BLESSING OR CURSE? UNFAIR COMPETITION IN CZECH COPYRIGHT ENFORCEMENT AND ITS IMPACTS ON PLATFORM LIABILITY AND PUBLIC DOMAIN

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Keywords: ***Copyright balance, Copyright enforcement, Hellspy, Free riding, Public domain, Platform liability, Unfair competition***

Abstract: *This article delves into the intricate interplay between safe harbor protection, platform liability, and the emerging use of unfair competition claims in the Czech Republic. These claims serve as an additional copyright protection layer, potentially extending its scope. Of particular concern is their impact on the public domain.*

The study investigates the application of unfair competition in Czech copyright enforcement and its implications for both copyright and the public domain. It reveals a growing trend of unfair competition complementing copyright enforcement, upsetting the delicate balance of copyright.

The article critically examines unfair competition claims in the Czech context, particularly the Hellspy case, offering three arguments against its conclusions. In addition to arising from a flawed legal analysis, the unfair competition claims appear unconvincing since they utilize the same economic rationale that underpins the system they aim to circumvent. Ultimately, these claims constitute an external approach to copyright, thereby disturbing the delicate equilibrium of the copyright framework.

1. Introduction[1, 2]

In the Czech Republic and the European Union, the issue of safe harbor protection and platform liability for copyright infringement is a complex one. To further complicate things, unfair competition claims are increasingly used in the Czech Republic to supplement copyright protection and possibly extend it. This practice even made it a preliminary question to the CJEU that unfortunately cannot provide its insight as the Czech High Court that raised the question wished to discontinue, and the CJEU removed the case from its register.[3] The prevailing problem remains that claims of unfair competition have essential implications for the scope of the public domain.

In this Article, I investigate the research question of how unfair competition is utilized in copyright enforcement in the Czech Republic and what the subsequent ramifications are for copyright and the public domain. This examination aims to understand how these claims are utilized to complement and potentially extend copyright protection. Consequently, I observe an emerging trend of unfair competition that augments copy-

[1] This paper is the result of a project funded by the Grant Agency of the Czech Republic [Copyrighted Works and the Requirement of Sufficient Precision and Objectivity (GA22-22517S)].

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[3] 'Order of the President of the Seventh Chamber of the Court of Justice in Case C-470/22 from 24 August 2023' https://curia.europa.eu/juris/document/document.jsf?text=&docid=277401&pageIndex=0&doclang=CS&mode=req&dir=&occ=first&part=1&cid=4691321 accessed 31 October 2023.

right enforcement. Nevertheless, these practices disrupt the delicate balance of copyright and adversely affect the public domain.

The Article starts with an analysis of unfair competition claims in the Czech Republic, focusing on the *Hellspy* case.[4] In the following Part, I present three reasons why I believe the conclusions drawn in the *Hellspy* case are incorrect and harmful. In the final Part, I conclude the Article with remarks answering the research question.

In the Article, I offer criticism of the emerging practice on three grounds. The first ground argues that while the Czech Supreme Court focused on the correct issue, it provided incorrect legal conclusions. Next, my criticism stems from free riding as the underlying logic of the safe harbor system that is meant to be countered by unfair competition claims of free riding. The last ground reflects on the public domain and copyright as a delicate balance system upset by the import of outside solutions. Together, these grounds offer an academic reflection on emerging legal practice in the Czech legal system. Altogether, I argue that legal practice should rely on tools within the copyright framework to achieve the same result without the outlined negative impacts.

2. Rising trend of unfair competition in copyright enforcement in Czechia

The following Part consists of two subsections. The first inspects how the concept of free riding unfair competition evolved. The second Part presents a short case study of the Supreme Court‘s landmark case of *Hellspy*.[5] In the *Hellspy* case, the applicants succeeded in claiming unfair competition claims that, according to the Supreme Court‘s opinion, even bypassed the safe harbor protection offered at the time to hosting ISPs under the Directive on Electronic Commerce („*eCommerce Directive*“)[6].[7] However, this controversial conclusion was raised as a preliminary question that was withdrawn.[8] One should note that the eCommerce Directive safe harbors developed into the Digital Services Act („*DSA*“)[9] safe harbors, but the ruling and analysis are still relevant.

