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De Berti Jacchia Franchini Poriani
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UBERISATION AND INTELLECTUAL PROPERTY

A PRESENTATION BY

AVV. ROBERTO A. JACCHIA

Brussels, 30 May 2017

THE UBERISATION OF SOCIETY ITS ECONOMIC AND LEGAL ISSUES

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UBERISATION → “... transition to an operational model where economic agents exchange under-utilised capacity of existing assets or human resources (typically through a website or software platform), while incurring only low transaction costs. The term is derived from the company name Uber. The company developed a mobile application that allows consumers to submit a trip request which is then routed to Uber drivers who use their own cars. The term refers to the utilisation of computing platforms, such as mobile applications, in order to facilitate peer to peer transactions between clients and providers of a service, often bypassing the role of centrally planned corporations ...” (Wikipedia, 2017)

UBER AND THE LAW ...

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- “... Although the development of new technologies is, in general, a source of controversy, UBER is a case apart. Its method of operating generates criticism and questions, but also hopes and new expectations ...”
- “... What is UBER? Is it a transport undertaking, a taxi business? ... Or is it solely an electronic platform enabling users to locate, book and pay for a transport service provided by someone else? ...”
- “... UBER’s activity must be viewed as a whole encompassing both the service of connecting passengers and drivers with one another by means of the smartphone application and the supply of the transport itself, which constitutes, from an economic perspective, the main component. This activity cannot therefore be split into two ... Consequently, the service must be classified as a «service in the field of transport» ...

(Opinion AG Szpunar, Asociación Profesional Elite Taxi, para.s 1, 41, 71)

UBER AND THE LAW ...

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- UBER → unexplored, unstable legal environment
- IP perspective can the UBER model be monopolized/protected by means of IP legal tools?
- UBER and IP debate involves features of both EU law and national law

- UBER operates through a mobile application software or mobile app
- Mobile app → an application software designed to run on a mobile device, such as a smartphone or a tablet computer
- User interfaces → screen, input and mobility features involving both hardware and software, through which the app interacts with the device

APP ECONOMY HIGHLIGHTS

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- Global mobile industry at 2014 values
 - 3.3 bn \$ market value
 - 11 mio jobs, of which 5 mio jobs in Europe
 - 1.9 bn \$ R&D investments

- Other sectors revolving around mobile industry
 - 63 bn € projected market value 2018

- Two main issues from the IP angle
 1. is the UBER App capable of protecting towards third parties as an IP object?
 2. is the UBER App capable of protecting after it is made available by contract (license) to users and commercial partners?

- Mobile apps are software
- Legal protection of mobile apps
 1. as copyrightable software
 2. as database (by copyright and/or the “sui generis” right)
 3. by license (contractual means)

COPYRIGHT PROTECTION

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- Software → a computer program, which may be protected by copyright as literary work (Art. 1.1 Directive 91/250/EEC and Directive 2009/24/EC)
- Ideas and principles which underlie the constituent elements of a computer program → not autonomously capable of copyright protection (Art. 1.2)
- Software may be protected if it is original → i.e. it is the author's own intellectual creation different from existing creations (Art. 1.3)
- No tests as to qualitative or aesthetic merits applied to determine eligibility of software for copyright protection (Recital (8) Directive 2009/24/EC)

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- App → software comprised of a series of instructions given to a computer to achieve certain results
- App → original if the way the instructions are given is original in comparison with existing apps → i.e. existing apps do not present all and the same functionalities and/or do not utilize all and the same selection criteria
- Originality threshold to be met for copyright protection → low → relevant similarity between conflicting softwares (apps) strictly appreciated

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- Case law of Court of Justice on Directives 90/250/EEC and 2001/29/EC on legal protection of computer programs
 - no specific precedents on copyright protection of mobile apps
 - notwithstanding originality threshold being low, copyright protection cannot be claimed on single software elements such as graphic user interfaces, programming language and protection of data files (Cases C-393/09, Bezpečnostní Softwarová Asociace; C-406/10, SAS Institute)

■ Italian Case law

- no specific precedents on copyright protection of mobile apps
- a recent specific precedent on copyright protection of mobile apps
- Trib. Milano 01.08.2016 Faround v. Facebook → mobile app called Faround capable of geo-localising business places (such as restaurants, hotel, discos, etc.) present within a certain radius from the user's position and showing comments of user's Facebook friends → found that Faround presented the required minimum degree of originality making it eligible for copyright protection under domestic legislation transposing Directive 2001/29/EC → Facebook's own similar, subsequently launched Nearby app found infringing

- Database → a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other mean (Art. 1 Directive 96/9/EC on legal protection of databases)
- Database → a container legally separate from contents
- Database may enjoy
 1. copyright protection
 2. protection through the exclusive database “sui generis” right

DATABASE AS OBJECT OF COPYRIGHT

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- Protection of database by copyright → if the database has creative character lying in the selection or arrangement of contents, not the contents themselves (“... database which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation ...” – Art. 3 Directive 96/9/EC)

DATABASE AS OBJECT OF COPYRIGHT

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- Case law of Court of Justice on Directive 96/9/EC → Case C-604/10, Football Dataco → database containing fixtures lists (catalogue of matches) of the English and Scottish football leagues → protectable by copyright under Art. 3(1) of Directive 96/9/EC only if it is “... an original expression of the creative freedom of its authors ...” → intellectual effort and skill devoted to creating the data contained in the database do not confer copyright protection on the database

DATABASE AS OBJECT OF COPYRIGHT

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- Italian case law → Faround v. Facebook of 2016 → Faround app moreover constituted a database autonomously protected by copyright as such under domestic legislation transposing Directive 9/96/EC

DATABASE AS OBJECT OF “SUI GENERIS” RIGHT

- Exclusive “sui generis” right under Directive 96/9/EC → the “... right to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of [the] database ... (Art. 7 (1))
- Protection of database by the “sui generis” right → if, independently of copyright protection, a substantial investment was made to develop the database, not its contents, which pre-exist the database and are independently created
- Substantial investment → in either the obtaining, verification or presentation of the contents of the database, not their creation (Art. 7 Directive 96/9/EC)
- Substantial investment → may be quantitative and/or qualitative

