[41] The term "database" refers to a collection of independent works, data or other materials, which have been arranged in a systematic or methodical way, and have been made individually accessible by electronic or other means.[42] There must have been "qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents".[43] It is not clear that a collection of user

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[38] Compare with Edmund W Kitch "The Law and Economics of Rights in Valuable Information" (1980) The Journal of Legal Studies 9(4), 683. For a discussion on different property regimes vis-à-vis data and an argument against property in data, see Lothar Determann, "No One Owns Data" (2018) UC Hastings Research Paper No. 265 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123957.

[39] This is in difference to other kinds of information about individuals that give their aggregators a competitive advantage. See Lundqvist (n 35) at 12-13.

[40] It is possible that something short is original, but not a literary work. See e.g. *Exxon Corp v Exxon Insurance Consultants International Ltd* [1982] Ch 11, where the Court held that "Exxon" was not a literary work". The Court decided this on the basis of this that the word Exxon would not afford any information or instruction, nor would it provide pleasure through literary enjoyment by itself. This was despite the fact that Exxon was a made-up word and, in this sense "original".

[41] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases (1996) 77 OJ L 20.

[42] Article 1.2.

[43] Article 7.1.

reviews on an online platform would satisfy this. In any case, owners only have protection from extraction/re-utilisation of the whole or a substantial part of the database. The *sui generis* protection does not extend to individual entries in the database, or the extraction/re-utilisation of a non-substantial part of the database.

As noted above, users write reviews to help other users make informed decisions. One could, thus, argue that no incentive is required for their creation.[44] It is important, then to differentiate between the incentives behind creation as opposed to collection. Platforms invest in developing the space and maintaining collections of user reviews because it increases their competitive advantage. Having such reviews is also of value to users. We may, hence, understand why platforms might wish to see the reviews they collect in a proprietary light.

From a more theoretical perspective, one of the arguments for having intellectual property is that property in general allows for efficient transactions – it is something defined that one can contract and license around. Following this line of thought, one could argue that subsistence of intellectual property in user reviews or their collection could facilitate their portability between online platforms. Put another way, it would be property that platforms could license from each other or from authors. Notably, the GDPR does not confer property right on data subjects with respect to their personal data.

If we presume that there is some kind of proprietary right over individual reviews or the collection of such, there are then two related issues: (1) Who owns the property, the author, the platform or the manufacturer of the product being reviewed? And (2) whether the existence of property hinders or facilitates the porting of user reviews and thereby competition.

The ownership of any proprietary right in user reviews depends on the terms and conditions of the platform for which the reviews are written. It also depends on the jurisdiction, as each jurisdiction has different rules about whether and how copyright can be assigned, and whether yet-to-be completed works can be pre-assigned. Different jurisdictions have also dealt with "click" licences/contracts in varying ways. The portability of user reviews would be easier to regulate if it were the platforms that own any existing property. It would be easier to deal with one platform than with multiple authors. If it is the authors who own the property, it would arguably be a transactional nightmare to get consent/licences from all the users to port the reviews. From a transactional perspective, it is, hence, more efficient to have platforms be data (review) aggregators (and owners of any copyright).[45]

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[44] If users write reviews to help other users to make informed decisions, it also seems that no property is required from a natural rights perspective.

[45] Kitch (n 38) ; and Dan L Burk "Patents as Data Aggregators in Personalised Medicine" (2015) 21(2) BU J Sci & Tech L 233, on the increased value of data when aggregated, lowered transaction costs.

One could imagine that users would be quite willing to publish their reviews under a creative commons licence,[46] or under an implied licence of portability;[47] after all, users write comments for the benefit of other users. However, it is difficult to imagine that all users would think to write reviews under a CC licence, or that platforms would allow this. Furthermore, a platform could easily require that writers of comments explicitly contradict any implied licence.

