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EU Digital Legislation as a “Wimmelpicture”? What Children’s Books Can Teach Us About Laws

Heiko Richter

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Last November, I was invited to give a speech on the “Wimmelbild of EU digital legislation” in Berlin. Wimmelpictures (German, literally “teeming pictures”) are large-format pictures that show a variety of elements, figures and actions in one image. The tradition goes back to the Middle Ages (e.g. Hieronymus Bosch and Pieter Bruegel the Elder). Nowadays, wimmelpictures and wimmelbooks are primarily aimed at children. In English-speaking countries, Martin Handford’s “Where is Wally” is probably the best-known similar work. The forefather of modern wimmelpictures is the Munich-based artist Ali Mitgutsch (1935–2022). This explains why the German term “Wimmelbild” is even used in the English language.

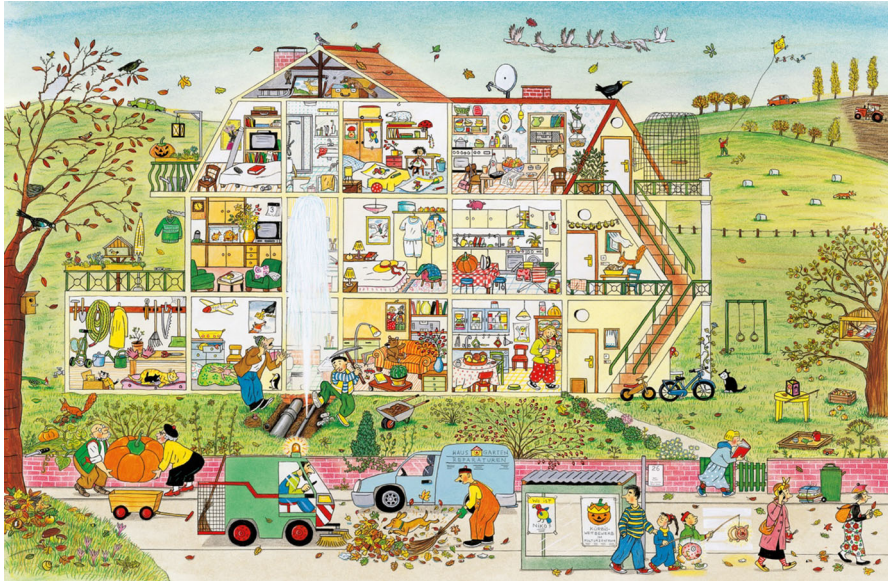
The title selected by the conference organizer made sense to me at first glance. Several EU digital acts¹ have recently been proposed or enacted. This has resulted in a complex, untransparent set of rules. The wimmelpicture metaphor suggests that the whole state of regulation is confusing, even chaotic, and that the devil is in the details. All in all, the term wimmelpicture takes on a rather pejorative meaning in this context, since laws should ideally be the opposite – understandable, user-friendly, and clear. But on closer inspection, this negative connotation puzzled me somewhat. After all, children (and also adults) around the world enjoy wimmelpictures and their complexity. Therefore, I wanted to take a closer look: Are there profound differences and similarities between wimmelpictures and laws that also cast the metaphor in a different light? What does a comparison of the creation and reception of EU digital laws with the creation and reception process of wimmelpictures reveal? Indeed, both are works which were generated during a

¹ Namely the Digital Markets Act (DMA), Digital Services Act (DSA), Data Governance Act (DGA), Data Act, and Artificial Intelligence Act.

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creative process and, once in the world, take on a life of their own in the eyes of the recipients. I was therefore inclined to ask: Can taking a closer look at wimmelpictures help us to see the special features digital laws even more clearly?



Source: Gerstenberg Verlag, R.S. Berner

I may be able to say something about the creation and reception process of laws; but I didn't have the slightest idea about those processes with wimmelpictures. So, in order to carry out my thought experiment, I needed to speak with a wimmelpicture expert. Not only because we have some of her books at home, I instantly came across Rotraut Susanne (R.S.) Berner. She is considered one of the world's most regarded illustrators of children's books. Her masterpiece is the "seasons" – an epic cycle of four wimmelpicture books starting in winter, continuing through spring and summer and ending in fall, in which numerous creatures unfold their lives. R.S. Berner is now 75 years old and has received highest distinctions for her artistic work.² Her books have sold millions of copies in over 30 countries. I felt overwhelming grateful that I was able to speak with her personally over a coffee about the creation and reception of wimmelpictures. In the following, I would like to share my insights and reflections.