DATABASE AS OBJECT OF “SUI GENERIS” RIGHT

- Case law of Court of Justice on Directive 96/9/EC (Cases C-46/02, Fixtures Marketing v Veikkaus; C-203/02, British Horseracing Board v William Hill Organisation; C-388/02, Fixtures Marketing v Svenska Spel; C-444/02, Fixtures Marketing v OPAP)
 - fixtures lists of a football league or horse race organisation → databases
 - qualifying investments → must refer to the resources used to seek out existing independent materials and collect them in the database, not the resources used for the creation of the materials which make up the database content
 - drawing up of fixtures lists of matches and lists of horses, horse breeds and races → do not require substantial investments devoted to obtaining, verifying or presenting contents

DATABASE AS OBJECT OF “SUI GENERIS” RIGHT

■ Italian Case law

- Trib. Milano 04.06.2013, Ryanair v Lastminute → Lastminute database consisting of continuous interrogations and re-arranging and re-publishing of contents and functionalities of Ryanair website → no creativity found → no copyright protection of Lastminute database recognized → however, “sui generis” right protection recognized because Lastminute made substantial investments in creating its database, distinct from those expended by Ryanair in creating its own data → Lastminute database found non-infringing
- Trib. Roma 19.09.2013, Aste Giudiziarie Italia v Incanto.net → database created by Aste Giudiziarie, the contractor of forced sales by auction of judicially seized and confiscated property → found eligible for “sui generis” right → third party website Incanto.net merely extracting and re-publishing data from Aste Giudiziarie’s database found infringing
- Key-importance of expert witnesses in Italian judicial practice, even in preliminary injunction proceedings

CONTRACTUAL PROTECTION

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- Contractual protection of the UBER App → principally in two UBER contract models
 1. Contract between UBER and USER (for provision of transportation service by THIRD PARTY PROVIDER – also called BUSINESS - contractualized with UBER)
 2. Contract between UBER and BUSINESS (for provision of transportation services to USERS)
- UBER App → an object of license

- Contract UBER/USER → “... governs the access or use by ... an individual from within any country of the world ... of applications (including the UBER App), websites, contents, products and services ... solely for personal, non-commercial use ...”
- UBER App → “... the software application and related services provided by UBER ...”
- UBER App → UBER grants to USER a “... limited, non-exclusive, non-sublicensable, revocable, non-transferable license ... for ... personal, non-commercial use ...” subject to restrictions
- UBER license to USER → not expressly designated royalty-free

- Ownership of UBER App → UBER (or UBER's licensors)
- User Provided Content → content submitted to UBER by USER and remaining USER's property, of which USER grants UBER an up-front "... worldwide, perpetual, irrevocable, transferable, royalty-free license ... with the right to sublicense ... textual, audio and/or visual content and information ..."
- Cross-License of User Provided Content from USER to UBER → expressly designated royalty-free
- Compensation component for license to use UBER App economically placed on BUSINESS → embedded within Charges (price of transportation service) paid by USER to BUSINESS through UBER for transportation service?

CONTRACTUAL PROTECTION UBER / BUSINESS

- UBER App → UBER authorizes BUSINESS, and BUSINESS agrees to use, UBER App subject to contractual restrictions
- Ownership → UBER and its affiliates
- Authorization to use UBER App given by UBER to BUSINESS → not expressly characterized as a license, but containing elements of implied license
- UBER authorization to BUSINESS → not expressly designated royalty-free
- Compensation component for license to use UBER App economically placed on BUSINESS → embedded within Services Fees paid by BUSINESS to UBER ?

CONTRACTUAL PROTECTION

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- Contractual protection from improper use of UBER App by USERS/BUSINESSES → by enforcing restrictions and limitations of license/implied licence granted by UBER

PROTECTING UBER APP AS IP OBJECT

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- Protection as object of copyright → if UBER App shown to constitute an original intellectual creation
→ originality threshold low
- Protection as copyrightable database
→ if selection or arrangement of contents inherent to the UBER App shown to constitute an original intellectual creation, independently of creation of contents
- Protection as database object of the “sui generis” right
→ if UBER App shown to have involved substantial qualitative and/or quantitative investments in the obtaining, verification or presentation of the database contents, independently of investments involved by the creation of such contents

PROTECTING UBER APP AS IP OBJECT

- Protection against improper use of express or implied licenses contractually granted to user and commercial partners
 - as allowed under the relevant contracts
- Little specific case law
- Important role of experts

PROTECTING V MONOPOLIZING UBER?

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- Uberisation of economy → growing (irresistible?) trend
- The broader the diffusion of UBER and the horizontalization of UBER-like models, the harder the enforcement of IP monopolies in traditional sense over the business formula and its components
- Within 2017 → first specific ruling of the Court of Justice expected on UBER (Case C-434/15)
- Three main open issues:
 1. growth rate of Uberisation likely to outrun the pace of legislation and case-law?
 2. legal tools existing in EU and national legal orders adequate to prevent both monopolization of and freeriding on UBER-like IP?
 3. how should a fair balance be stricken between exclusive IP rights protecting newly developed UBER-like IP, and the general interest in ensuring accessibility of new economic and societal patterns involving increasingly diverse categories of stakeholders?

UBER AND IP...

DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Forlani
studio legale

Thank you for your attention!

ROBERTO A. JACCHIA

partner

De Berti Jacchia Franchini Forlani

r.jacchia@dejalex.com

www.dejalex.com

20121 Milan

Via San Paolo, 7

tel. +39 02725541

fax +39 0272554600

20121 MILAN

Via San Paolo, 7

tel. +39 02 72554.1

fax +39 02 72554.500

milan@dejalex.com

00198 ROME

Via Vincenzo Bellini, 24

tel. +39 06 809154.1

fax +39 06 809154.44

rome@dejalex.com

1170 BRUSSELS

Chaussée de La Hulpe 187

tel. +32 (0)2 645 5670

fax +32 (0)2 742 0138

brussels@dejalex.com

115114 MOSCOW

Ulitsa Letnikovskaya, 10

tel. +7 495 792 54 92

fax +7 495 792 54 93

moscow@dejalex.com





WHAT'S THE EUROPEAN REGULATORY FRAMEWORK FOR UBER?

