

COMMENTARIES

Rewriting the Rule Book? The Latest on the Draft Copyright Directive

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The Draft Copyright in the Digital Single Market has been approved by the EU Parliament. This is a commentary on the key provisions which impact on the media and entertainment industries, namely the link tax for digital publication of press publications, the new liability for content on digital sharing platforms and rights for sports event organisers.

Keywords: Digital; copyright; media; content sharing; directive

Introduction

On 12 September 2018, the European Parliament approved the Draft Directive on Copyright in the Digital Single Market (European Commission, 2016). In recent years, there have been several directives that have modernised the scope of copyright and related rights protection to make it fit for purpose in the digital age. For example, there has been the European Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and European Council Directive 96/9/EC on the legal protection of databases.

The scope of the current draft Directive is wider. It forms part of the EU's Digital Single Market Strategy for regulation of the business models that have emerged with the development of digital technologies (European Commission, 2015). The Directive is therefore in part an intervention in the commercial relationships between information society service providers and rightsowners and its provisions are likely to have real operational bite if fully implemented. In addition, the Directive has the ambitious policy objective of shoring up sustainable news media across the EU to facilitate citizens' access to reliable online news content, thus providing a counterweight to fake news. This article will consider how the Directive purports to achieve these aims with a focus on Article 11 and 13, which are the provisions which have generated most debate. Article 12a, which gives new rights to sport event organisers, is also considered. These provisions directly engage two of the aims behind the Directive: (i) the fostering of high-quality journalism and (ii) the assurance that creators, and those who invest in the production of content, have a say about whether and on what terms their content should be made available on online platforms.

The Directive has already been the subject of fierce lobbying from two opposing camps. On the one hand, the digital tech giants and campaigners for internet freedom oppose what they perceive as censorship and the tighter regulation of online content. On the other hand, rights holders welcome provisions that create revenue streams for use of copyright works on digital platforms. The tension around this debate caused the EU Parliament to defer approval of the Directive in June 2018. The form of the Directive that was eventually passed by the Parliament in September diluted some of the obligations on digital service providers. It is possible that there will be further dilution as the Directive is negotiated (and lobbied) through the next stages of the legislative process. At an official press conference held just after the Directive had been approved it was heralded as a major step forward in making the internet a fair place for the so-called 'crown jewels' of Europe – namely, the creators and authors and associated industries. Yet it was also stressed that the Directive was not seeking confrontation with internet platform operators and there was no intention of imposing mandatory filters or censorship. Keeping both camps happy will be a delicate balance. As will be explored below, the mechanisms by which crucial provisions of the Directive will be implemented have been kept fluid and important provisions have been left for future dialogue between stakeholders. To that extent some of the points of tension have been circumvented, at least in the short term.

Article 11 – A Link Tax on News?

Article 11 requires information society service providers to pay 'fair and proportionate' remuneration to publishers of press publications for making their publications available to the public by digital means. This is achieved by new reproduction and digital communication rights for press publishers, which will last for 5 years from publication of the

original article, beginning on 1 January of the year following the date of publication (draft Article 11(4)). In recognition of some of the concerns raised by opponents of this provision, the period of protection has been shortened from the 20-year period that was originally proposed. The remuneration obligation has been reported to be a 'link tax' (for example Woollacott, 2018; Reda, 2018). In contrast, the Directive portrays it as a de facto subsidy for responsible journalism.

The precise details of how the rights will be administered and calculated is not elaborated but payment of money is clearly envisaged. Recital 33 states that the mere listing of an article or author in a search engine should not be considered fair and proportionate remuneration.

Information society service providers are not specifically defined under Article 11, other than it is clear that service providers must be doing something to optimise content. Where the news aggregation consists solely of a hyperlink or of a hyperlink accompanied by an individual word or (disconnected) words the rights will not apply (draft Article 11(2a)). The obvious target of the provisions are news aggregation services such as GoogleNews and Twitter which link to content from a range of publications, but the scope of the Article is arguably wider. The Directive makes it clear that legitimate private and non-commercial use of press publications will not be caught by the provisions (draft Article 11(1a)) but there is currently no de minimis limitation on commercial use and it seems that remuneration will therefore be payable by smaller commercial information society service providers who do more than provide a hyperlink to press publications.

