The Copyright Directive – The EU Battles the Internet

Victoria Hewson, Counsel, International Trade and Competition Unit, Institute of Economic Affairs

The Commission put forward a legislative proposal in September 2016 for a new directive on copyright in the digital single market. The aim is to update copyright law in particular in the areas of digital and cross border use of content, text and data mining in scientific research and preservation of cultural heritage. But it has proved highly controversial, both from an economic and legal perspective and because of its potential impact on freedom of expression.

The proposals

The Commission proposal was accepted by the Council with some slight changes. After being voted down by the European Parliament in June, an amended draft directive was passed on 12 September 2018. The most striking elements of the proposal are Article 11, which would establish a new right for "press publications[1]" to be compensated for "digital use" (dubbed the 'link tax'); and Article 13, which would compel online platforms to enforce copyright in respect of material uploaded by users (dubbed the 'meme ban' or 'censorship machine').

Less widely commented on, the data mining proposals provide for the right of research institutions to carry out data mining for research purposes. This has been limited to non-commercial institutions after a Parliamentary amendment that would have enabled research for commercial use to benefit was defeated.

Articles 11 and 13 have been furiously debated by rights holders and free speech advocates. They would require platforms to pay to link to news items and pre-filter user content for potential copyright violations.

The Key Battlegrounds

The stated aim of Article 11 is to give recognition of the contribution of press publishers and to encourage the sustainability of the publishing industry, because a free press is essential to ensure quality journalism and citizens' access to information. In effect it will require online operators to enter into arrangements with press publishers to pay them for "use of" press publications. Amendments passed by Parliament sought to address concerns about the wide-ranging impact of the legislation by adding that the rights "shall not prevent legitimate private and non-commercial use of press publications by individual users" and "shall not extend to mere hyperlinks which are accompanied by individual words".

Article 13 seeks to improve the position of rights holders with respect to content uploaded to platforms by users without the rights holder being able to determine whether and how their work is to be used or to be remunerated for it. The provision effectively redraws the boundaries of liability for online platforms that were established by the 2001 e-Commerce Directive. This provided for a safe harbour for information society service[2] providers hosting content uploaded by users. Service providers are not liable for such content unless and until they have actual knowledge of any illegality, as long as they take action as soon as it is brought to their attention. Article 13 reverses this, and requires the platform to take action in advance to ensure that infringing content is not uploaded in the first place.

The risk of framing liability in the way set out in Article 13 is that mass surveillance of all user content will have to be deployed and validly uploaded content will be filtered out.

In the amended text passed by Parliament, online content sharing service providers will be required to enter into "fair and appropriate" licensing agreements with rights holders covering liability for content uploaded by users. If they do not wish to do so (and in practice it may simply not be feasible), the online content sharing service providers and rights holders are to cooperate "to ensure that unauthorised protected works or other subject matter are not available on their services". This no longer specifically mentions "effective content recognition technologies", which was the wording in the Commission proposal, but it is broadly understood that this will be the only possible way to achieve the requirement to prevent infringing content from being uploaded. Somewhat optimistically, the Parliament amendment states that the cooperation between rights holders and service providers "shall not lead to preventing the availability of non-infringing works or other protected subject matter".

---

[1] Defined (as amended by Parliament) as a fixation by publishers or news agencies of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider. Scientific and academic periodicals are not included.

[2] Which means any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

The risk of framing liability in this way is that non-infringing content will be filtered out, as the balance of interests of the platform is to remove illegal content rather than to protect material that is validly uploaded. Acknowledging this, both the Commission proposal and the Parliament amendment require a redress mechanism for users who dispute having their content filtered out. The Parliament amendment states that this mechanism is to be "effective and expeditious". Given the volume of content in circulation on social media and, in many cases, its short shelf life, this also seems optimistic.

Will the link tax help the Press?

A similar link tax implemented in Spain proved counterproductive to publishers, as Google withdrew its news search facility, and news sites saw a drop in traffic and therefore in advertising revenue. In reality, any website can opt out of featuring in Google's search results, and newspaper websites do not do so. This measure is clearly not aimed at protecting the rights of publishers, but would instead operate as a subsidy to the traditional press, redistributing revenue from the aggregators like Google. This can surely only succeed in delaying the decline of traditional press, as well as reducing the news content in circulation, whereas acknowledging and adapting to the new reality of how news is consumed would lead to better outcomes for publishers and consumers.

What are the implications for freedom of expression?

Article 13 has been widely criticised for limiting the right of individuals to benefit from the exceptions to copyright that are intended to protect fundamental rights of freedom of expression. The use of content filtering mechanisms also entails surveillance of internet users on a massive scale, which is likely to conflict with the Charter of Fundamental Rights, the GDPR and Article 15 of the e-Commerce Directive which specifically prohibits the imposition of a general requirement to monitor information or actively seek out evidence of illegality. Because the EU position itself as a leader in this area it is danger of setting a dangerous precedent for countries like Russia and China which have been criticised for their controls on the Internet.

Does a digital single market need this Directive? Do creators?

Platforms have clearly come a long way since the e-Commerce Directive. In many ways, Facebook, Google and Twitter are arguably going further than simply hosting content and making it available, but it must be possible to regulate copyright in a way that allows optimisation of delivery of content of interest to users without platforms incurring all the risk and liability of being a publisher. The approach of the Directive risks causing fragmentation of the Internet (already in evidence in the aftermath of the GDPR). Although no doubt contrary to the intention of the legislators, Article 13 will cement the position of the existing large platforms that dominate social media and content sharing. Content filters are costly to procure and operate so smaller operators and start ups will be seriously disadvantaged (the exemption for smaller businesses put forward by Parliament will simply act as a deterrent to expansion for challengers to the global giants). This approach effectively protects existing business models of rights holders and entrenches the practices of incumbents that do not reflect the way in which users access content, instead of incentivising publishers and rights holders to innovate.

What's next

The amended text now goes into the trilogue process of negotiations between the Commission, Council and Parliament, to try to reach an agreed form before being voted on again by Parliament. It is known that some member states had reservations in respect of the threats to fundamental rights and legal implications of undermining the workings of the e-Commerce Directive, so there may yet be scope to have these more controversial provisions revisited.

References

Commission Legislative Proposal for a Directive on Copyright in the Digital Single Market. Available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593

Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive on copyright in the Digital Single Market. Available at:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0337+0+DOC+PDF+V0//EN

Google statement on news service in Spain. Available at:
https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html

AEEPP (Spanish publishers' association) findings on impact of link fee regulation in Spain. Available at:
https:/www.aeepp.com/noticia/2272/actividades/informe-economico-del-impacto-del-nuevo-articulo-32.2-de-la-lpi-ne

Written questions from Belgium, Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding article 13 and recital 38 of the proposal for a directive on Copyright in the Digital Single Market. Available at:
http://statewatch.org/news/2017/sep/eu-copyright-directive-ms-questions-council-legal-service-25-7-17.pdf