At the same time, there are dangers in having ownership sit with online platforms. Namely, if good reviews promote better and/or more sales, online platforms are motivated to remove negative reviews.[48] Furthermore, if user reviews give a platform a competitive advantage, platforms have no incentive to license those reviews. As noted above, competition law only intervenes in the refusal to license intellectual property in very limited cases.

There is a strong argument to be made that the manufacturers of the products being reviewed should be the owners of any property in the reviews. After all, it is their reputations that are at stake and they have a strong motivation to port the reviews and to ensure broad usage of such reviews (though perhaps only positive reviews). Furthermore, if a manufacturer's product builds a reputation on one platform through reviews, which it cannot port, this can lock the manufacturer to that platform.[49] However, the desirability of these manufacturers owning any property rights in reviews can only be hypothetical, as the nature of intellectual property and neighbouring rights is that they are owned by their creators or whomever invested in their creation. The manufacturer could only become owner as an assignee. It is difficult to imagine that either the authors of reviews or the platforms on which reviews are written would wish to assign ownership to manufacturers. Authors of negative reviews would be particularly hesitant. Platforms would only do so for powerful manufacturers with strong bargaining power.

Table 1. Pros and Cons of Ownership of User Reviews

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[46] See https://creativecommons.org/.

[47] On implied licences, see e.g. *Helme & Ors v Maher & Anor* [2015] EWHC 3151 (IPEC); *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988; and *Orvec International Limited v Linfoots Limited* [2014] EWHC 1970 (IPEC)

[48] Goldman (n 12) at 58; "the Medical Justice form prospectively takes copyright ownership of any patient-authored reviews (Carbine 2009). This approach effectively allows doctors—or Medical Justice, as their designee—to get reputation systems to remove any unwanted patient reviews simply by sending a DMCA takedown notice (17 U.S.C. § 512(c)(3))." See also Elliot Harmon and Kit Walsh "Consumer Review Freedom Act Would Protect Customers' Right to Post Reviews" (3 November 2015) Electronic Frontier Foundation; "The other way that a company might use form contracts to silence its customers is a little more complicated. The company uses a clause that *assigns the copyright for any review customers might write to the company*. Then, when the company finds a review it doesn't like, it files a DMCA notice to take the content down." <https://www.eff.org/deeplinks/2015/11/consumer-review-freedom-act-would-protect-customers-right-post-reviews>

[49] For an analogous discussion on how vendors on online markets can become locked to a platform if they cannot port their reputations, see Randal C Picker n (4). We thank Inge Graef for bringing this to our attention. See also Barbara Engels "Data Portability Among Online Platforms" (2016) 5(2) Internet Policy Review 1 at 12.

Ownership	Pros	Cons
Platform	• Transactional efficiency • Easier for competition law to regulate – but limited	• Competitive advantage = incentive to refuse to license • Incentive to remove unfavourable reviews
Author	• No reason to refuse to license	• Transactional nightmare • Difficult for competition law to step in
Manufacturer	• Their reputation at stake • Motivation to ensure cross-platform usage of reviews	• Incentive to remove unfavourable reviews

Today's legal reality is then that ownership will lie either in the authors or platforms. Taking into account the transaction efficiencies of aggregation, the low incentive of online platforms to license and lose their competitive advantage, and the limited extension of competition law vis-à-vis the licensing of intellectual property, a pure data aggregator, which has an incentive to license as broadly as possible, might be preferable. This is particularly true when one takes into account that GDPR and RtDP are unlikely to be helpful for the portability of user, as concluded in the following section.[50] Personal Information Management Services (PIMS) are discussed further below.

There might, however, be difficulties in creating a market for user reviews. In particular, identifying the monetary value of reviews might prove challenging.[51] The value of reviews depends on their rate of depreciation.[52] That is, how long the reviews will be valuable for. This depends, of course, on the market of the goods/services being reviewed. If the good/service only has a short market life, the reviews have less value, and vice versa. Difficulties involved with valuing user reviews will similarly exist whether we are talking about transactions around copyright or databases, or data portability.