A PRESENTATION BY

AVV. ANTONELLA TERRANOVA

Brussels, 30 May 2017

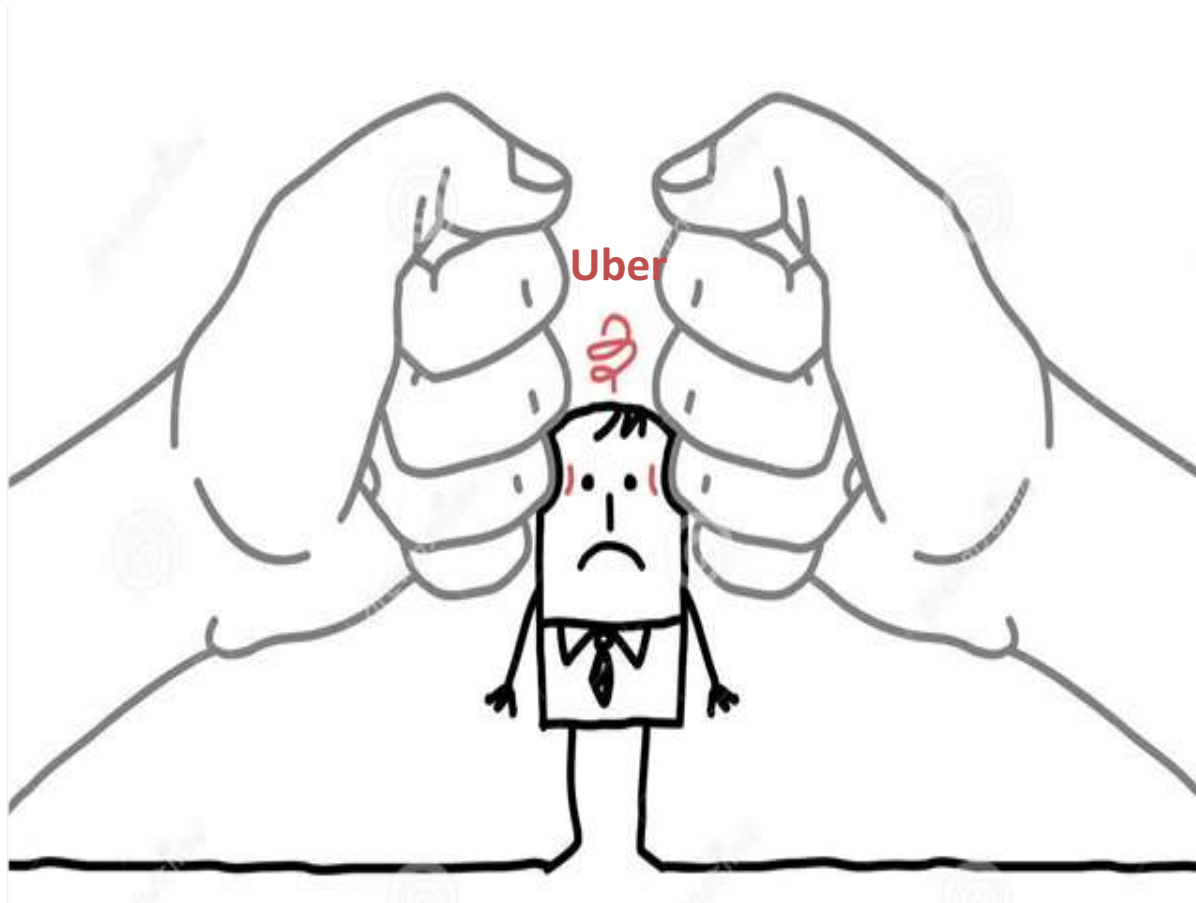
THE UBERISATION OF SOCIETY ITS ECONOMIC AND LEGAL ISSUES

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DE BERTI JACCHIA

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THE OBSTACLES THAT HAMPER THE DEVELOPMENT OF THE COLLABORATIVE ECONOMY IN EUROPE



THE OBSTACLES THAT HAMPER THE DEVELOPMENT OF THE COLLABORATIVE ECONOMY IN EUROPE

- Application of existing legal frameworks
- Blurring lines between consumer and provider, employee and self-employed and professional and non professional provision of services.

HOW CAN THE SERVICE OFFERED BY UBER PLATFORM BE CLASSIFIED?

- Service in the field of transport
- Information society service pursuant to Directive (EU) 2015/1535 (that replaced Directive 98/34/CE)



THE EUROPEAN COMMISSION'S VIEW

The communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions of 02.06.2016



Relevant contribution for the solution to be adopted by the single Member States and positive feeling for the “collaborative economy” business model

THE ADVOCATE GENERAL SPUZNAR'S OPINION IN CASE C-434/15

A “collaborative economy” business model like Uber cannot claim the benefit of the principle of freedom to provide services guaranteed by EU law for information society services.

Such business model falls within the field of transport and in order to operate Uber must obtain the necessary licences and authorizations under national law.

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WHAT'S HAPPENING IN CALIFORNIA?