2.1. Fair and unfair

The concept of unfair competition is well-established in the Czech Republic. The Czech Civil Code outlines the basic framework that provides the general unfair competition clause and a list of specific subject matters.[10] Courts, moreover, apply the general clause to pursue subject matters outside the list provided in the Civil Code that fulfill the general clause.[11]

Free riding is one such subject matter not outlined in the Czech Civil Code. Its core is consistent with the economic understanding of free riding, i.e., it occurs when one exploits another‘s investment without incurring the expenses themselves.[12] In the words of the Czech Supreme Court:

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4 *Supreme Court Decision No 23 Cdo 2793/2020 of 31 August 2021 (Hellspy)*.

5 ibid.

6 Art 14 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market 2000.

7 Para 118 *Supreme Court Decision No 23 Cdo 2793/2020 of 31 August 2021 (Hellspy)* (n 4).

8 *Case C-470/22: Request for a preliminary ruling from the Vrchní soud v Praze (Czech Republic) lodged on 14 July 2022 – Česká národní skupina Mezinárodní federace hudebního průmyslu, z s v I&Q GROUP, spol s r.o, Hellspy SE* (ECJ); CJEU removed the case from its registry. ‘Order of the President of the Seventh Chamber of the Court of Justice in Case C-470/22 from 24 August 2023’ (n 3).

9 Regulation (EU) 2022/2065 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) 2022 (OJ L).

10 Section 2976 et seq. ‘Law n. 89/2012 Col., Civil Code (Občanský zákoník)’ (*Zákony pro lidi*) <https://www.zakonyprolidi.cz/cs/2012-89> accessed 26 October 2023.

11 Section 2976 et seq. ibid.

12 Mark A Lemley, ‘Property, Intellectual Property, and Free Riding’ (1 May 2007) 1040 <https://papers.ssrn.com/abstract=982977> accessed 8 May 2023.

> *"so-called parasitic profiteering from the competitor's performance (also called „stowaway" or „free riding", which occurs e.g., the exploitation of someone else's idea, someone else's work and someone else's cost invested in their implementation), which would endanger the competitor's position and devalue its competitive advantage, which it has acquired through its diligence and financial sacrifices (...) „* [13]

This understanding of free riding was subsequently upheld and further established in subsequent cases, saying, e.g., that free riding:

> *"(...) occurs, for example, through the misuse of someone else's idea, someone else's idea, someone else's work and someone else's cost invested in their implementation"* [14]

> *"whereby one competitor benefits from the efforts and costs of the other competitor by gaining a competitive advantage in that it does not have to incur such costs itself"* [15]

2.2. Novel litigation strategy

The Czech Supreme Court ruled in the case of *Hellspy* in 2021. This landmark case marked a revolutionary win for rightsholders and opened a brand-new avenue to pursue copyright infringement, namely the free riding unfair competition claim. The following Part presents a brief analysis of this landmark case and points out observations that are important further down the Article.

The interesting aspect of the *Hellspy* case is that claimants leveraged the claim of unfair competition to pursue a case of copyright infringement.[16] However, the case does not stop there. The Supreme Court ruled even further that liability for unfair competition differs from liability from which platform is exempted under the eCommerce Directive safe harbor.[17] In other words, the Supreme Court stated that copyright infringement can be pursued within the framework of unfair competition and that safe harbor protection cannot avoid any such liability.

