Battle Resumes – the Copyright Directive is Back

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The Directive on Copyright in the Digital Single Market (the "Directive") is back. The issues with the Directive were described in our September 2018 briefing *The Copyright Directive – The EU Battles the Internet.*

Article 13, on the liability of platforms that make content available to the public, has been redrafted in trialogue discussions. It has done little to address concerns about freedom of expression, monitoring of communications and costs to smaller operators. Substantive concerns raised in respect of earlier versions of the Directive have not been resolved and may even have been exacerbated. It develops the law in a way that would increase legal uncertainty and cause the risk of variable implementation and enforcement across member states to be high.

Parliament will likely vote on whether to accept or reject the new text later this month.

The new proposals

This briefing focuses on Article 13 – use of protected content by online content sharing service providers. Article 13 has been substantially redrafted, but its effects remain the same. The definition of online content sharing service provider (which for brevity, this note will refer to as "platform") has been amended slightly to clarify exactly which service providers will be covered. It will mean "a provider of information society services which has as its main purpose, or one of its main purposes, storing and giving the public access to a large amount of copyright works or other protected subject matter uploaded by its users which it organises and promotes for profit making purposes". Online market places are excluded, as are cloud service providers that allow users to upload content for their own use, open source software platforms and not for profit encyclopaedias, educational and scientific repositories.

Platforms would be compelled to use their best efforts to conclude agreements with rights holders – but at what cost, and on what terms? There is little guidance as to what best efforts will look like, and whether it could mean accepting onerous terms.

Platforms that fall under the definition (and the concepts of "main" purpose and "large" amounts of content are still not developed) will be required to obtain an authorisation from rightsholders to be permitted to make available to the public any copyright material that its users may upload.

If a platform does not obtain such authorisation, it will be liable if material uploaded by its users infringes copyright unless the platform meets all three of the following conditions:

- the platform has made best efforts to obtain an authorisation;
- the platform has made best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works notified to it, with sufficient information, by rights holders; and
- the platform acted expeditiously, on receiving sufficiently substantiated notice from rights holders, to remove or disable the specific content so notified, and made best efforts to prevent it from being re-uploaded.

This removes the option in the text previously passed by the Parliament, under which platforms could avoid liability either by putting licensing arrangements in place or taking cooperative measures to prevent the availability of infringing material. Platforms would now be compelled to use their best efforts to conclude agreements with rights holders – but at what cost and on what terms? Would platforms have to accept onerous terms offered by rights holders to avoid falling short of the 'best efforts' condition?

The words 'content recognition technologies' are not used but platforms will face liability if they do not deploy best available technologies to filter out infringing content, and remove any material that does get through the filters.

There is no specific mention of content recognition technologies, but this is clearly what the second and third conditions would entail. Platforms will face liability for copyright violations unless they use their best efforts to reach agreement with every owner of copyright protected by EU law whose content might be uploaded by a user, and deploy best available technologies to filter out infringing content and remove anything that does get through the filters. All this is to be achieved without preventing the unavailability of works that do not infringe copyright - members states are specifically required to ensure that users are able to rely on the exception in existing law for quotation, criticism, review, caricature, parody and pastiche. It seems likely that the liability framework outlined above would conflict with this, and it would be challenging for member states to achieve an implementation to avoid such conflict.

There is a new, partial exemption for small start-up operators. To avoid liability, platforms that have been in operation in the EU market for less than three months and have a turnover of less than €10 million only have to demonstrate best efforts to conclude licensing agreements and expeditious removal of infringing content. This exemption is very narrow and likely to be counterproductive. It will actively discourage innovators and investors in start-ups, who will be exposed to all of the costs and risk that the Directive introduces.

Points Taken?

To avoid liability, platforms would have to monitor all content to identify and filter unauthorised material. There will inevitably be false positives, as automated means will not be able to determine whether an item falls under a permitted exception.

One of the main criticisms of previous iterations of Article 13 was that it appeared to have the effect of revoking the 'safe harbour' provided for under the 2000 eCommerce Directive. The new draft addresses this criticism by putting it beyond doubt, and now expressly provides that the liability exemption under the e-Commerce directive is withdrawn with respect to copyright for platforms making uploaded content available to the public.

Another criticism was of the casual rewriting of copyright law in the recitals, which assumed that information society services providers who store and give access to the public to copyright protected material are "performing an act of communication to the public". The new wording also addresses this by expressly providing for the law to be changed so that a platform will be performing an act of communication to the public when it enables public access to copyright material uploaded by its users. The new Recital 38 describes this as a clarification, but in reality, it is a material development of the law.

Article 13.7 now states that Article 13 will not to lead to any general monitoring obligation. The de facto requirement to monitor content has been raised as a concern in previous versions of the Directive. Such an obligation would contravene the e-Commerce Directive, which specifically provides that no such obligation shall attach to information society service providers, and the Charter of Fundamental Rights. But the reality of the second condition described above is that monitoring of all content would be required in order to identify and filter the unauthorised material. Simply not using the words "content recognition technologies" does not change the substance of what satisfying the condition would require.