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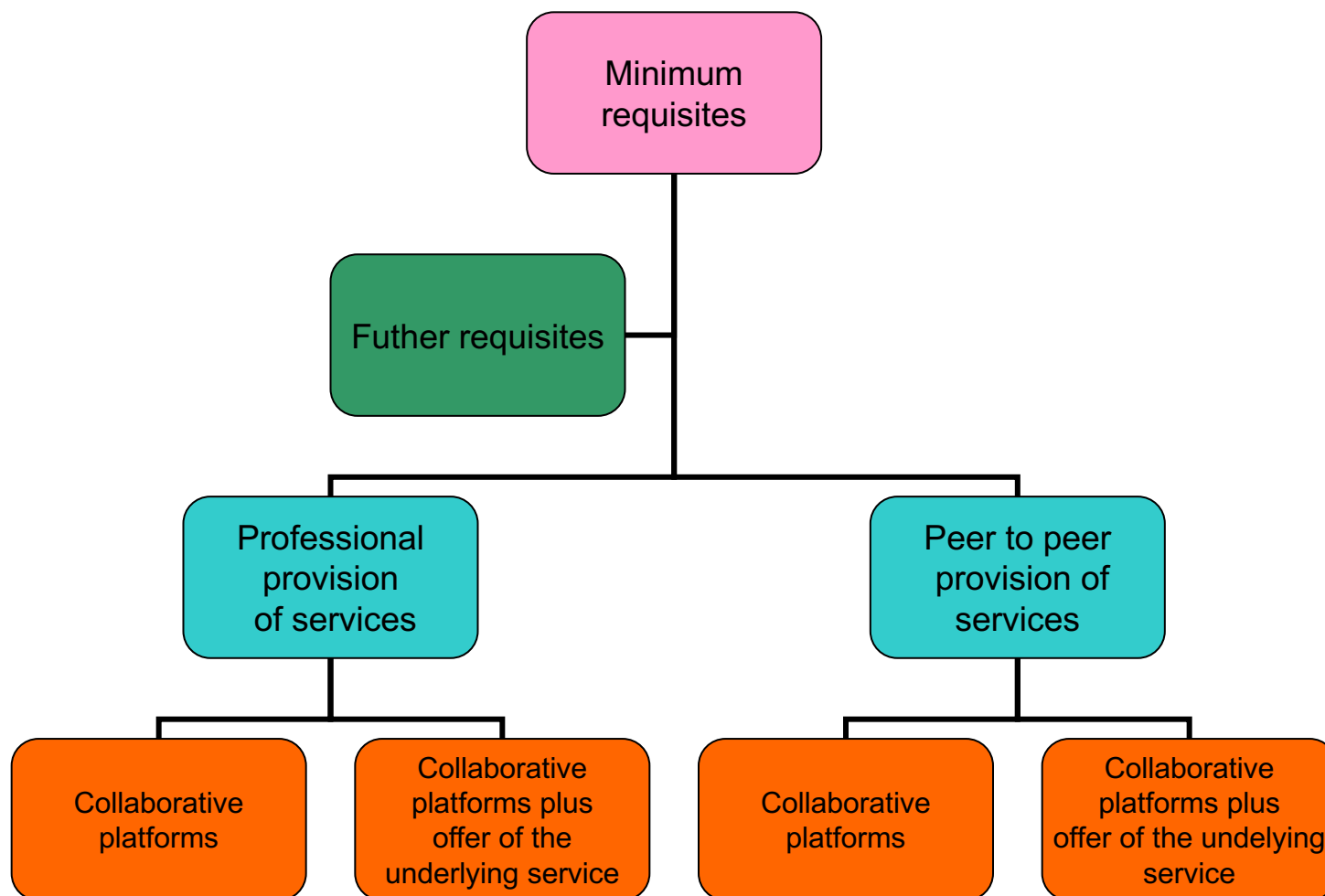
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The TNC – Transportation network companies in California:

- Phase I – 2012
- Phase II - ongoing



WHAT'S THE NEXT POSSIBLE SCENARIO ?



ANTONELLA TERRANOVA

partner

De Berti Jacchia Franchini Forlani

a.terranova@dejalex.com

www.dejalex.com

00198 Rome

Via Vincenzo Bellini, 24

tel. +39 06 809154.1

fax +39 06 809154.44

20121 MILAN

Via San Paolo, 7

tel. +39 02 72554.1

fax +39 02 72554.500

milan@dejalex.com

00198 ROME

Via Vincenzo Bellini, 24

tel. +39 06 809154.1

fax +39 06 809154.44

rome@dejalex.com

1170 BRUSSELS

Chaussée de La Hulpe 187

tel. +32 (0)2 645 5670

fax +32 (0)2 742 0138

brussels@dejalex.com

115114 MOSCOW

Ulitsa Letnikovskaya, 10

tel. +7 495 792 54 92

fax +7 495 792 54 93

moscow@dejalex.com



Services provided via a digital platform

-

Challenges for labour law

Brussels, 30 May 2017



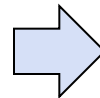
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Different types of employment

- Salaried employees
- Self-employed
- Civil servants

New types :

- Interim work
- Interim management
- Portfolio work
- Service vouchers
- Occasional work
- Flex work, etc.



Flexibility

Collaborative economy: characteristics

- Parties collaborate by providing services or sharing goods
- Whether or not in exchange for payment
- Via a platform
 - Jobs around the house
 - Sharing/renting cars
 - Renting apartments
 - Restaurants / deliveries
 - Care
 - Borrowing goods
- Increasing popularity



Remunerated
activities



+ New employment opportunities
+ Flexibility
+ Additional revenues
- Less regular
- Less stable

Classification: local rules

Taxi drivers:

- Either employees or self-employed, depending on the type of contract with the operator, subordination relationship in place (France, Poland, Belgium)
- Self-employed (Germany)
- Individual entrepreneurs, members of workers' cooperatives or via a consortium (Italy)



Third way ?

Supreme Employment Council: NO

Case law ?

- US:
 - Berwick Case
 - Lyft case (settlement agreement – 01/2016)
- UK:
 - GMB/Uber – London Central Employment Tribunal 10/2016)
- France:
 - Criminal court of Paris: VTC (Uber) €800,000 as a criminal penalty (06/2016).
- NL:
 - The “College van Beroep voor het bedrijfsleven”
- ...



