

Copyright Rules for the Digital Age

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As part of its so-called ‘digital single market strategy’, in 2016, the European Commission undertook a review of the European Union’s (“EU”) copyright regime resulting in a proposal for a new directive on ‘Copyright in the Digital Single Market’.

After a long period of debate and review, the European Parliament finally adopted a revised version of the draft legislation on 12 September 2018 which has now been passed to the Member States and the European Council for further review before a final version can be agreed by the various legislative institutions and adopted into EU law, presumably sometime early next year.

The “Copyright in the Digital Single Market” directive is the latest in a number of copyright directives adopted by the EU over the past two decades, most notably the 2001 directive on the “harmonisation of certain aspects of copyright and related rights in the information society”, better known as the “Information Society directive”.

In contrast to other areas of intellectual property law, such as trade marks, designs and patents, where EU legislators, keen to prevent IP rights from being used as barriers to trade within the single market, introduced comprehensive legislation aimed at maximum harmonisation, copyright has so far been treated piecemeal by EU law makers and the approach has largely been limited to defining minimum standards for protection.

The new draft legislation proceeds along the same lines. It is concerned with addressing a set of specific copyright issues relating (mainly) to the digital environment.

New rules for a new age

The application of copyright rules to the digital environment raises a host of technical legal questions, some of which have already been addressed in the 2001 Information Society directive. The Court of Justice of the EU has also examined such issues on several occasions in the past, based on the basic principles set out in the directive (for example, whether providing a hyperlink that directs internet users to infringing materials on a third party website, or the transmission of a television signal to TV sets in a pub or in hotel rooms, are acts that can potentially constitute copyright infringement).

In part, the new proposed legislation deals with a number of technical points

of that nature. There are new provisions relating to the digital use of copyright materials for teaching, demonstration and educational purposes and for cultural preservation purposes. Similarly, there are provisions dealing with data mining of digital resources by non-commercial research institutions. These provisions in fact add only incrementally to existing provisions in the Information Society directive that cover much the same ground.

Enhanced rights for authors of works

The new directive also includes a chapter (not focused directly on the digital environment) that will enhance the rights of authors and performers who granted publication rights in relation to their works. The proposal seeks to ensure that authors will have rights to receive regular reports from their publishers regarding the exploitation of their works and in some cases even the right to require terms in publishing contracts to be adjusted where the remuneration originally agreed to the author is disproportionately low compared to the exploitation value of the work.

Another provision (added by the EU Parliament in the latest round of revisions) will allow authors who granted exclusive rights to publishers to terminate those rights where the licensed work is not being exploited.

Special protection to press publishers and organisers of sporting events

Alongside these proposals which would be unwelcomed by publishers, the new legislation also seeks to promote the interests of press publications, a sector struggling to survive economically as a result of falling circulation figures and the shift of advertising spend to the online platforms.

The draft directive seeks to help press publications secure appropriate remuneration for the dissemination of news content through digital channels. To do so, the legislation will create a new type of copyright for the benefit of press publishers.

The new right will exist alongside the rights of authors (journalists, photographers and other contributors of content). It will last for 5 years (a period cut down by the EU Parliament from the 20 year period originally proposed by the EU Commission) and will entitle press publishers to a share of the revenue generated by digital platforms from the aggregation and dissemination of news content.

Like much of the EU copyright legislation (including the Information Society directive), the proposals on the new rights to be enjoyed by press publishers, as well as another new special copyright that will benefit organisers of sporting events, are lacking in detail and it is not entirely clear how those new rights will work in practice.

The draft legislation does not provide much detail as to the conditions for such rights to subsist in the first place or what acts exactly will amount to infringements of those rights. For instance, there is no mention of the principle of originality nor any reference to the requirement of substantial taking. It may be that these threshold requirements for the validity of rights and their infringement are assumed.

At any rate, it can be expected that the very fact that press publishers and organisers of sporting events will have their own independent copyright in the relevant subject-matter – distinct from the copyright of authors who contribute to the news publication or the rights of broadcasters who record and distribute footage from sporting events - should make it easier for such bodies to ensure that online publishers pay an appropriate share of the revenues generated from the digital dissemination of news and sporting events.

Policing cyberspace

Much attention has been paid by the media (particularly online) to another set of provisions in the draft legislation, in Article 13, focusing on the enforcement of copyright against unauthorised distribution of copyright materials by users of online platforms.

The ease and speed by which digital content can be reproduced, distributed, published and republished online, create significant challenges to rightholders who see their assets being abused with impunity. Analogue technologies enabled infringements in the past - for instance, when vinyl records were copied onto tapes or cassettes or the use of photocopiers to copy pages from textbooks, journals and other paper publications. But the digital environment provides the tools to create copies at a quality which is often indistinguishable from the original and to distribute those copies widely (or to publish them to the world at large) all at virtually zero cost for the user. Consequently, rightholders struggle to cope with high levels of unauthorised (and unpaid-for) access to valuable content, which they claim make it increasingly difficult for legitimate

publishers and for the authors and creator of content to generate revenue from published works, particularly music and films.

The new directive sets out to tackle this problem and to provide better legal tools to allow publishers and rightholders to fight infringements online and to ensure they are remunerated for the exploitation of their content.

The proposals sparked a lively debate over free speech principles and the virtues of the content-sharing culture on the Internet.