As preliminary recognition, one must understand the character of Hellspy and its role in the Czech digital environment. Hellspy is an operator of hosting platforms Hellspy.cz and Hellshare.cz that allowed users to upload and download files, including protected works of copyright.[18] Moreover, Hellspy offered users subscription models and credits in exchange for uploaded content and its download.[19]

The dispute revolving around Hellspy's business model started in 2014 on the grounds of unfair competition. The unfair competition element consisted of an operation enabling users to upload, search, and download files while also operating a specific incentive system to motivate users to upload more data.[20]

Similarly to established caselaw, the *Hellspy* ruling recognized the concept of free riding as:

> *"(c)onduct in which one competitor benefits from the efforts and costs of another competitor by gaining a competitive advantage in that it does not have to incur such costs itself (cf. also the concept of ‚free riding') must therefore be regarded as unfair competition. „* [21]

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13 'Supreme Court Decision No. 32 Cdo 166/2008 of 14 November 2008' <http://kraken.slv.cz/32Cdo166/2008> accessed 26 October 2023.

14 Supreme Court Decision No 23 Cdo 971/2014 of 17 December 2015.

15 Supreme Court Decision No 23 Cdo 2793/2020 of 31 August 2021.

16 Para 77 *Supreme Court Decision No 23 Cdo 2793/2020 of 31 August 2021 (Hellspy)* (n 4).

17 Para 118 ibid.

18 Paras 1 and 2 ibid.

19 Para 2 ibid.

20 Para 4 ibid.

21 Para 77 ibid.

Supreme Court then identified acts of unfair competition of free riding. Unfair competition was found in the platform‘s business model:

> *“Therefore, in a situation where the conditions of operation of an information storage service (...) allow its users to make publicly available information (data files) infringing the intellectual property rights of third parties to a non-negligible (i.e., competitively significant) extent, a certain way (business model) of operating that service may, depending on the particular circumstances, fulfill the characteristics of unfair competition.“*[22]

However, even if liability for unfair competition was found, the platform claimed the protection of safe harbors. Czech Supreme Court sidelined this defense by claiming that liability for unfair competition is of a different breed than that from which platform is exempted under the eCommerce Directive safe harbor. In the words of the Supreme Court:

> *“The subject matter of the proceedings is the protection against unfair competition based on the particular economic method (business model) of the defendants‘ provision of the service in question, which arises from a different legal liability of the defendants than liability for the content of the information stored. (...) Therefore, the legal regulation limiting the liability (i.e., safe harbor) of the provider of the information storage service (...) does not apply to the circumstances of the present case. „*[23]

3. Copyright at risk

The following Part presents several reasons why I believe the conclusions and approach drawn in *Hellspy* are wrong. For the first Part, the Supreme Court analyzed correct facts but drew incorrect conclusions by stepping outside the traditional scope of copyright. Secondly, the focus on free riding seems unjustified as it is used to bypass the legal exemption of safe harbors founded on the same economic reasoning. Finally, the unfair competition approach circumvents the conventional boundaries of copyright, disrupting the equilibrium it establishes and potentially endangering the extent of the public domain.

3.1. Supreme Court‘s correct focus but incorrect conclusion

In my view, the Czech Supreme Court‘s arguments do not hold. Inspecting the letter of the eCommerce Directive safe harbor, the platform is exempted from liability for content stored at users‘ request unless it obtains actual knowledge of the illegal activity. Czech Supreme Court suggested that while the platform is immune to liability for the storage of information, the operation of the business model, which is closely connected to the storage of information, is a different issue.

In line with CJEU caselaw and, most recently, *Cyando/YouTube*, the business model operated by the platform should instead serve as grounds for the conclusion of whether the platform deliberately intervenes in the communication.[24] CJEU proposes several factors that help the determination, such as that the primary or predominant use of the platform consists of making available content illegally,[25] for-profit intent,[26] or that:

> *“operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform.“*[27]

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22 Para 87 ibid.

23 Para 118 ibid.

24 Para 83 ‘Judgment of the Court from 22 June 2021 In Joined Cases C-682/18 and C-683/18 (YouTube/Cyando)’ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=243241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4316933> accessed 30 October 2023.