Complexity: In our conversation it became abundantly clear to me that the comparison is worthwhile, because just like laws, wimmelpictures are complex in the eye of the beholder while at the same time, the creation is a multi-layered process. The composition of backgrounds, sceneries and moods is based on meticulous planning. R.S. Berner conceived her wimmelpictures as a serialized novel, so she began by writing scripts and logging role descriptions. This explains

² Most notably the Hans Christian Andersen Award of 2016, see https://www.ibby.org/fileadmin/user_upload/Patsy_HCA_laudatio.pdf, last visited 12 December 2023.

why you can watch dozens of characters mature individually and interact interpersonally in her books. This all adds up to a small society that develops as a whole. By creating a dynamic microcosm without words, she founded an entirely new genre of children’s books. The illustrations are sprinkled with countless gimmicks for young and older readers to enjoy. In the autumn wimmelpicture book, for example, a fountain of water shoots up in front of the house, while right next to it, a picture of a fox and a raven with cheese in its beak hangs in a room. The invisible intellectual connection is Jean de Lafontaine (1621–1695), whose fable of the raven and the fox is foreseen here and then told in the following pages. It took R.S. Berner roughly five years to complete the seasons cycle – not least because she deliberately chose not to illustrate digitally, but purely by hand. It becomes clear that wimmelpictures are akin to EU digital acts when it comes to richness of thematic entanglements, complexity and details.

Coherence: A high level of complexity inevitably leads to the call for coherence, meaning the issue of consistency in content and presentation. Legal scholars may tend to think that coherence is the “holy grail” for laws, while for children’s books it may be a nice to have at best. This hubris would fail to recognize that children have an unspoiled and utterly sharp perception. Their eagle eyes rarely miss a contradiction. And the consequences – for example, when the same hat is painted green in one picture and yellow in another – can be disastrous. Such contradictions naturally prompt the child to ask “why?” and parents are rarely able to find a convincing answer. Ultimately, contradictions in wimmelpicture books can jeopardize bedtime rituals in millions of homes. Thus, just as with laws, an incoherent intellectual work unpredictably affects reality. R.S. Berner therefore takes the possibility of eliminating inconsistencies seriously. In response to a letter from a young boy who furiously complained that a little girl in a picture was only wearing one glove (the other could be seen lying in the apartment), but later puzzlingly wore two, she corrected this mistake in a subsequent edition. As for laws, coherence is a constitutional requirement, but it remains a rarely achieved ideal in practice. Inconsistency – both within legal acts and between them – has even become a typical feature of the EU digital legislation genre.³ There are various reasons for this: horizontal and vertical coordination with many other legal acts, which are themselves not free of contradictions, different terminologies, opposing legal cultures among Member States, etc. Moreover, EU digital regulation is a field where multiple stakeholder interests clash strongly. Therefore, uncertainty and inconsistency must even be built in to enable political consensus. Notable are especially the interfaces between digital regulation and intellectual property, trade secrets, data protection (which is now even more complicated since the Data Governance Act and the Data Act have introduced the regulatory subject matter of non-personal data), the open questions of private law enforcement, etc. Instead of

³ On several issues only regarding the Data Act, see Josef Drexler et al., “Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission’s Proposal of 23 February 2022 for a Regulation on Harmonised Rules on Fair Access to and Use of Data (Data Act) (May 25, 2022)”, Max Planck Institute for Innovation & Competition Research Paper No. 22-05, available at: <https://ssrn.com/abstract=4136484>, last visited 12 December 2023.

reaching the goal of harmonization and coherence, regulation increases EU-wide fragmentation, with coherence being established by the courts, at best a few years later by the CJEU. The contradictory nature of EU digital legislation can also be explained by the EU legislative process itself, which leads us to the next point.

Compromise: Laws are the result of political compromise. Anyone who has ever been involved in an EU trialogue knows how much is discussed, lobbied and negotiated (not to say bargained). Thousands of individuals are involved in creating something that is ultimately published on a few pages in the Official Journal of the EU. It feels truly unsatisfying that there is no single individual who can fully comprehend an EU digital law and knows all the background of its creation. In contrast, an individual artist like a wimmelpicture book author is seemingly able to create more rigorously without the need to compromise. But actually, that is only half the truth. What adds to the ordinary pressure of market demand is the fact that children's books are highly political – they aestheticize and thus inevitably educate. That is why many people would like to have their say here. And R.S. Berner is not exempt from politicized criticism, e.g. why nuns or church spires are often visible, why people smoke in the café or why she depicts two garbage men (and not women) with a migration background. At this point, the actual paradigm of the work becomes relevant. According to R.S. Berner, the wimmelpicture captures the world – or at least a small fraction of it – as it is, and not as this or that person would like it to be. Much inspiration comes from everyday life. And moreover, the depiction of the observable – often by knowingly exaggerating clichés – is particularly important, as it encourages the reader to engage with it. It is not easy to free artistic expression from the burden of social expectations that are placed on such works. In contrast, digital laws may be seen at the other end of the spectrum: Regulation has a steering function, since it aims to achieve a socioeconomic state in the future (such as making market positions contestable, promoting innovation or enabling data sharing). But one easily overlooks that every law is based on implicit assumptions about the current state of things. The accurate capturing of reality is a prerequisite for functioning regulation. Especially when it comes to digital regulation, this capturing is often a complex, even speculative exercise, amounting to laws which assume modes of action and take on an experimental character. Nowadays, such issues of reality and aspiration inevitably have a global dimension. But even back in 2007 (George W. Bush was U.S. President and the very first smartphones came on the market), R.S. Berner's wimmelpicture books were already in the focus of the German daily press in global context.⁴ Her books were offered the rare opportunity to be licensed to an American publisher. However, the publisher imposed conditions: in his opinion, the winter wimmelpicture book contained precarious content. Specifically, it depicted a museum exhibition in which naked breasts were exposed in a painting and a micro-penis on a mini statue no bigger than half a rice grain. According to the U.S. publisher, R.S. Berner would have had to retouch this, as well as all cigarettes and pipes. However, she refused, and the lucrative deal was

