



Is the EU close to harmonising copyright?

The European Commission's Digital Single Market plan has been surprisingly effective at gaining traction. **Akash Sachdeva** and **Annie Websper** assess its progress towards EU-wide copyright integration

Currently there is no single European copyright act or code, meaning that copyrighted works across Europe are protected on the basis of 28 member state national laws, all of which may differ on issues such as authorship and ownership of copyright, assignment and licensing of rights and exceptions. There are, however, various directives relating to certain aspects of copyright protection that have been in place since the 2001 Information Society Directive. These are binding on member states as to the results to be achieved but require implementing measures by member states, normally in the form of amendments to existing copyright legislation. The fragmented status of copyright across the EU means that sometimes different standards are applied for different copyright works, depending on whether the law governing those works is a European directive or a national law.

The existence of a number of European directives has also seen the role of the Court of Justice of the European Union (CJEU) increase in recent years, sometimes leading to inconsistent jurisprudence between national courts and the CJEU. For example, in *UsedSoft GmbH v Oracle International Corporation*, the CJEU held that the principle of exhaustion of a copyright holder's distribution right in relation to software applies where the copyright holder not only markets copies of software on a material medium, but distributes them by means of download. However, it is uncertain whether this principle is also to be applied to other works that are not governed by European law.

Against this fragmented backdrop,

there has also been an enormous change in the ways in which copyrighted works are created and consumed, including a shift from ownership to access based consumption models and digital networks increasing the possibilities for distribution of copyrighted works. This has placed considerable strain on the current copyright framework. The European Commission predicts that global digital spending on entertainment and media is expected to increase at a rate of 12.1% over the next five years,¹ which underlines the need for reform. Further, as distribution of content has shifted from a goods-based to services-based supply model, there are concerns that the current copyright framework is hindering accessibility and failing a central tenant of the EU – the free movement of goods and services.

Consequently, there have long been calls to harmonise all of copyright law across the EU in the same way trademark law has been. More recently the European Commission published its Digital Single Market (DSM) strategy in May,² which included measures aimed at harmonising copyright law across the EU focusing on three main pillars: territoriality, exceptions and enforcement.

Territoriality

One of the Commission's main concerns surrounds the accessibility of legally purchased content in cross-border situations, in terms of both access to content from another member state and portability of content when travelling between member states.

Territorial exclusivity is currently central to the licensing of content in Europe – film distributors, television channels and on-demand

services such as Netflix hold distribution rights in individual countries and many films and programmes are financed through the pre-selling of territorial licences. Online intermediaries are asked to block content that is not licensed in the user's country – a form of geo-blocking.

The commission envisages that businesses should be able to sell products and content online without differences in national law preventing them from doing so. Breaking down national barriers would allow access to a huge EU market, allowing businesses to significantly expand their operations. For consumers, it is envisaged that they would be able to purchase products and content throughout the EU without location making a difference. A consumer in France would therefore be able to watch content available in the UK.

It is not presently clear how far the Commission will go in addressing territoriality or exactly how it will do so. Requiring content to be available on a pan-EU basis would entail considerable reform to the nature and licensing of copyright in Europe, and significantly change the manner in which rightsholders and platforms do business in Europe.

Some stakeholders have seen the Commission's proposals as counterproductive. One fear is that distribution rights may become more expensive if every piece of content is to be available across Europe, potentially leading to a reduced choice of service providers, with only the biggest market players able to afford the inflated licence fees – which may then be passed on to consumers. Some licensors fear they may suffer a loss of revenue if they are compelled to simultaneously make available

content on a pan-EU basis and are no longer able to command premiums for certain territories.

The DSM strategy states the wish to respect “the value of rights in the audiovisual sector”, yet some consider that due to aforementioned concerns, this sits uncomfortably with references in the DSM to preventing “unjustified geo-blocking”. However, the word unjustified does suggest that the Commission may allow some territorial practices to be justified – under what circumstances, however, remains to be seen. Notably, the DSM refers to the possible revision of Article 20 of the Services Directive (2006/123/EC), which prevents service providers discriminating on grounds of nationality or place of residence when it comes to general conditions of access to a service. Audiovisual services are currently exempt from this provision, though the provision could be expanded to include the supply of digital content. Also unclear is whether proposals surrounding the portability of legally acquired content will apply to public service broadcasting content, such as BBC iPlayer, or only downloaded content.