25 Paras 84, 100 ibid.

26 Para 86 ibid.

27 Para 84 ibid.

Thus, I conclude that the Czech Supreme Court misinterpreted the safe harbor provisions by treating the operation of a business model as a separate matter from information storage. CJEU, however, has already ruled that these factors should instead weigh-in to conclude whether the platform does not deliberately intervene in the communication, which would result in the platform's act of communication to the public.[28]

Additionally, I must highlight a similar case of *UlozTo,* where copyright-protected content was disputed.[29] In that instance, the case relied on the accountability framework[30] built within the safe harbor system.[31] The Czech Supreme Court upheld the accountability framework as a viable and legal alternative enabling targeting specific infringements.[32] However, I must acknowledge that compared to *Hellspy*, the scope of the resulting injunction was extremely narrow.[33]

3.2. Fighting free riding with free riding

In the following Part, I offer the second point of criticism of the emerging practice of unfair competition claims. The focus lies precisely on the unfair competition subject matter of free riding. The logic of the following argument is based on recognizing the safe harbor exemption as an institutionalized free-riding exemption. It raises the question of whether it is sound to bypass free riding exemption by claiming unfair competition of free riding.

First, one must revisit the original reason for establishing safe harbor regimes. Lemley presents the following narrative:

> *"if Internet intermediaries were liable every time someone posted problematic content on the Internet, the resulting threat of liability and effort at rights clearance would debilitate the Internet."*[34]

In other words, it is impossible to bear the costs of running an online platform unless liability exemption enables functioning by shielding platforms from liability. Should platforms bear this externality, the argument goes, their operation would be near impossible. Making such costs an externality enables online platforms to free ride. Subsequently, platforms are beneficiaries of institutionalized free riding.

Platform's ability to free ride hindered the rightsholder's copyright control and enforcement attempts, and the frustration resulted in the value gap argument.[35] Value gap describes a mismatch in revenue generated by platforms like Spotify and YouTube.[36] In essence, the creative industry argued that the institutionalized free riding enables platforms to free ride and that the free riding translates into revenue lost. This is underscored by the arguments raised by creative industry stakeholders who argued, e.g.:

> *"(...) that, however the law may have been interpreted over the years, services have in effect been exploiting a loophole in the law to build massive content platforms without paying market-rate (or any, in some cases) royalties to copyright owners."*[37]

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28 Paras 80 and 81 ibid.

29 Para 1 et seq. *Supreme Court Decision No 23 Cdo 1840/2021-II of 8 June 2022 (UložTo)*.

30 Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (1st edn, Cambridge University Press 2017) <https://www.cambridge.org/core/product/identifier/9781108227421/type/book> accessed 3 June 2023.

31 Para 77 et seq. *Supreme Court Decision No. 23 Cdo 1840/2021-II. of 8 June 2022 (UložTo)* (n 29).

32 However, it still remarked on applicability of unfair competition. See Para 150 ibid.

33 Paras 8 and 9 ibid.

34 Mark A Lemley, 'Rationalizing Internet Safe Harbors' (2007) 6 Journal on Telecommunications and High Technology Law 101 <http://www.jthtl.org/articles.php?volume=6>.

35 Enforcement focus increasingly shifted towards platforms that were able to claim the safe harbor protection. João Quintais and Joost Poort, 'The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3437239 <https://papers.ssrn.com/abstract=3437239> accessed 30 January 2021.

36 Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' (2020) 22 Vanderbilt Journal of Entertainment & Technology Law 323, 326 et seq.

37 MMF (Music Managers Forum), Dissecting The Digital Dollar (2015) 68 <https://themmf.net/digitaldollar/> accessed 26 August 2022.

Now that one recognizes that safe harbors are, in fact, institutionalized free-riding exemptions, the Supreme Court's arguments warrant further remark. Supreme Court specifically argued that liability for free riding unfair competition differs from liability from which platforms are exempted. This argument, however, leads to an absurd outcome when free riding exemption is overruled by free riding unfair competition. While different legal institutes, both are built around the very same economic concept of free riding, and it does not seem persuasive that one is so much different as to render the other inapplicable. At the very least, awareness of this issue highlights the weakness of *Hellspy* ruling and unfair competition strategy.