A press publication is defined in draft Article 2(4) as an item produced by publishers or news agencies of a journalistic nature, such as an individual item in a periodical or regularly updated publication (e.g. newspapers or general or specialist interest magazines). The publication must have the purpose of providing information related to news or other topics and must have been published in any media under the initiative, editorial responsibility and control of a service provider. Excluded are articles from scientific or academic journals. It would stretch the definition to include articles by individual bloggers or citizen journalists who not aligned to industry publishers. It would therefore appear that they fall outside the scope of the new remuneration right, which reflects the objective of shoring up the established professional news media. The new right is not intended to monopolise content. The protection conferred does not extend to the underlying information within a publication which third parties should be free to use, as they would be under current copyright law. Recital 34 provides that Member States should be able to subject the new press publisher rights to the same exceptions and limitations as apply to copyright. In the UK this would mean that the UK Government could provide for fair dealing of press publications for certain purposes, including quotation and criticism and review.

The Directive requires press publishers to share the additional publication revenue so that authors achieve an 'appropriate' share of the revenue. This is intended to achieve fair remuneration for journalists and will apply whether journalists are employees or independent contractors engaged by the press publication. This concept is akin to the remuneration rights enjoyed by performers under 182D Copyright Designs and Patents Act 1989, which provides a non-waivable right to equitable remuneration for performers payable by the copyright owner for exploitation of sound recordings. Recital 35 of the Directive provides that the amount of compensation should take into account specific industry licensing standards accepted as appropriate in the relevant Member State.

The social policy behind the creation of a defined revenue stream for press publishers chimes with the times. In recitals 31 and 32 to the Directive, it is recognised that the growth of news aggregation sites has led to a 'remarkable regression in the media landscape' particularly a decline in regional news. The creation of digital publication income is intended to safeguard high quality professional journalism. In the era of fake news, the Directive is concerned that the availability of reliable information is guaranteed. In the UK, we have also recently seen the launch of the Cairncross Review, which is considering how to sustain the production of high-quality journalism in a changing market, and Article 11 aligns with that concern.

However, critics point to the fact that similar schemes in Germany and Spain have not had a good track record and have failed to benefit the media industries leading to a decline in reliable news content being available online. A review into the economic evidence underpinning Article 11 – including evidence from the European Commission itself – has been carried out by Copybuzz, an online initiative that analyses copyright issues. It concluded that in Spain and Germany the news aggregators benefitted publishers by increasing traffic visiting the publishers' websites. A decline in exposure on the aggregators' sites when mandatory licence fees were imposed led to a corresponding decrease in traffic (Moody, 2018). In Germany a major news publisher, Axel Springer, was reported by Reuters as saying they would have 'shot themselves out of the Market' if they had continued to charge Google licensing fees for use of extracts from their articles (Wolde and Auchard, 2014).

Of course, a uniform pan-European Union approach may provide publishers with a better negotiating hand leaving the aggregation services with no option but to pay fees for use of content. It does seem that much will depend on how Article 11 is administered, which is not fleshed out in the Directive as it currently stands.

Article 13 – Closing the Value Gap

Article 13 of the Directive has proved to be highly controversial. It concerns liability for copyright infringement in respect of material uploaded by a user onto a commercial online content sharing service provider such as YouTube and Facebook. The Directive makes the online content sharing service provider responsible for copyright clearance and also for infringement where unauthorised works are communicated to the public by digital means. Content sharing platforms have historically benefitted to varying extents from the so-called safe harbour provisions of the European

Council Electronic Commerce Directive (2000). These exempt from liability information society service providers, which passively host content without knowledge of infringement. Over time, the application of the safe harbour provisions has been more tightly defined (for example in *L'Oréal SA v eBay International AG ETMR 52* (2011) and *Stichting Brein v Ziggo BV (C-610/15)* [2017]). In fact, many online content sharing platforms which optimise the presentation of uploaded works do now pay some remuneration for the works made available on their platforms (although the recitals to the Directive indicate that some do not). Even so, bodies representing creators assert that the revenue is much less than the revenue that the service providers earn from use of the content (British Copyright Council, 2018; PRS for Music, 2016). This gap has created the so-called 'value gap' which the Directive sets out to fill.