Also mentioned is a review of the Satellite and Cable Directive (93/83/EEC), which could be extended to cover broadcasters’ online transmissions. This would mean that online broadcasting services would need to be licensed only with copyright consents in the country of origin, not in every territory where the transmissions are capable of being received, simplifying and widening the distribution of online content across Europe.

Exceptions and limitations

The fragmented legal landscape can be clearly seen with exceptions and limitations, with member states currently free, subject to a few exceptions,³ to reflect as many or as few limitations or exceptions in their national legislation as they wish. The current framework does not provide for the cross-border effect of exceptions and a licence is required to distribute copyright to a member state where a particular activity is illegal, obstructing the mobility of copyrighted works across Europe.

The DSM strategy proposes to assess exceptions for education, research and text and data mining, though fails to clarify how exactly the fragmented landscape described above will be rectified – for example, will any exceptions become mandatory? – and it is not clear whether other exceptions relevant to the DSM, such as parody, news reporting and quotation will be addressed.

Enforcement

The shift to digital access to content has created significant copyright enforcement challenges, and many rightsholders are concerned that

the current copyright framework is inadequate to tackle piracy and therefore does not incentivise or reward creativity. The principle of intermediary liability under Article 14 of the e-Commerce Directive (2000 /31/EC), which prevents hosting platforms from liability for content hosted, has been interpreted differently in different jurisdictions. The current European framework also lacks a common notice and take-down procedure, making it arduous for rightsholders to tackle damaging infringements.

The DSM strategy proposes clarifying the rules on the activities of intermediaries in relation to copyright-protected content and, in 2016, modernising the enforcement of IP rights, focusing on commercial-scale infringements. Although the exact method of targeting intermediaries is not clear, the DSM strategy does make clear the need to consider rigorous procedures for removing illegal content and whether to require intermediaries to exercise greater responsibility and due diligence in the way that they manage their networks and systems. The message is clear: proactivity will be expected of intermediaries. Search engines, domain-name registrars, advertising and digital advertising platforms will no doubt wish to push back on these proposals, but for rightsholders, the proposals will be very welcome, opening the door to a faster, easier, cheaper and more effective means of redress than pursuing the direct perpetrators of copyright infringement.

Next steps

While the proposed reforms may tend to increase the harmonisation of copyright across Europe, many feel that the Commission has in fact taken a more moderate step-by-step approach than expected, falling short of full harmonisation and failing to pronounce the creation of a EU-wide unified copyright code. Nonetheless, upcoming changes are likely to have a significant effect on current digital business models across Europe.

The DSM strategy proposals to harmonise copyright are still lacking in detail, and in-house counsel will be hotly anticipating the announcement of draft legislation, expected before the end of 2015, which will serve to clarify the proposed measures. In the meantime, in-house counsel should begin an assessment of the potential commercial impact of possible reforms, for example, by assessing the scale of potential renegotiations of current licence arrangements to ease territorial restrictions.

It is worth remembering that, as DSM vice-president Andrus Ansip put it at a press conference on the adoption of the strategy, “this strategy is not the finishing line – it is

a starting point”. Stakeholders across the wide range of affected sectors would be well advised to engage in the lobbying activity that is expected to be intense, particularly in light of the Commission’s recent consultation on copyright reform,⁴ which attracted some 10,000 responses.

The road ahead is going to be a long one laden with challenges and complexities and it is likely to be years before the harmonising proposals make their way out of the European legislative process. Until that point, in-house counsel should proceed on a case-by-case basis.

In such a fast-moving sphere, there is a real danger that any legislation enacted may be outdated by the time it comes into force and copyright subject to a number of currently unknown challenges. It would be premature to say that the EU is close to harmonising copyright, but it has certainly taken an ambitious step in the right direction.

Footnotes

1. ‘A Digital Single Market Strategy for Europe – Analysis and Evidence’ page 25, available at: http://ec.europa.eu/priorities/digital-single-market/docs/dsm-swd_en.pdf
2. ‘A Digital Single Market Strategy for Europe’, available at: http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf
3. For example, the use of orphan works under the Orphan Works Directive (2012/28/EU).
4. See ‘Public Consultation on the Review of EU copyright rules’ 26 June 2013, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf and ‘Report on the Responses to the Public Consultation on the Review of the EU copyright Rules’, July 2014, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

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