Part C—Does Article 20 GDPR allow User Reviews portability

[50] Note that the relationship between competition law and data protection in the EU is by no means clear. See Lundqvist (n 35) at 25-26, citing C-238/05 *Asnef-Equifax*, ECLI:EU:C:2006:734 at [63]; and European Commission, *Facebook/Whatsapp*, COMP/M.7217 (03.10.2014)<http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf> at §164.

[51] Analogous discussions are undertaken regarding the valuation of personal data. See e.g. Gianclaudio Malgieri and Bart Custers "Pricing Privacy – the Right to Know the Value of Your Personal Data" (2017) Computer Law & Security Review (in Press) < ttps://doi.org/10.1016/j.clsr.2017.08.006>.

[52] Kitch (n 38) at 713-714. See also Krämer and Wohlfarth (n 32)

The rising market power of online platforms has been a concern for competition policy world over. The European Commission acknowledges that data portability promotes competition between the online services.[53]

Data portability is one of the most notable features of the GDPR that is to take effect from 25 May 2018. Personal data portability has never before been attempted at such a large scale.[54] Data portability can support the free flow of personal data in the EU and foster competition between controllers.[55] Along with a user's updates on Facebook, other examples of 'personal data' are titles of books ordered through an online bookstore, or the songs listened to via a music streaming service.[56]

Data portability allows users to transfer their personal data to different online platforms. Article 20 of the GDPR states,

> The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided…

Article 20 only applies to 'personal data' and, in this respect, it has narrower reach than competition law, which is not limited in this manner.[57] Article 4 (1) of the GDPR defines personal data as,

> any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

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[53] Commission Staff Working Document on the free flow of data and emerging issues of the European data economy Accompanying the document Communication Building a European data economy {COM (2017) 9 final}, at47. On the GDPR and data portability generally, see Paul De Hert, Vagelis Papakonstantinou, Gianclaudio Malgieri, Laurent Beslay, Ignacio Sanchez, "The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services" (2017) Computer Law & Security Review (in Press) < https://doi.org/10.1016/j.clsr.2017.10.003>; and Van der Auwermeulen (n 3)

[54] Paul De Hert et al, Ibid

[55] Article 29 WP, Guidelines on the right to data portability, 16/ EN, WP 242, rev01, as last revised and adopted on 5 April 2017

[56] Ibid, at 8

[57] Graef (n 3) at 509. Cf. Nadezhda Purtova, "The Law of Everything. Broad Concept of Personal Data and Overstretched Scope of EU Data Protection Law" (2018) 10(1) Law, Innovation and Technology 1, who argues that the definition of "personal data" is so broad that it has no effective meaning.

Comments made by individuals may fall in the category of 'personal data', as individuals can be identified through their comments.[58] The purpose, however, is not to keep the comments classified, instead individuals intend to reach out to other potential buyers. Moreover, it would be unlikely that any demand for 'comment portability' would come from the user who generates it.[59] Instead, it will be a manufacturer or other platforms where the same manufacturer is listed that will be interested in porting the comments.

The right to data portability allows data subjects to move, copy or transmit personal data easily from one IT environment to another.[60] In the case of 'user review portability', however, instead of data subject moving from one platform to another, it is the reviews that travel from one platform to another. There are other differences as well. While other consumers may not be interested in 'personal data' of a data subject, other peers (consumers) benefit from the reviews of a data subject.

Comment portability can serve two objectives. First, it facilitates competition among online platforms. Second, it promotes the public interest by facilitating information to consumers. However, so far as the second objective is concerned, it is important to note that data portability is inapplicable when data processing is necessary for the performance of a task carried out in the public interest.[61] Data portability for public interest purposes may have implications for law enforcement purposes such as crime detection, intelligence investigation or for administrative purposes.[62] By extension, it implies that personal data cannot be used for the benefit of third-party consumers. Thus, it appears that the objective of data portability is to benefit the interests of data subjects only. This provision affirms the reasoning that data portability is a tool to empower consumers vis-à-vis their personal data. Any other objective may be served through tools other than Article 20 GDPR.