These concerns are not unfounded. Copyright and censorship always went hand in hand and the enforcement of copyright is inevitably a form of constraint on free speech and the free circulation of content. On the other hand, copyright exists precisely in order to protect works of authorship against unauthorised distribution and exploitation and there is no reason to accept unbridled abuse of copyright materials, whether on- or off-line.

Can legislation help to curb online infringements?

Beyond the ideological arguments and campaigning efforts on both sides of the debate, there is the question whether the directive offers any interesting new ideas that may help solve the perceived problem of rampant copyright piracy online.

The stated aims of the directive, as described in the Commission's press release, is to create "clearer rules of the game for a functioning copyright marketplace, which stimulates creation of high-quality content".

The text of the directive is yet to be finalised and only time will tell whether its provisions will have the effect hoped for. The text before us, however, particularly the provisions concerning the online distribution of unlicensed materials, is not the easiest legal text to follow.

Article 13 focuses on the distribution of unauthorised copyright material on digital platforms that host a significant volume of user-contributed content. The draft directive contains complex definitions of what amounts to such a platform. The text suggests that legislatures wanted to ensure that the provisions of Article 13 will only apply to very large online players. However, the language can be quite open to interpretation and some smaller operators may be caught as well.

The proposed legislation would mark a shift from the principles laid down in the e-Commerce Directive (Directive 2000/31/EC), which provide immunity from liability to any host of digital content as long as it acts expeditiously to remove infringing content upon receiving a complaint. The mechanism places a burden on the rightholder to identify infringing content on digital platforms and to notify the operators in each case where the rightholder wants infringement content to be 'taken down'.

Article 13 introduces the idea that large

platforms that host user-contributed content would have to take proactive measures, in cooperation with rightholders, to police their platforms and to remove infringing content, not just in response to 'take down notices' (something that it is understood many of them do anyway). But the draft legislation does not impose a general obligation on such platform to act proactively to remove infringing content. The obligation would only apply as required "to ensure the functioning of agreements concluded with rightholders for the use of their works [...] or to prevent the availability on their services of works [...] identified by rightholders through the cooperation with the service providers".

The language is somewhat cryptic, and in the latest round of revisions the EU Parliament introduced a great deal more complexity to the text.

The amended text declares – effectively making a finding of fact – that operators of platforms that host user-contributed content are engaging in acts of 'communication to the public' in relation to such content ('communication to the public' being one of the acts restricted by copyright). It proceeds to state that, therefore, they must enter into licensing agreements with rightholders. Further, it is stated that those agreements must "cover the liability for works uploaded by the users of such online content sharing services in line with the terms and conditions set out in the licensing agreement, provided that such users do not act for commercial purposes".

The text provides that if rightholders do not wish to enter into such agreements (that is, to license the distribution of the content by end-users on the platform) the platform operator and rightholders must cooperate to ensure that unauthorised copies are not available on the platform.

In other words, the legislation tells platform operators – either you enter into licensing agreements with rightholders to enable users to distribute content, in which case you must act proactively to ensure that the licence terms are not abused by users' conduct, or else you must cooperate with rightholders to prevent infringements on your platform.

What that means in practice is far from clear. Normally, the law lays down rights and liabilities which provide the backdrop against which relevant parties can enter into contracts. It is unusual to provide in legislation for particular obligations (in this case, to cooperate in implementing anti-piracy measures) by reference to agreements that may or may not be entered between relevant parties and by reference to terms and conditions that would need to be negotiated. The proposed text, far from laying down 'clearer rules of the game for a functioning copyright marketplace', opens up an awful lot of questions.

Safeguard against over-zealous enforcement

Another element added to Article 13 as part of the revisions introduced by the EU Parliament seeks to provide a response to concerns raised since the publication of the Commission's proposal that the requirement to use active measures to

fight online piracy will lead to systems of censorship that will jeopardise the distribution on content sharing platforms of legitimate content including parodies, pastiche and other forms of derivative works that are (or can be) exempted from copyright protection.

In response to these concerns the amended legislation requires that platform providers set up "effective and expeditious complaints and redress mechanisms" allowing users to complain, anonymously, against the removal of content they claim is legitimate. This mechanism seems a rather naïve attempt to pass a complex problem – the application of exemptions to copyright protection, which are often a matter of context and judgment, to specific works – over to the hands and responsibility of internet companies.

The EU legislatures hope that these provisions will force rightholders and platform operators to work together and to put in place contractual arrangements and enforcement systems that would not only ensure that rightholders are adequately remunerated for the sharing of materials by the users of digital services but also that the legitimate rights of those users will be safeguarded. This is an ambitious plan which has not been received well by the internet industry.

Conclusion

The EU proposals for new copyright rules for the digital age address some real issues and fundamental economic problems brought on by the emergence of digital technologies. On the one hand they seek to unlock access to copyright materials for research, education and cultural preservation purposes, which are all in the public interest, and to do so without undermining the economic interests of rightholders. On the other hand, they set out to enhance the position of authors and publishers who struggle to receive a share of the economic benefits generated from the explosion of information sharing and content distribution that happens online, largely free of charge, and which generate significant revenues to the operators of online platforms.

There are no simple solutions to these issues. Those proposed by the EU in the current legislation may need to be practiced and developed over time before their impact can be assessed.

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Ron advises on a wide range of technology related transactions, investments and compliance matters working primarily with clients in the software and digital field, electronics and telecoms, medical devices and life sciences. Ron also gained much experience in the aerospace and automotive, cleantech, consumer products, branded goods and food industries.

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