3.3. Shrinking of the public domain

There are many perspectives on the nature and reason for copyright's existence. However, what remains common to all approaches is an integral element of balancing various competing interests.[38] Elkin-Koren and Salzberger specifically highlight the role of the public domain as a balancing element in the copyright system, noting that the public domain is the ultimate goal of copyright.[39]

For this very reason, it is crucial to discuss the impact of unfair competition claims on the scope of public domain and copyright. The worrying aspect is that enhanced protection may shrink the public domain and potentially leave fewer resources for further creation.[40]

First and foremost, it is crucial to understand that for this Contribution , the public domain does not refer to a static pool of works that are either protected by copyright or in the public domain after their term expires. The public domain should instead be viewed as a dynamic space in which some forms of usage may be protected by copyright while others would not be, even if the term of protection remains in effect. In other words, protected work of copyright may be left unprotected in certain circumstances, such as the application of exceptions and limitations.

While such an understanding of the public domain may offer an uncommon perspective, it can be supported by, e.g., Horowitz,[41] Benkler,[42] or Boyle[43]. Similar, although less explicit, remarks can also be observed by Elkin-Koren and Salzberger.[44] Finally, Koukal offers similar remarks in analyzing applicable methods for determining elements in the public domain.[45]

The case of *Hellspy* targets uses of works of copyright that fall outside copyright boundaries. The platform can leverage its use of copyright-protected content by referencing safe harbor protection. I must, however, highlight that such use is not a form of legal use in the sense of copyright, such as communication to the public. This use, consequently, falls into the public domain as copyright protection cannot be raised.

Extending legal protection to previously unprotected forms of use can drastically affect the scope of the public domain. In essence, it removes uses from the public domain and grants rightsholders the ability to enforce despite the legal exemption.

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38 Matěj Myška, *Výjimky a omezení autorského práva v prostředí digitálních sítí* (Právni stav publikace je ke dni 15122019, Wolters Kluwer 2020) 19 et seq.

39 Niva Elkin-Koren and Eli Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge, Taylor & Francis Group 2013) 40.

40 ibid 122.

41 Steven Horowitz, 'Designing the Public Domain' (2009) 122 Harvard Law Review 1490 <https://harvardlawreview.org/2009/04/designing-the-public-domain/> accessed 14 February 2023.

42 Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (*NYU Law Review*, 9 August 2018) 362 <https://www.nyulawreview.org/issues/volume-74-number-2/free-as-the-air-to-common-use-first-amendment-constraints-on-enclosure-of-the-public-domain/> accessed 14 February 2023.

43 James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 Law and Contemporary Problems 33, 60 et seq.

44 Elkin-Koren and Salzberger (n 39) 40, 122.

45 Such methods are, e.g., method of weighing conflicting interests or differentiating individual and nonindividual elements. Pavel Koukal, *Autorské právo, public domain a lidská práva* (Masarykova univerzita 2019) 152 et seq. <https://munispace.muni.cz/library/catalog/book/1243> accessed 14 February 2023.

A similar situation can be seen in the case of *Codexis*, where copyrightable subject matter became an issue. Copyright protection is typically granted to works that fulfill the requirement of sufficient precision and objectivity, as established in the CJEU caselaw.[46] In these cases, CJEU refused copyright protection to the taste of food[47] and aesthetics of work dictated by its technical function[48].

Additionally, there may be other exemptions to copyright protection, as is the case with official works under Czech law.[49] In Codexis, the dispute revolved around legal collections from 1918 to 1944, where one legal information system included these documents with intentional inaccuracies and grammatical mistakes.[50] Although such technical alterations to official works would not alter their copyright status, the claimant still pursued unfair competition claims in an attempt to assert rights over works that belong to the public domain.

I perceive these outcomes as concerning due to copyright's fundamental role as a system that balances competing interests. Within this system, protected uses bestow rights upon rightsholders, representing the individualistic positive aspect, while copyright's scope of protection, exemptions, limitations, or safe harbors restrict rightsholder's rights, constituting the collective exclusionary element.[51]

International organizations, legislators, and courts balance individual positive and collective exclusionary elements at global, European, and national levels. Unfair competition, however, is not part of this balancing scheme. It is an outside element that was not considered in setting the balances. Rights granted to rightsholders have their internal limits.