Salaried employees

C-434/15 Elite Taxi / Uber Systems Spain

European Court of Justice - Preliminary ruling:

- Either as transport services or
- Digital platform providers/information society services within the meaning of the e-commerce Directive

Opinion of Advocate-General Szpunar (11 May 2017):

- Transport service
- (Services can be provided by subcontractors / unrelated to Elite Taxi case)

Open questions:

- Classification
- Labour conditions (CBA, unions /employee representation, working time, holiday entitlements)
- Salary conditions
- Well-being at work (regulatory issues)
- Liabilities
- Tax and social security contributions
- Benefits (unemployment, work incapacity, health care, pension rights)
- Competent inspections and courts

Classification: Definitions (1)

Salaried Employee

CJEU: 'The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'



- Link of subordination
- Nature of work (marginal and accessory)
- Remuneration (volunteer ?)

COM(2016) 356

Classification: Definitions (2)

Self-employed workers

- **Sociological criteria:** A physical person who performs professional activities in Belgium, without employment contact or being a civil servant
- **Tax criteria:** (i) physical person with a (ii) professional activity in Belgium who (iii) acquires income (profit, remuneration as company manager or assets)
 - Performed on a regular basis
 - Search for profit

→ Main activity

→ Complementary activity

Classification of employment relationship (1)

General Criteria to assess a link of subordination:

- Parties' intention expressed in the contract
- Freedom to schedule working time
- Freedom to plan the work
- Possibility of exercising hierarchical supervision

Belgian Programme Act of 27 December 2006

Classification of employment relationship (2)

Specific criteria:

Assumption introduced by the Law of 25 August 2012:

- Construction
- Security
- Transport
- Cleaning sectors

If more than half of the nine specific criteria have been met → labour relationship is refutably presumed to be ruled by an employment agreement

Specific criteria

1. Absence of any **financial or economic risks** carried by the worker;
 - no substantial personal investment in the company; or
 - worker does not participate in the losses or profits made by the company
2. Absence of any **responsibility or decision-making power**
3. No decision-making powers re. **pricing policy**
4. No decision-making powers re. **purchase/acquisition policy** of the company, unless the prices are defined by law
5. No obligation to achieve a **specific result** re. agreed services
6. Guarantee of **fixed remuneration**
7. Not being able to **hire workers**
8. Not acting as a company or working primarily for **only one** contracting party
9. Working **at premises** not owned or rented by the worker or working with tools which are put at his disposal

Collaborative economy (1)

- Specific regime: Programme Act of 1 July 2016
- Royal Decrees of 12 January 2017 (in force: 1 March 2017)

Conditions:

- Services
- Provided by a physical person
- To a physical person
- No professional activities
- Digital platform approved by the government
- Payments through the digital platform

Collaborative economy (2)

TAX

- Specific regime if annual gross income $\leq$ € 5.000 (*)
- Miscellaneous income ($\longleftrightarrow$ professional income)
- 50% can be deducted as lump sum cost
- Balance subject to fixed tax rate of 20% $\Rightarrow$ 10%
- Exempted (no VAT number or filing)

If $>$ € 5.000: entire income will be taxed

Except rebuttable evidence

Sanction: taxed as professional income

Quid affiliation ?

Collaborative economy (3)

SOCIAL SECURITY

- If annual income $\leq$ € 5.000 gross: no contributions as self-employed
- If $>$ € 5.000: affiliate as self-employed
 - If self-employed: total income treated as one
 - If salaried employee: complementary activity as self-employed

Collaborative economy (4)

	Main activity	Complementary activity	Collaborative economy
Affiliation Social Fund	Before start	Before start	n/a
Social Security Contributions	Min. € 13,296,25 (21,5%)	If < € 1,471 = € 0	€ 0
Income tax	Progressive rate	Progressive rate	20%
Expenses	Real expenses	Real expenses	50% income
VAT	Exemption if turnover ≤ € 25.000	Exemption if turnover ≤ € 25.000	n/a

Collaborative economy (5)

Conditions to get approved as a platform:

- Platform managed by company or non-profit association
- Located in EEA
- Responsible person = comply with professional liability conditions
- Application FPS Finance

Collaborative economy (6)

- Services only
 - No goods
 - No rental activities (20% + movable or immovable property)
- Peer to peer other than professional activities to:
 - Individuals (no professional activities)
 - Companies excluded
- Approved platform required (EEA)
- All payments through platform (withholding)

Outstanding topics

- Not all activities covered / only financial incentive ?
- Complexity for platforms (mix, legal requirements)
- Lack of equal treatment / acceptance of 'contracts on demand'
- Mini jobs
- Lack of protection
- Platform created by unions ? (e.g. FairCrowdWork = IG Metal)
- Delegation of employer's authority ? Prohibited by Act of 24 July 1987
- App with tracer integrated within taxi sector

Johan Kerremans

j.kerremans@janson.be

+32 (0)2 663 85 03



67 years of solutions

Brussels

Chaussée de La Hulpe, 187
Terhulpsesteenweg 187
1170 Brussels - BELGIUM
Tel. : + 32 2 675 30 30
Fax : + 32 2 675 30 31

Nivelles

Place Albert 1^{er}, 13
1400 Nivelles - BELGIUM
Tel. : +32 67 21 79 95
Fax : +32 67 21 72 45

Gent

Congreslaan, 27
9000 Gent - BELGIUM
Tel. : +32 9 240 77 20
Fax : +32 9 244 51 81

Uber and IP

*Mireille Buydens, Professeur à l'Université Libre de Bruxelles,
associé du cabinet Janson Baugniét*



Janson
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- ✓ Uber was founded in San Francisco circa 2008
- ✓ First application: UberCab launched in NY city and San Francisco in 2010
- ✓ First Cease&Desist action in 2010 from the San Francisco Metro Transit Authority & Public Utilities Commissions of California for acting as a cab company without license
- ✓ 2015: valuation at 62,5 billion



- ✓ 2016: Uber is available in 60 countries and 404 cities
- ✓ 11 May 2017: conclusions of ECJ Advocate General Szpunar in the matter C-434/15 Asociacion Profesional Elite Taxi vs. Uber Systems Spain SL: Uber is a public transportation service, not a mere platform putting users and drives together
- ✓ May 2017: Uber launches Uber Freight
- ✓ 26 May 2017: A Rome court annulled a short-lived ban on ride-hailing app Uber