Online content sharing service providers are defined in Article 2(4) as service providers which store and give access to the public of 'a significant amount' (not defined) of copyright works uploaded by their users. Article 13 itself uses the term 'large amounts of copyright works' rather than 'significant'. This may be a translation issue. It is to be hoped that the fine-tuning of the directive will iron out this discrepancy of definition between Article 2 and Article 13. To fall within Article 13 the service provider must optimise and promote the content for profit-making purposes. Recital 37a sets out a widely drawn non-exhaustive list of the activities that amount to optimising. It includes any type of active use by the content sharing service provider such as displaying, tagging, curating and sequencing of content. It is difficult to envisage how a content sharing platform will fall outside these activities. This led to concerns that compliance with the Directive would be a barrier to entry into the market for smaller commercial content sharing platforms. The Directive has addressed this concern by excluding microenterprises and small-sized entities from Article 13. These are technical concepts within the EU and cover businesses employing less than 250 employees and having an annual turnover not exceeding 50 million euro and/or an annual balance sheet not exceeding 43 million euro (European Commission, 2003).

Also excluded from the definition of online content sharing service providers are (i) services that act in a non-commercial capacity, such as an online encyclopaedia, (ii) providers of cloud services (because they do not make content available to the general public) and (iii) online marketplaces whose main objective is online retail of physical goods.

The Directive envisages that the primary mechanism for safeguarding against infringing use by non-commercial users will be a 'permission and payment' model using collective licensing arrangements. The practicalities of how this will be worked out is left open, but it is envisaged in Article 13(2) that collective licensing bodies (such as PRS for Music in the UK for example) will enter into agreements with the online service providers under which blanket licensing agreements will be in place for use of members' work. As readers will know this mode is established and works well in other areas. The licence agreements must be 'fair and appropriate'. The aim is that the so-called value gap will be closed and rightsowners will receive equitable remuneration. Rightsowners who are currently aggrieved by the lack of or amount of remuneration they receive will benefit from this provision. The regime should also facilitate rights clearance across Europe for those copyright works that are regulated by collective licensing.

A problematic area arises where no licence is in place for use of a copyright work, perhaps because permission is refused or because it is not caught by a collective scheme. Article 13(2a) requires rightsowners and content sharing service providers to 'co-operate in good faith' to ensure that unauthorised works are not available on the content sharing platform. This is a significant move away from an earlier version of the directive which explicitly referred to 'effective content recognition technologies' (such as upload filters) as the means to avoid infringement. Co-operation in good faith is somewhat of a nebulous concept and it was acknowledged at the press conference following parliamentary approval that the practicalities for achieving compliance with this provision must be worked through. The Directive has no explicit requirement that online content sharing service providers must proactively monitor the materials that are uploaded onto their service. Concerns about imposition of mandatory content filters may therefore have been premature.

Under Article 13(3) from the date of the coming into force of the Directive, the EU Commission and Member States are to organise dialogues between stakeholders to harmonise and define best practices on both licensing agreements and co-operation practice. When defining best practice special account is to be taken of fundamental rights, the use of exceptions and limitations to copyright infringement and ensuring that the burden on SMEs remains appropriate. This latter point again reflects the concerns that Article 13 may make it impossible for smaller service providers to enter into the market. The question of how (and even possibly whether) copyright content should be identified and monitored by service providers has effectively been deferred.