The issue with unfair competition is that it creates a court-made and unexpected backdoor. Unfair competition, as a result, can offset the system's balance. In other words, unfair competition shifts the balance in favor of rightsholders. It grants them more rights than the copyright intended. The public domain then leaves less space for creation or business deemed desirable within the copyright framework, such as the institutionalized free-riding exemption enabling online business operations.

Koukal offered similar criticism of employing unfair competition to expand copyright:

> *"The assertion of unfair competition claims where the legislator establishes the general use of intangible goods would, on the one hand, undermine the separation of powers (the courts would, contrary to the express will of the legislator, grant protection to goods that are supposed to be legally free on the basis of an express decision of the legislator) and, on the other hand, would effectively establish unlimited protection for an unlimited period of time, and intellectual property rights that are limited in time would appear obsolete."*[52]

The two leading models of copyright can be identified in the law and economics literature. On the one hand, one can approach copyright as a system of incentives that should motivate the creation, consumption, and dissemination of information as a public good.[53] Shrinking the public domain then reduces the available resources and the creators' ability to reuse and remix. Consequently, unfair competition claims could be linked to the reduction of copyright incentives.

On the other hand, the proprietary copyright model must be considered where copyright is understood as a property, and its task is the organization and management of information goods.[54] Unfair competition can

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46 *Judgment of the Court of 13 November 2018, Levola Hengelo BV v Smilde Foods BV, C-310/17* (CJEU); *Judgment of the Court of 11 June 2020, SI and Brompton Bicycle Ltd v Chedech / Get2Get, C-833/18* (CJEU).

47 Para 41 *Judgment of the Court of 13 November 2018, Levola Hengelo BV v Smilde Foods BV, C-310/17* (n 46).

48 Para 33 *Judgment of the Court of 11 June 2020, SI and Brompton Bicycle Ltd v Chedech / Get2Get, C-833/18* (n 46).

49 Section 3 'Law n. 121/2000 Col., Copyright Code (autorský zákon)' (*Zákony pro lidi*, 25 July 2023) <https://www.zakonyprolidi.cz/cs/2000-121> accessed 25 July 2023.

50 Para 4 *Constitutional Court ruling No I ÚS 3150/21 of 27 July 2022 (Codexis)*.

51 Myška (n 38) 13–14.

52 Translated by author. Koukal (n 45) 145.

53 Elkin-Koren and Salzberger (n 39) 57 et seq.

54 ibid 115 et seq.

pose problems even here as it offers organization and management tools outside the copyright framework. Assuming these tools of copyright were crafted with these goals in mind, unfair competition again upsets the balance of copyright.

Finally, I must highlight that elements of copyright also promote certain fundamental rights, such as free speech or access to information.[55] Consequently, unfair competition claims can also hurt fundamental rights.

4. Blessing or curse? A few final remarks

In the title of this article, I pose the question of whether unfair competition is a blessing or curse for copyright. In my opinion, the answer points out the negative impacts of unfair competition claims. Apart from being a result of incorrect legal analysis, the unfair competition claims seem unpersuasive as they employ the same economic argument that is the backbone of the system they try to bypass. Finally, the unfair competition claims are an external solution to copyright and upset copyright balance.

Still, the unfair competition path might seem appealing to some industry actors, practitioners, or courts, and I wish to discuss some of their arguments. One benefit raised, and on its face value, one of the roots of the litigation strategy is that unfair competition enables active standing to an extended pool of actors.[56] While copyright litigation is open to actors who hold the copyright, unfair competition opens up the potential pool to other interested actors, such as creative industry intermediaries. This can be seen in the *Hellspy* case, where the applicant is a Czech branch of the IFPI association.[57]

Another benefit for litigators is the ease of raising unfair competition claims and the necessary burden of proof. Practitioners presenting at the Czech ALAI seminar noted that courts require a lower level of evidence in quantity and quality in situations where copyright infringement and unfair competition are raised for the same act.[58]

Another benefit raised is that unfair competition enables targeting the platform as a whole without reference to specific infringement.[59] In the UlozTo case above, the applicants relied on the accountability framework.[60] However, the resulting injunction was extraordinarily narrow and restricted to particular infringements.[61] Understandably, rightsholders would, thus, attempt to push for a more generous injunction with a significantly enlarged scope.