Uber and its IP strategy

1. Patenting the app?

- Uber (and Uber-type companies) is based on a business model materialized in an application
- Business models/methods: patentable in the US (but weak)
 - o Uber US Patent No. 9.066.206 (filed March 15, 2013, concerning a “system and method for providing dynamic supply positioning for on-demand services”, i.e. a method for providing on-demand service information)
 - o Uber US Patent No. 9.135.353 (filed June 25, 2012, concerning “high precision internet local search”, i.e. a method for identifying webusers on a map).
- Business models/methods: not patentable in Europe – Art 52(2) EPC: “*The following in particular shall not be regarded as inventions within the meaning of paragraph 1: (..) (c) schemes, rules and **methods for performing mental acts, playing games or doing business**, and programs for computers;*”
- Uber files many patents, especially as from 2015 (409 hits in Espacenet! 20 for EP’s)

- Could Uber patent the “App”?

Example Jan . 2017



US 20170116065A1

(19) **United States**
 (12) **Patent Application Publication** (10) **Pub. No.: US 2017/0116065 A1**
 Holden et al. (43) **Pub. Date: Apr. 27, 2017**

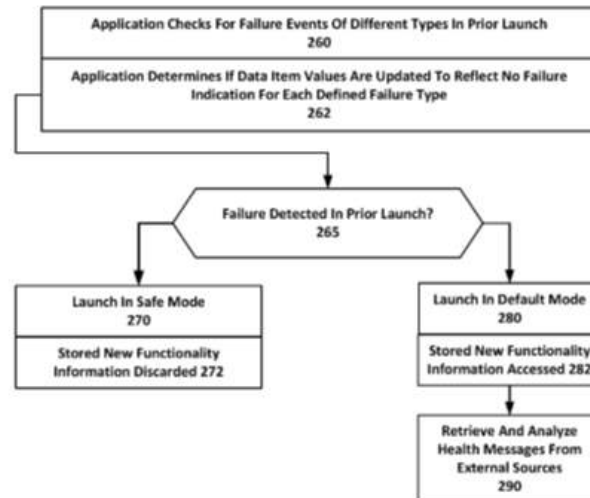
(54) **SYSTEM AND METHOD FOR INTRODUCING FUNCTIONALITY TO AN APPLICATION FOR USE WITH A NETWORK SERVICE** (51) **Int. Cl.**
Publication Classification
G06F 11/07 (2006.01)
G06F 11/36 (2006.01)

(71) Applicant: **Uber Technologies, Inc.**, San Francisco, CA (US) (52) **U.S. Cl.**
 CPC: *G06F 11/0709* (2013.01); *G06F 11/0751* (2013.01); *G06F 11/0787* (2013.01); *G06F 11/0791* (2013.01); *G06F 11/3668* (2013.01); *G06F 2201/865* (2013.01)

(72) Inventors: **Paul-Phillip Holden**, San Francisco, CA (US); **Logan Rockmore**, San Francisco, CA (US)

(21) Appl. No.: **15/397,535** (57) **ABSTRACT**
 (22) Filed: **Jan. 3, 2017**
 A computing device operates an application to receive and implement new functionality from a network service. If the new functionality causes the application to fail, the application can automatically discard or ignore the new functionality when the application is re-launched.

Related U.S. Application Data
 (63) Continuation of application No. 14/612,913, filed on Feb. 3, 2015, now Pat. No. 9,575,837.



- o **Software is not patentable *as such* in Europe:** art. 52 (2) c and (3) EPC → no patent for source code as such (but copyrightable)

Art 52(3) EPC: *“Paragraph 2 shall extend the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities **as such**.”*

EPO practice:

- ✓ subject matter of claim is assessed as a whole
- ✓ if at least some of the subject-matter is not excluded, then the claim is not excluded

o **Computer-implemented inventions can be patented if the following conditions are met :**

- It is an invention – no definition in EPC but = a technical solution to a technical problem
- The invention is new
- The invention is inventive
- Industrial application



➔ **Computer-implemented invention patentable if it contains an instruction addressed to a skilled person as to how to solve a particular technical problem using particular technical means.**

The computer program must bring a "further technical effect" going beyond the "normal" physical interactions between the computer program and the computer hardware on which it is run.

When is a computer-implemented invention technical?

Technical	Non technical
Software controlling or carrying out a technical process or controlling a device (washing machine, brakes..)	Business method
Invention impacting the internal functioning of the computer itself (e.g. memory organization)	Computer programs for implementing a business method (originate from non-technical constraints of particular business requirements)
Processing of measuring results	Words processing (Word, excel)
Simulation of technical process	Mere bookkeeping
Method of encrypting/decrypting or signing electronic communications	Theory without a technical application
A SIM card having two identities (e.g. professional and private)	
communication/media technology such as automated natural language translation, voice recognition or video compression	
Computer-implemented method for viewing changes to an original optimization plan for a query to a database	
A method of displaying applications on a mobile device	

➔ The key question for computer-implemented inventions: are they inventive?

Art 56 EPC: *“An invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.”*

EPO practice:

- Non-contributing features can not be considered when evaluating inventive step
- Non-technical features ≈ special class of non-contributing features

Cfr. T0844/09 – COMVIK (5/02/2013) “ According to established jurisprudence, an invention consisting of a mixture of technical and non-technical features and having technical character as a whole **is to be assessed with respect to the requirement of inventive step by taking account of all those features, which contribute to said technical character** whereas features making no such contribution cannot support the presence of inventive step.”

o **Assessment of inventive step:**

- Define the closest prior art (CPA)
- Define the difference between invention and CPA
- What technical problem does this difference solve?
- Could a “person skilled in the art” easily solved the same problem in the same way to reach the same effect using his general knowledge?