There is one more impediment—Article 20 creates a right for *data subjects* to ask for portability. While, data subjects have incentives to ask for portability in cases of data such as titles of books and song list, they have no obvious incentives to port their comments to a rival website. Article 20 does not create an automatic obligation on the part of data controllers to port the data when someone other than the data subject asks for the port. This means, competing platforms have no right to ask for the porting of user data.

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[58] The meaning of identifiable is broad, such that personal data includes information that is non-personal but makes a natural person identifiable when taken with other information. See Björn Lundqvist (n 35) at 10-11. See also Purtova (n 57), who agrees that the Court of Justice of the European Union has interpreted "identifiable" broadly, but "information relating to" more narrowly .

[59] "Feedbacks produce therefore pure positive externality, benefiting all agents but the provider, so they are an extreme type of public good." Dellarocas et al (n 7).

[60] WP, Guidelines on the right to data portability, 16/ EN, WP 2042, rev01, as last revised and adopted on 5 April 2017, at 4

[61] Recital 68 and Article 20(3) of the GDPR; see also, footnote 16 of Article 29 WP, Guidelines on the right to data portability, 16/ EN, WP 242, rev01, as last revised and adopted on 5 April 2017, at 8.

[62] De Hert et al. (n 53)

Data portability has largely been seen as a tool that ensures user control of personal data in the digital world.[63] The additional objective of competition among platforms is a natural corollary of control over personal data. Inter-operability between platforms is a means towards these two objectives. Comment portability strengthens the second objective of data portability by nurturing competition amongst platform. The public interest in this case is served not through any direct intervention that has been envisaged by Article 20(3), but by promoting competition.

If user reviews were included in the hitherto undefined contours of RtDP, it would mark a new era in the e-commerce sector. The only difference, however, in the case of user reviews is that this portability is useful for other consumers and not necessarily for the individual generating the data in the form of reviews. This aside, it has the same effect on platforms—it facilitates competition. The present architecture of data portability in the GDPR, however, cannot support user-review portability, as shown above.

Part D - A Possible Solution

The uncertainty around the IP rights in user reviews and the present architecture of Article 20 GDPR do not make a convincing case for the portability of user reviews. As a solution, a third-party repository may hold user comments that can be made available, not only to other online platforms, but also to brick-and-mortar businesses.[64] To this end, Personal Information Management Services (PIMS) that have been envisaged as intermediaries[65] between users and service providers (and also other users) can hold personal information of users, including user reviews and ratings (and any property they might embody). The main objective of PIMS is to put users in control of their personal information.[66] According to the CMA:

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[63] Ibid at 8, "Right to data portability is therefore an essential element towards empowerment of data subjects and a first step to an idea of data subjects' default ownership of their personal data." (at 9); Commission Staff Working Paper Impact Assessment Accompanying the document Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. Brussels, 25.1.2012, SEC (2012) 72 final at 43. Read also EDPS recommendations on the EU's options for data protection reform, (2015/C 301/01)... "gateway in the digital environment to the user control which individuals are now realising they lack), Also, recital 68 of GDPR explains that the rationale of right to data portability is " [t]o further strengthen the control over his or her [data subject] own data", recital 7: "Natural persons should have control of their own personal data"); See also, Graef (n 3).

[64] On the market for data see, Lundqvist, (n 35) at 7.

[65] "PIMS can be considered intermediaries, or 'platforms' of a sort connecting two sides of the market: individuals offering their data for (re)use on the one hand, and organisations wishing to (re)use this data." EDPS Opinion 9/2016 <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2016/16-10-20_PIMS_opinion_EN.pdf > at 11.

[66] Ibid. at 9.