Finally, the practitioners faced obstacles when applying the CJEU caselaw in the Czech context where, according to some, the Czech lower court explicitly refused to apply the *YouTube/Cyando* ruling to determine whether an act of communication to the public occurred.[62] Unfortunately, the case is still in progress, and practitioners could not offer more insight.

Putting these factors together, I present three doctrinal issues with unfair competition claims. At the same time, I note the supposed benefits observed by some Czech practitioners. These mainly consist of a lower burden of proof, opening litigation to more actors, and direct refusal of a Czech lower court to apply relevant CJEU caselaw. Another noted benefit is the widened scope of injunction compared to accountability measures available within the copyright framework. Nonetheless, in my opinion, the scales speak loudly against unfair competition.

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55 Myška (n 38) 43 et seq.

56 Presented as part of 'Seminar on Illegal Online Content Sharing – Unfair Competition Aspects ALAI Czech Republic 2023' <http://www.alai.cz/?uid=70> accessed 31 October 2023.

57 *Case C-470/22* (n 8).

58 'Seminar on Illegal Online Content Sharing – Unfair Competition Aspects ALAI Czech Republic 2023' (n 56).

59 Presenters at ibid.

60 Para 150 *Supreme Court Decision No. 23 Cdo 1840/2021-II. of 8 June 2022 (UložTo)* (n 29).

61 Paras 8 and 9 ibid.

62 Presenters at 'Seminar on Illegal Online Content Sharing – Unfair Competition Aspects ALAI Czech Republic 2023' (n 56).

Unfortunately, the same practitioners defending this litigation strategy are also active in Czech academia, pushing for more robust copyright control and enforcement and providing arguments that I find problematic.[63] Notably, these academics can also be traced to the *Hellspy* ruling that was decided by Senate 23 of the Czech Supreme Court.[64] The specific connection is Judge Tůma, who is a longtime coauthor of Czech copyright commentaries with Professor Telec.[65] However, I cannot independently verify the impact of this connection using official resources that do not disclose any further details regarding, e.g., who the judge reporter was.[66] Should that be the case, I cannot rule out interference of subjective opinions and positions.

5. Conclusion

In summary, in this Article, I argue that unfair competition is, in fact, a curse to the Czech copyright system. While I cannot hope this Article will shift the practice, I deem it crucial to explicitly formulate arguments opposing the emerging trend and point out why different approaches should be taken, including the updated copyright framework of Article 17 Digital Single Market[67] and DSA. I, however, cannot rule out that we will not witness further attempts to build upon the framework of the *Hellspy* case, even in the updated legal framework.

[63] An illuminating example is evident in the following academic article, which provides a reflective examination of a litigation strategy utilized by one of the authors as a lead attorney on the case. Notably, this author also contributes to the academic discourse on the subject, presenting at first glance an independent perspective. Zuzana Císařová and Tomáš Dobřichovský, 'Poznámky k Limitům Bezpečného Přístavu v Oblasti Nekalé Soutěže Aneb k Rozsudku Nejvyššího Soudu ČR k Filesharingovým Službám', *Aktuální otázky autorského práva a práv průmyslových* (2021) <https://verso.is.cuni.cz/pub/verso.fpl?fname=obd_public_det&id=605159> accessed 31 October 2023.

[64] *Supreme Court Decision No 23 Cdo 2793/2020 of 31 August 2021 (Hellspy)* (n 4).

[65] Ivo Telec and Pavel Tůma, *Autorský zákon. Komentář. 2. vydání* (2nd edn, 2019).

[66] *Supreme Court Decision No 23 Cdo 2793/2020 of 31 August 2021 (Hellspy)* (n 4).

[67] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019 [32019L0790].