The Directive seeks to protect against restriction of freedom of expression which goes further than the legitimate protection of rights. It provides that the good faith co-operation referred to above shall not lead to preventing the availability of *non-infringing* works such as those covered by an exception or limitation to copyright. For example, in the UK where the use of a copyright work would fall within the scope of the fair dealing provisions of CDPA 1988 the provisions of Article 13 should not block use of what would otherwise be a legitimate use of the work. Applying some of the rules on copyright exemption is a nuanced exercise involving complex concepts that do not lend themselves to blanket application. This is reflected at Article 13(3), which provides that automated content blocking should be avoided. No alternative method for safeguarding of copyright exemptions is however suggested. A danger would be that Article 13 creates a chilling effect in that service providers will take a cautious approach to the application of copyright exceptions/limitations that may lead to a culture of self-censorship.

There is a safeguard against incorrect decisions. The content sharing service provider is required under Article 13(2b) to put in place effective and expeditious complaints and redress mechanisms for rightsowners in case the co-operation referred to above leads to unjustified removal of their content. The complaint must be dealt with without undue delay

and subject to human (i.e. not automated) review. On the other side of the coin, users who upload material and whose content is blocked should also have access to an independent body for the resolution of disputes as well as to a court or another relevant judicial authority.

At present the content service providers which most obviously fall within Article 13 (e.g. YouTube and Facebook) already use content recognition/filtering of varying kinds. It is generally accepted that these currently lack the sophistication to make consistent nuanced judgments about application of copyright exemptions. Opponents of Article 13 fear that, despite the safeguards in the Directive, unlicensed copyright works will be subject to takedown unless an obvious exemption or limitation applies – for example German MEP Julia Reda whose website has numerous criticisms about the draft directive (Reda, 2018). If this proves to be the case, the redress mechanism for rightsowners and users provided for in Article 13(2b) will become particularly significant for ensuring that incorrect removal or blocking of content can be remedied easily, cheaply and quickly.

Article 12a – At the Final Whistle: Rights for Sport Events Organisers

In a last-minute victory for sport event organisers Article 12a provides them with statutory rights to reproduce and make available footage of sporting events. The Article is sketchily drafted and there are no interpretative provisions in the recitals or definitions to clarify its scope. The rights will be exercisable against commercial infringers who exploit footage of sports events without authorisation. They could also apply to private individuals who film footage of sporting events for private use unless private use exemptions and limitations are confirmed in the final Directive. Where footage is uploaded onto social media content sharing platforms, presumably Article 13 will apply. It is to be hoped that Article 12a will be fleshed out before the final version of the Directive is approved – especially in relation to any exemption for private and non-commercial activity.

The Future?

The draft Directive is now moving through the trilogue process under which the Parliament, Council and Commission will negotiate and fine-tune its provisions. It is expected that the negotiations will be concluded by January 2019 at which point the EU Parliament will have a final vote, currently expected in early 2019. Once it has been approved, Member States will have two years in which to implement the Directive into their national laws. The obligations of the UK in this regard are still to be determined. Should the UK leave the EU on 29 March 2019 under the current terms of the draft withdrawal Bill, there will be no specific obligation on the UK to implement the draft Directive. This could lead to rights holders and authors in the UK being disadvantaged in terms of remuneration if a national equivalent to the Directive's value gap provisions is not enacted. Those who fear that Article 13 will operate as a censorship mechanism may welcome non-implementation. But it must be remembered that information society service providers are likely to operate using a pan-European approach. As with much of Brexit we are in the realms of speculation, but the UK could end up with the worst of all worlds, a de facto use of the operating model envisaged by Article 13 but without the corresponding income stream for rights holders. A lack of implementation of Article 11 could similarly put UK national media and individual journalists and writers at a financial disadvantage compared to their EU counterparts if the Article operates as envisaged.

In terms of finalisation of the details in the Directive, the trilogue process is an opaque and relatively informal process. Undoubtedly lobbying is taking place behind closed doors. While the direction of travel is unlikely to change, the detailed route to the destination could still be revised. One of the objectives of the EU's programme of copyright reform is to provide clearer rules of the game for a functioning copyright marketplace. If the Directive is approved as drawn, the deferral of operational detail will mean that the full practical implications of the provisions – especially the workings of Article 13 – will take time to emerge. It may therefore be some time before stakeholder dialogue can generate a meaningful rule book that is truly fit for purpose.

Competing Interests

The author has no competing interests to declare.

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