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EU Copyright Directive: Might vs (Copy)right

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The tussle continues between large online businesses that host third party copyright materials (news, images, music, video etc.) and certain copyright owners. Although there have been some minor concessions offered to the online businesses, copyright owners appear to now have the backing of European lawmakers.

On 12 September 2018, the European Parliament approved an amended text for the proposed new EU Copyright Directive which included controversial Articles 11 and 13.

What's the point?

European Union legislators intend the draft Copyright Directive to both harmonise EU copyright law and ensure that the law remains relevant in the face of the challenges raised by the recent surge to dominance of the internet.

Under intense lobbying (from all sides of this debate), the EU is seeking to provide enhanced protection in the EU to the owners of copyrighted works (with a focus on musicians, performers, journalists and news publishers). The proposed changes to the law should allow copyright owners to more easily monetise their rights by imposing obligations on websites (and other platforms) which utilise user generated content, or aggregate news. The Directive will impose enhanced obligations on these websites and platforms to prevent infringing use of copyrighted works and to ensure that rights owners are fairly compensated for any use of such works.

What's changed?

Over 250 amendments have been made to the text of the proposed Copyright Directive since the first draft was rejected by the EU Parliament in July 2018, so we focus on the two provisions that have provoked the most controversy, namely Article 11 and Article 13.

Article 11

Article 11 now sets out that press publishers (newspapers etc.) should be able to obtain fair and proportionate remuneration for the digital use of their copyright publications by "information society service providers," attempting to balance freedom of expression with the ability of rights owners to access royalties for content utilised by news aggregators.

Under the proposed Directive, online platforms will be liable for copyright infringement if they include the work of press publishers without permission. This would include the use of snippets which may only display a small part of the protected work.

The recent changes exclude small and micro platforms and aggregators from the scope of Directive in an attempt to address concerns that the new requirements would stymie innovation. The new wording also clarifies that Article 11 does not prevent the private and non-commercial use of press publications by individuals nor does it extend to the use of single word hyperlinks. The question remains at which point a free to use hyperlink becomes a protected "snippet."

Despite these amendments, the effectiveness of Article 11 remains in doubt, with critics making reference to the failed attempts to implement similar provisions under national law in Spain and Germany.

Article 13

Article 13 is aimed at "online content sharing service providers" (OCSSPs) and seeks to ensure that online

platforms are liable for user generated content that infringes copyrights.

Under the provision, platforms which utilise user generated content have the burden of ensuring that either copyrighted works are used under fair and appropriate licensing agreements or the availability of such works is prevented (while at the same time not hindering the use of non-infringing works).

A new Recital 37a confirms that non-commercial platforms (such as Wikipedia) or open source software platforms (such as GitHub), are excluded from the definition of OCSSPs under the Directive, as are "online market places whose main activity is online retail of physical goods."

Critics have questioned how Article 13 will be enforced in practice when EU copyright law is still far from harmonised across Member States and exceptions and defences available in one Member State, for example parody and fair quotation, may not be available in another.

What's next?

The adoption of a final text by European legislators remains some way off as the draft Directive now becomes the subject of trialogue negotiations. These happen mostly in private, away from the lobbyists, and provisions may be amended further in the course of those negotiations before final approval.

While it is possible that this may be achieved before Brexit on 29 March 2019, Member States are likely to be given at least a year to implement the Directive into national legislation. This does not necessarily mean that UK copyright owners will be unprotected; given the cross-border nature of the internet, it is not an unrealistic proposition that the UK will still seek to harmonise its national law with the new Directive despite not being under any obligation to do so.

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