There has been an attempt to address concerns that the Directive would undermine fundamental rights to free expression, by causing platforms to block validly uploaded content. Article 13.8 asserts that "this Directive shall in no way affect legitimate uses" and refers to the specific exceptions noted above but gives no suggestion as to how this should be achieved. And what if it is not? It is not unheard of for regulations to have unintended consequences, and the likely unintended consequences of this Directive are obvious and well documented.

The question of balance between competing rights and freedoms of copyright holders, platform operators and their users is now addressed, somewhat half-heartedly, by Recital 38b, which gives guidance for assessing whether platforms have made best efforts. It refers to proportionality, and states that "any steps taken by the service providers should be effective with regard to the objective sought but should not go beyond what is necessary to achieve the objective if avoiding and discontinuing the availability of unauthorised works and other subject matter". Much of this, like what will constitute "best efforts" and "best industry standards", will fall to being determined on a case by case basis as the risk of legal uncertainty and variable implementation and enforcement across member states is high.

The biggest platforms like Facebook and YouTube can invest in the content filtering technology and legal "best efforts", but smaller operators will be likely to simply avoid the EU market, disincentivising innovation and competition amongst platforms in the EU.

A dismal future

While platforms like YouTube already routinely screen content for copyright and other violations, being mandated by law to do so, and the very serious financial implications of being found not to meet the conditions laid down will likely lead to more content being screened out across all platforms. This will inevitably include false positives, as automated means will not be able to determine with complete accuracy whether an item falls under a permitted exception. This will likely result in dissuading users from uploading content that quotes, parodies or pastiches copyright material. Complaint and redress mechanisms cannot effectively safeguard against this – the vast volume and (in many cases) short shelf life of uploaded content make human review a fruitless task. There is already evidence that complaint and redress mechanisms are rarely taken up by end users, and are thus not a realistic way of safeguarding fundamental rights or the dynamism of platforms.

As we have seen after the General Data Protection Regulation came into effect in 2018, non-EU websites will take action to avoid coming within the sphere of onerous EU regulation by geoblocking their content to users in the EU. While the biggest platforms like Facebook and YouTube may be able to invest in the content filtering technology and legal "best efforts", smaller operators will surely be likely to simply avoid the EU market, disincentivising innovation and competition amongst platforms in the EU.

What's the alternative?

The Directive seeks to address a claimed misalignment between the volume of creative content accessed by users and the revenue that this access generates for the copyright holders of that content, also known as the so-called 'value gap'. Some in the music industry, for example, claim that while the volume of music being streamed through platforms is increasing, revenues to record labels and artists have remained flat. However, the fact of differentiated revenues from different means of delivery does not in itself demonstrate unfairness or a loophole: there have always been different models and pricing arrangements to reflect different ways of accessing and using creative content, and the differing values that parties attach to them. The evidence shows that interventions like this Directive, that purport to support artists and performers, invariably benefit large publishers and rights holders at the expense of innovators, and, in this case, the fundamental rights of individual internet users.

Differentiated revenues from different means of delivery does not in itself demonstrate unfairness or a loophole: different models and pricing arrangements to reflect different ways of accessing and using creative content are good for rights holders and consumers.

The trilogue discussions have clearly sought to take into account some of the serious criticisms made by academics and campaigners but appear to have focussed on formalistic resolution of technical legal matters rather than re-examining whether the approach adopted is the right one. For example, could a better balance of rights be achieved by retaining the principle of ex post enforcement ("notice and take down"), with rightsholders themselves deploying content recognition technology (at their cost) to alert platforms of violations instantaneously? Platforms would be liable if violating material is not removed promptly. This could be used alongside a copyright law reform to develop and harmonise the concept of accessory liability for platforms, linked to the service provider's knowledge and control in failing to remove violating content and block offending users. This would be a more rational development of the current position under case law. It would avoid the risks of undermining fundamental rights and the viability of platforms, especially for new and small operators, that arise from mandatory filtering requirements.

It is to be hoped that the Parliament will vote this down when it returns and that the Commission will then reconsider its approach from first principles, to be more respectful of fundamental rights, competition and innovation.

Leading academics have also suggested a new exception from copyright for non-commercial use of protected material by individual users and the creation of 'remixes and mashups' of copyright content. These measures would work together with a means for fair compensation to be made to the rightsholder, paid by platforms for cases where uploaded content does not fall under the exception. This may bring its own difficulties of identifying the boundary between commercial and non-commercial use and remix/mashup and quotation or pastiche, although critically it would operate by requiring platforms to take down infringing material where they have actual or constructive knowledge of it, rather than to monitor and filter content before upload.

While legal certainty and consistency under the current EU and member states' legal frameworks could be improved in respect of platform and intermediary liability, the latest iteration of the Directive, heavily lobbied and poorly evidenced, looks unlikely to achieve this. It would lead to overenforcement and greater entrenchment of larger market players, both platforms and rights holders. It is hoped that the Parliament will vote this down when it returns and that the Commission will then reconsider its approach from first principles, to be more respectful of fundamental rights, competition and innovation.

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