The new Copyright Directive in the Digital Single Market : how it will impact the freedom of expression

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Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC

1. Timeline

- Adopted by European Parliament on 26 March 2019
- Published on 17 May 2019 (OJEU 17 May 2019 L130/92)
- enters into force on 7 June 2019.
- 24 months, until 7 June 2021, to implement the Directive into national laws

3. The main provisions of the Directive

a) Three new copyright exceptions

- Researchers may make reproductions or extractions of protected works in the context of text or data mining;

- Educational institutions receive a more extensive exception for the use of protected works as an illustration of non-commercial teaching;

- Cultural heritage institutions may make reproductions of protected works for preserving such works

3. The main provisions of the Directive

b) Other issues

- Provisions aimed at facilitating the negotiation of licenses for making available audio-visual works on video-on-demand services;

- Fair remuneration and transparency in exploitation contracts of authors and performers (art.18 sqq)

3. The main provisions of the Directive

c) The most controversial provisions

- A new IP right for publishers of press publications (art.15, previously art.11 in the draft)

- New liability regime for content-sharing platforms, which have to obtain an authorisation from rights holders (art.17, previously art. 13 in the draft)

Objective: ensuring "*tech giants*" share revenue with "*artists and press publishers*".

4. Content-sharing platforms and copyright infringing content

a) The problem: the uploading of infringing content

- Platforms offer the possibility to publish "user generated content" (self-made music, photos and videos);

- Users also upload/repost protected content;

- The platform only operates as a (purely technical) intermediary.

4. Content-sharing platforms and copyright infringing content

b) The situation under the eCommerce Directive

- The eCommerce Directive (Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services) **limits the liability of Internet Service Providers** (ISPs)

→ no liability if infringing content is transmitted, stored or hosted by ISP provided some conditions are met (e.g. notice&take down procedure)

4. Content-sharing platforms and copyright infringing content

c) The new copyright Directive: ISP's liability for infringing content

- **The limited liability of the eCommerce Directive no longer applies to "providers of online content sharing services" = providers which allow (for profit) their users to store and give the public access to a large amount of copyright-protected works.**

  Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not 'online content-sharing service providers' within the meaning of the Directive.

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- **New liability regime of article 17: obligation to enter into agreements with rightholders**

Art.17.1: "*Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.*"

→ Objective: address the "value gap" between the low remuneration of rightholders and the high profits made by Internet giants

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- **The obligation to obtain authorisations from right holders only apply to online content sharing services = commercial platforms** offering "**a large amount** of copyright-protected content"

Preamble (62): "The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share **a large amount of copyright- protected content** with the purpose of obtaining profit therefrom, either directly or indirectly, **by organising it and promoting** it in order to attract a larger audience, including by categorising it and using targeted promotion within it"

Preamble (63): "The assessment of whether an online content-sharing service provider stores and gives access to a large amount of copyright-protected content should be made on a case-by-case basis and should take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service."

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- If no authorization has been obtained, art.17.4 applies and provides for **liability** of the on-line content-sharing provider **unless** it can demonstrate that three conditions are met :

  - ✓ It has made **best efforts to obtain an authorisation;**
  - ✓ It has made, in accordance with high industry standards of professional diligence, **best efforts to ensure the unavailability of specific works** for which the rightholders have provided the service providers with the relevant and necessary information and
  - ✓ It has acted quickly once **notified** by rightholders, to **disable access to, or to remove from their websites, the notified works**, and made best efforts to prevent their future uploads in accordance with point (b) ("notice and take down" procedures).

4. Content sharing platforms and copyright infringing content

c) The new copyright Directive: ISP's liability for infringing content

- Small online content-sharing service providers benefit from less stringent obligations than the internet giants. If a service provider :

  - ✓ is less than three years old and
  - ✓ has an annual turnover below EUR 10 millions,
  - ✓ The average of monthly visitors is less than 5 million

→ it only has to comply with conditions (a) (best efforts to negotiate licenses) and (c) ("notice and take down") of article 17(4) to escape liability.

4. Content-sharing platforms and copyright infringing content

c) The new copyright Directive: ISP's liability for infringing content

- If the platform is found liable, the **damages may be important** (potential massive viewing of the infringing content) → How will platform protect themselves against the risks of hosting infringing content?

    - They will tend to use **upload filters /monitoring technologies** to control what is uploaded by users.

    - Art.17 (8): "The application of this Article shall not lead to any general monitoring obligation"

    - An earlier version of art. 17 referred to "proportionate content recognition technologies" (Art. 13(3) Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (14 September 2016) Com(2016) 593 final)

4. Content-sharing platforms and copyright infringing content

c) The new copyright Directive: ISP's liability for infringing content

- The website of the European Parliament recognizes that filtering technologies are the most likely solutions :

"The draft directive sets a goal to be achieved - An online platform must not earn money from material created by people without compensating them. Therefore, a platform is legally liable if there is content on its site for which it has not properly paid the creator. This means that those whose work is used illegally can sue the platform.

The draft directive however does not specify or list what tools, human resources or infrastructure may be needed to prevent unremunerated material appearing on the site. There is therefore no requirement for upload filters.