- **Uber-type applications: patentable if “technical” (will often be the case) and “inventive” (more difficult as the non-technical features are not taken into account for assessing inventiveness).**

EX: EP2024939B1: “draggable maps” – Claim 1: *“a computer-implemented method for rendering a map, the map including a plurality of tiles and further including a specified location, the method comprising: receiving, by a computer, a first request for a tile grid (...).”*

- o **Patent is a useful tool for computer-implemented inventions**

Fraunhofer study of June 2015 (“The economic impacts of computer-implemented inventions at the European Patent Office” 4iP Council/Fraunhofer, ISBN: 978-3-945185-02-5):

- o *“Since about 2002, more than 35% of total filings at the EPO are CII patents”.*
- o *“In total, almost 1.4 million jobs were directly or indirectly dependent on CII in 2010 in Germany. These are 3.9% of total employment.”*
- o *“In the manufacturing sector 14.2% (abs.: 963.000) of the jobs are dependent on CII”*

2. Take care not to infringe third parties' rights!

- February 2017, San Francisco: Waymo (Google) starts litigation against Otto (Uber) for violation of trade secrets. Anthony Levandowski, former Google employee, left Google in 2015 with 14000 documents concerning i.a. the Lidar system used in computer-controlled vehicles (laser detection and ranging). Levandowski works for Otto, taken over by Uber, and developing the same type of vehicles...
- Problem with the patents filed by Uber based on this information!



3. Uber trademark strategy : protecting words and logos giving the company a strong image/corporate identity

- Protecting the image/trademark is key for “trust based” services, in particular online services
- Uber first protected the **wordmark**

- 2011: UBER (EU TM no 010460442 - IR no 1111203)

9 Computer software for coordinating transportation services, namely, software for the automated scheduling and dispatch of motorized vehicles; Computer software; Computer peripherals; Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; Apparatus for recording, transmission or reproduction of sound or images; Magnetic data carriers, recording discs; Automatic vending machines and mechanisms for coin-operated apparatus; Cash registers, calculating machines, data processing equipment and computers; Fire-extinguishing apparatus. 38 Telecommunications services, namely, routing calls, SMS messages, and push-notifications to local third-party motorized vehicle operators in the vicinity of the caller using mobile phones; Telecommunications. 39 Providing a website featuring information regarding transportation services and bookings for transportation services; Transport; Packaging and storage of goods; Travel arrangement. 42 Providing temporary use of online non-downloadable software for providing transportation services, bookings for transportation services and for dispatching motorized vehicles to customers; Scientific and technological services and research and design relating thereto; Industrial analysis and research services; Design and development of computer hardware and software.

- Uber then protected the “**sub-marks**”, **icons and logos**

o 2013 (EU) :



o 2015 (US):



o 2016 (EU):



o 2015 onwards: UBERX, UBERRUSH, UBEREATS, UBERGO, UBERPOOL....

- Followers:



Owner: Demon Tweeks Limited

Classes:

9 Clothing and footwear for motor cyclists and racing drivers; clothing for protection against fire, injury; protective and safety clothing and footwear; safety apparatus and equipment for motorcyclists and racing driving; helmets; safety goggles; ear protectors; sunglasses; protective clothing and footwear for cyclists; battery chargers.

12 Bicycles and parts thereof; tricycles and parts thereof; motorcycles and mopeds and parts thereof; saddle bags; accessories for bicycles and tricycles in this class; covers for bicycles; motorcycle parts; motorcycle covers; motorcycle tyre warmers; discs and pads for motorcycles; luggage adapted for motorcycles; bicycle stands and motorcycle stands; heated grips for handlebars; chains and sprockets for bicycles and motorcycles; tax disc holders adapted for motorcycles; locks and locking devices for bicycles, motorcycles.

Mireille Buydens
Avocat Associé de Janson Baugniet,
Professeur à l'Université Libre de Bruxelles

Chaussée de La Hulpe, 187

B-1170 Bruxelles

Tel. : +32 2 663 07 48

E-Mail : M.Buydens@janson.be



60 years of solutions

Brussels

Chaussée de La Hulpe, 187
Terhulpsesteenweg 187
1170 Brussels - BELGIUM
Tel. : + 32 2 675 30 30
Fax : + 32 2 675 30 31

Nivelles

Place Albert 1^{er}, 13
1400 Nivelles - BELGIUM
Tel. : +32 67 21 79 95
Fax : +32 67 21 72 45

Gent

Congreslaan, 27
9000 Gent - BELGIUM
Tel. : +32 9 240 77 20
Fax : +32 9 244 51 81

L'ubérisation

Comment appréhender ce phénomène ?

Christophe Sempels



Ubérisation ?



Ubériser

UBÉRISER v. tr. 1. (de *Uber*, nom d'une start-up) Transformer (un secteur d'activité) avec un modèle économique innovant tirant parti du numérique.
Start-up qui ubérise le secteur de l'hôtellerie. n. f. **ubérisation**

... cela ouvre un vaste champs aux multiples dimensions...

Economie collaborative, économie de pairs à pairs, économie de plateforme, mutualisation de biens, *on demand economy*, freelancisation, *gig economy*, consommation collaborative, styles de vie collaboratifs, production contributive, finance collaborative, économie du partage, réemploi, éducation collaborative, crowdsourcing, ...

Ubérisation ?

- Une diversité d'opérateurs sous divers statuts : société à capitaux, association, initiative citoyenne, coopérative, service public, ...
- Des logiques monétarisées VS fondées sur le don
- Une forte hétérogénéité dans les motivations (économiques, politiques, sociales, sociétales)
- Un rapport très variable et parfois ambigu face au développement durable



Ubérisation ?

Des acteurs emblématiques



Valorisation : \$70 milliards
CA : 5,5 milliards (2016)
Résultat net : - 2,8 milliards en
2016



Valorisation : \$30 milliards
Après 8 ans, premier profit
sur T2/2016

Ubérisation ?



TaskRabbit



couchsurfing

autolib'



Ubérisation ?

Et un principe de fonctionnement : la désintermédiation / réintermédiation



Qui est menacé ?