> Personal information management services (PIMS) act as intermediaries for consumer data between consumers and firms. The rationale behind these services is that it can be cheaper for one intermediary to hold data on consumers than for multiple firms to seek to collect this and hold it separately and for consumers to have to provide this on multiple occasions… [I]t might be easier for consumers to exercise control over the accuracy of their data, and choose which firms are able to have access to and use it.[67]

Users can specify the purpose for which their data can be held by PIMS.[68] This intermediary also allows the users to keep track of the information they have provided to see if it corresponds to the agreed purpose for which it was provided. If a user has agreed, other users and service providers can also access his data.[69] If the data were a review, the user could indicate whether this could be ported. One of the business models for PIMS does not require users to pay for the intermediary's services.[70] This 'hybrid model' instead requires online service providers and third parties to pay for the services of PIMS.[71] Thus, while the system does not disincentivise the user to share their data, it also enables the new/small online platforms to access reviews by paying fees to PIMS.

In fact, the European Data Protection Supervisor (EDPS; which ensures that EU institutions and bodies respect people's right to privacy when processing their personal data) recognises PIMS as "among the most promising efforts" to implement the right to data portability.[72] There is one more benefit of a PIMS type of intermediary—it can be a repository of comments from various platforms, thus maximising the number of reviews for every product.

The existing architecture of PIMS may face some challenges. For instance, users may be reluctant to place a large amount of their data in one location due to vulnerability to security threats.[73] There are challenges on the supply side as well. As individuals are accustomed to 'free' services on the Internet, any business model that would require a fee for the services of PIMS will not be an attractive proposition for users.[74] These challenges can, however, be dealt with more appropriately if the benefits of PIMS are better understood in their evolutionary phase.

Conclusion

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[67] CMA (n 34) at 83

[68] EDPS Opinion 9/2016 (above n 65).

[69] Ibid. at 7.

[70] This is termed as 'freemium model', which does not charge individuals for basic functionalities. See, European Commission, DG CONNECT, "An emerging offer of "personal information management services" Current state of service offers and challenges" at 7

[71] Ibid. at 7

[72] Ibid. at 9.

[73] Lachlan Urquhart, Neelima Sailaja and Derek McAuley, "Realising the Right to Data Portability for the Domestic Internet of Things" (2018) 22(2) Personal and Ubiquitous Computing 317-332; see also, European Commission, DG CONNECT (n 70) at7

[74] Ibid.

Not long ago, critiques advocated leveling the playing field between brick-and-mortar and online marketplaces. Seemingly, that argument is not as relevant as it used to be because businesses are increasingly going online. In this new age of online marketplaces, however, striking parity among online marketplaces is crucial for a vibrant competitive online ecosystem, especially when the competitive advantage of a platform is not efficiency driven.

This Paper looked at user reviews that constitute one critical determinant of competition among online platforms. It showed that portability of user reviews can facilitate competition and may result in reduced entry barriers for new entrants. The Paper analysed two legal regimes, intellectual property and data portability, and found that no regime, in its present form, can facilitate the portability of user reviews.

While intellectual property is often theorised as facilitating the transfer of information and knowledge, we have shown that this is not necessarily the case for user reviews. There are difficulties relating to whether there is subsistence of intellectual property, who owns any existing intellectual property (which is affected by contract law) and what incentives different players have to allow or ensure portability (particularly with respect to negative reviews).

The Paper has also shown, a critical determinant of competition in the online marketplace, user reviews, has been left out of the purview of data portability as enshrined in Article 20 of the GDPR. Though reviews might constitute "personal data", there is a disconnect between the fact that only individuals can ask for their own personal data to be ported, and the reality that it is rival platforms (rather than individuals) that want the porting of reviews. Additionally, Article 20 has not been tailored to serve any public interest, including that of bridging information asymmetry of buyers who want to benefit from the reviews of previous buyers on a different platform.

As a solution, we suggest that pure data aggregators or, more specifically, PIMS might offer a solution. Being intermediaries, PIMS are financially incentivised to broadly license the reviews, which authors have designated as portable, to any platforms that approach them.