However, if large platforms do not come up with any innovative solutions, they may end up opting for filters. Such filters are indeed already used by the big companies! The criticism that these sometimes filter out legitimate content may at times be valid. But it should be directed towards the platforms designing and implementing them, not to the legislator who is setting out a goal to be achieved "

4. Platforms and copyright infringing content

d) The drawbacks of the new liability system

- For protecting the economic interests of right holders (no use without compensation), the Directive provides for a liability of the platforms – and the platforms will tend to opt for a safe solution to avoid liability = filtering systems;

  → **Problem 1**: Designing and implementing filtering systems is very costly → small EU players/startups might (will?) be *de facto* excluded and the new Directive will in fact lock the Internet giant's dominance;

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→ **Problem 2**: locking the dominance of US giants (which can afford the costly technologies to filter content) means that the content of the Internet/the information flows in Europe will still be dominated by US companies

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→ **Problem 3**: Content recognition technologies are not reliable / prone to mistakes

2014: Youtube channel ‘Digihaven’ posted an hour-long video of a purring cat

Digihaven is flagged by Youtube Content ID System for copyright infringement

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→ **Problem 3:** Content recognition technologies are not reliable / prone to mistakes

Platforms must take copyright exceptions into account (art.17 (7)) – but how will such filtering technology be able to make a distinction between copying/reproducing a work (infringement) and fair use, criticism, parody or quotations?

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→ **Problem 4**: To avoid the imposition of heavy sanctions, dominant online platforms will probably perform invasive filtering and deletion of content

- The freedom to impart and receive information will be limited by the filtering excluding any suspicious content, including criticism and parody as it will reproduce (part of) copyrighted materials

  Art. 11 Charter of Human Rights of the European Union (2012/C 326/02): *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.."*

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→ **Problem 5**: platforms will adapt and strengthen their Users General Terms & Conditions:

- Users will then adapt their own behavior and refrain from uploading material in case of doubt (self-censorship)

- Creators often use copyrighted material to highlight a point or comment on a specific content. Using copyright-protected content for this specific purpose will probably fall under the exceptions. However, many creators have already confessed that because of their problems with Content ID, they have changed their creative processes (what will be the situation with an even more stringent filtering system?)

4. Content-sharing platforms and copyright infringing content

e) The new Directive and the ECJ caselaw

ECJ, 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (C-70/10) :

Question: the compliance of a system for filtering all electronic communications passing via the ISP's services as a preventive measure which is capable of identifying on the provider's network the movement of electronic files containing copyrighted material

The Court found that:

- measures which would require an ISP to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property right is a violation of art. 15(1) Directive 2000/31 (e-Commerce Directive) (§40).
- Such measures would violate the right of the ISP to conduct business as stated in Art. 16 of the EU Charter of Fundamental Rights of the EU (§46 et 48)
- Such a filtering system would be excessively costly, violating Article 3 Directive 2004/48 (Enforcement Directive).

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- ✓ Such a filtering system would also violate the fundamental rights of EU citizens to their personal data and to their freedom to share and receive information (§50):

> *"De plus, les effets de ladite injonction ne se limiteraient pas au FAI concerné, le système de filtrage litigieux étant également susceptible de porter atteinte aux droits fondamentaux des clients de ce FAI, à savoir à leur droit à la protection des données à caractère personnel ainsi qu'à leur liberté de recevoir ou de communiquer des informations, ces droits étant protégés par les articles 8 et 11 de la charte.* »

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ECJ, 16 February 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (C-360/10)

SABAM is a collecting society. Netlog runs an online social networking platform where every person who registers acquires a personal space where the user can i.a. upload photos or publish video clips. SABAM claims that Netlog thereby offers its users the opportunity to make use of copyrighted materials without paying any fee ("value gap").

The court of Brussels asks the ECJ whether a national court may order an ISP, whose services may be used to infringe, to introduce, for all its customers, in abstracto and as a preventive measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify copyrighted material and subsequently to block the exchange of such files?

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- a general monitoring obligation **violates the eCommerce Directive** 2000/31 (§38).
- a general monitoring obligations "would result in a **serious infringement of the freedom of the hosting service provider to conduct its business** since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly (see, by analogy, Scarlet Extended, paragraph 48)." (§46)
- "the contested filtering system may also **infringe the fundamental rights of that hosting service provider's service users, namely their right to protection of their personal data and their freedom to receive or impart information**, which are rights safeguarded by Articles 8 and 11 of the Charter respectively." (§48)

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ECJ, 29 January 2008, *Productores de Música de España (Promusicae) v Telefónica de España SAU* (C-275/06)

A **fair balance** must be struck between the fundamental right to property (including intellectual property) and the other fundamental rights (e.g. freedom to share and receive information, protection of private life) (§70):

"(…)Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them **which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order**. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality."

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→ The ECJ case law condemns any general monitoring obligation, or any similar system, as it violates the ISP's rights to conduct business, the Enforcement Directive and the EU citizen's fundamental rights to personal data and to share and receive information.

La strada per l'inferno è lastricata di buone intenzioni...

Janson

Thank You!

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