⁴ See Franziska Bossy and Elke Schmitter, "US Publisher Turns away from Cartoon Nudity", Spiegel online of 11 July 2007, available at: <https://www.spiegel.de/international/zeitgeist/the-mini-penis-scandal-us-publisher-turns-away-from-cartoon-nudity-a-493856.html>, last visited 12 December 2023.

off. German public opinion celebrated Berner as a defender of freedom of expression. Now, it is obviously tempting to draw parallels with two prominent transatlantic regulatory deals, which have also fallen through, at least following the intervention of the CJEU.⁵ The Schrems rulings not only exemplify the significance of cultural clashes concerning regulation, but also how global capitalism forces actors to compromise, which ultimately feels like squaring circles.

Curiosity: If you look at the recipients, wimmelpictures primarily address children. Children learn through the joy of observation and exploration. Complexity provokes curiosity precisely through its aesthetic expression, stimulating the children’s language, perception, and imagination. Children are grateful recipients. When it comes to laws, scholars at best fall into the category of childlike recipients, as the challenge of the complexity of laws may trigger pure excitement. But for practitioners, only the applicability and effects of the law matter. In fact, laws inevitably apply to their addressees and, at best, only those stakeholders who benefit from the regulations are grateful. Yet, in the case of digital legislation, it is often impossible to clearly assess this in advance. Therefore, clear positioning is the exception, and rather, pre-emptive, dismissive criticism is the rule. Moreover, regulation forces all subjects to learn, a major problem being that those who have the resources to do so learn better and faster. The fact that digital legislation often exempts micro and small enterprises across the board or stipulates a special set of rules⁶ actually aims to compensate for this. But this does not prevent the gap between large and small from widening even further.

Continuity: The wimmelpictures stay with you for life. They shape human aesthetic perception early on. Remember which children’s books you read and how much the images burned into your memory? What a locomotive looks like, what an angry dog looks like, what summer looks like? This visual imprint lasts a lifetime. In contrast, the EU’s digital laws are not guaranteed to last forever. Moreover, regulatory uncertainty and the dynamic nature of the subject matter of regulation increasingly prompt legislators to include evaluation obligations or sunset clauses.⁷ In reality, however, laws often come to stay, and once they are in place, they stabilize expectations. After a while, the subjective impression of complexity or chaos also disappears. In other words: we get used to the rules and the next generation is born into them. This is exactly the transition we are currently undergoing with EU digital legislation, whether we welcome the rules or not.

I would like to return to my initial question: Can pondering wimmelpictures help us to see even more clearly what special features digital laws have? Indeed, a comparative view reveals similarities and differences alike, which does not come as a surprise as both are intellectual works. And without doubt, both share a comparable degree of complexity. But unlike in wimmelpictures, coherency of digital laws remains wishful thinking. Moreover, the artistic freedom of individual

⁵ See CJEU, C-362/14 – *Schrems*; CJEU, C-311/18 – *Facebook Ireland and Schrems*.

⁶ E.g. Art. 6(4) DGA; Art. 15(2) DSA; Art. 9(4) DMA; Arts. 7(1), 15(2), 20(1) Data Act.

⁷ E.g. Art. 35 DGA; Arts. 49(2), 53(1) DMA; Art. 91 DSA; Art. 49 Data Act.

creativity implies no need to compromise when creating wimmelpictures; but in reality, children's books are exposed to public discourse and political pressure. Hence, being detached from public opinion is an existential challenge for art, while, in contrast, reconciling public opinion is the actual mission of democratically created laws. Wimmelpicture recipients bring natural curiosity, thankfulness, and eagerness to learn; much less can be expected from addressees of the law, which simply forces them to learn and to adapt behavior. And finally, laws and wimmelpictures have a lasting impact as they shape individual perception and societal expectations. Ultimately, I hope that this thought experiment has stimulated the readers' imagination, and it is up to them to take it even further. For sure, the initial hypothesis "Wimmelbild of EU digital legislation" holds true. But not for the mundane reasons of chaos and unprofessionalism the metaphor implies at first glance. Such a superficial interpretation would do justice neither to laws nor to children's books.

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