Exemple

Toute transaction économique engendre des coûts préalables à sa réalisation

coûts de transaction

Situation initiale : je suis un jardinier indépendant travaillant avec des sous-traitants en fonction de mes besoins et de ma charge de travail. Mes coûts de transaction sont composés :

1. Des « coûts de recherche et d'information » : recherche de sous-traitants, évaluation des compétences, ...
2. Des « coûts de négociation et de décision » : évaluation des offres des sous-traitants, rédaction et conclusion des contrats, ...
3. Des « coûts d'exécution et de surveillance » : coût de la prestation, contrôle de la qualité du résultat, ..

Les coûts sont directs (imputables directement à un chantier). Ils sont flexibles et variables en fonction de mes besoins

Exemple

Toute transaction économique engendre des coûts préalables à sa réalisation

coûts de transaction

Evolution : je décroche un gros contrat de 5 ans. L'expérience m'a montré que les sous-traitants sont attachés à leur liberté et que leur rotation est importante. L'idée de devoir passer un temps fou à chercher constamment de nouveaux sous-traitants et de devoir apprendre à travailler avec eux me semble fastidieuse. Je privilégie donc de créer une entreprise et d'engager 6 jardiniers salariés qui pourront non seulement se consacrer à ce contrat, mais aussi aux autres chantiers. Il me faut acheter du matériel ainsi que louer un hangar pour stocker l'équipement et les consommables (semences, végétaux, amendement, carburant, ...)

Ma structure de coût se complexifie : aux coûts directs (p.ex. plantes ou semis) viennent s'ajouter des coûts indirects (non imputables directement à un chantier – p.ex. l'outillage ou le loyer du hangar). La structure de coût comprend par ailleurs désormais d'importants coûts fixes.

Exemple

Toute transaction économique engendre des coûts préalables à sa réalisation

coûts de transaction

Evolution : ma société grandit. J'embauche, j'acquiers de plus en plus de matériel. Je dois nommer des chefs d'équipe, des responsables de planning. Je crée un service achat. J'internalise la fonction comptable...

Ma structure de coût intègre de plus en plus de coûts non directement productifs (fonction support, management, ...). Par ailleurs, le reporting que je demande aux équipes nuit à leur productivité.

Exemple

Toute transaction économique engendre des coûts préalables à sa réalisation

coûts de transaction

J'apprends que la société Ugarden vient de lancer une plateforme synchronisant des gens qui ont des besoins d'entretien de jardin avec des gens qui peuvent répondre à ces besoins. Chaque contributeur-jardinier est évalué par les clients antérieurs, de sorte qu'il est facile d'identifier dans sa zone géographique un prestataire compétent.

Je suis horrifié par les prix pratiqués. A leur taux horaire, je ne couvre même pas mes frais fixes...
Que vais-je devenir ?

Décodage

- Parce que je considérais que les coûts de transaction d'une approche par le marché devenaient prohibitifs, j'ai créé une entreprise.
- En me développant, ma masse salariale a gonflé, j'ai dû acheter équipements et des locaux ...
⇒ mes coûts de structure et mes coûts de management ont augmenté



Décodage

- Internet est ensuite arrivé. Avec lui, les coûts de transaction ont drastiquement baissé. Par ailleurs, le web permet aux opérateurs de plateforme de bénéficier d'une force de travail ou d'actifs sans avoir à les posséder.
- En synchronisant l'offre et à la demande à un coût de transaction très faible, cet opérateur peut se rémunérer sur le travail offert ou sur la mobilisation d'actifs qu'il ne détient pas, contrairement à moi.
- La désintermédiation s'est opérée, l'entreprise ne sait pas suivre si elle opère sur les mêmes marchés



En conclusion

- Tous les modèles dont les coûts de structure et les coûts de management sont élevés risquent-ils de se faire « ubériser » ?
- Les facteurs de risque sont nombreux :
 - Au plus le facteur travail est peu spécialisé et/ou les actifs sont largement disponibles, au plus le risque est grand de se faire désintermédier.
 - Uber : voiture + capacité à la conduire
 - AirBnB : logement + capacité à accueillir des hôtes, ranger et nettoyer le logement
 - KissKissBankBank : argent + capacité à naviguer sur Internet
 - ...

En conclusion

- o Le risque est amplifié si vous opérez dans un secteur non optimisé en termes d'utilisation des capacités de production (ex. GoJet)
- o Risque si votre secteur d'activités compte nombre d'indépendants ou d'autoentrepreneurs en complémentaire (ex. lepermislibre.fr ; Popmyday – 1,1 millions d'AE en France, 3 millions d'entreprises individuelles)
- o Risque si l'expertise peut s'encapsuler dans un support donné qui est le résultat recherché (p.ex. Testamento / Coursera)

En conclusion

- o Risque si vous opérez dans un marché complexe mais sous-tendu par des prestations standardisées, fondées sur des tâches routinières ou dont la valeur ajoutée est mal appropriée (demanderjustice.com, Gojob)
- o Risque si vous opérez dans un secteur d'activité faiblement orienté clients / avec une qualité clients perçue faible (Uber)
- o Risque si vous opérez dans un secteur déficitaire en termes de confiance clients (insPeer, Morning, ...)

Votre secteur d'activité se fait ubériser

Quelles réactions possibles ?

Pistes à méditer

- Il n'y a pas de réponse toute faite, tout dépend du contexte et de la situation singulière à traiter.
- Dans tous les cas, une réaction frontale n'a aucune chance de fonctionner. Toute réaction restant fondée sur la ressource matérielle ou la ressource immatérielle encapsulée dans une quasi-commodité ne peut pas rivaliser.



Pistes à méditer

- Revisitez le périmètre de votre métier pour l'enrichir autour d'une raison d'être de plus haut niveau

Garantir un environnement sain

Garantir une maison propre

Offrir une prestation de ménage

Pistes à méditer

- Augmenter de manière sensible la part d'immatériel dans votre offre et les effets serviciels atteignables pour travailler en profondeur la pertinence et la singularité de l'expérience
- Valoriser cette part par et pour elle-même - rémunération des effets induits - et non à travers son encapsulation dans un support matériel donné
- Vous appuyer sur le numérique pour accompagner la pleine valorisation de ces ressources

