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MID-WINTER MEETING 2019
Session 1: The EU's Digital Single Market Agenda

Panel participants

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Panel overview

The Panel will provide an overview of the EU's proposals for a Directive on Copyright in the Digital Single Market. It will focus, in particular, on the following topics of interest to a US audience:

- Article 13 - the controversial "upload filter" or "license or co-operate" provision. Has an appropriate balance been struck between rights holders and platforms? How radical is it? How much practical difference will the alternative obligations of taking a license or "co-operating in good faith" make? Will platforms need to introduce upload filters that will herald the end of the internet as we know it?
- Improving the position of creators through transparency and adjustments to remuneration. How will the practices of publishers, labels, studios and others who exploit works and performances have to adapt? When will creators be entitled to enhanced remuneration when their works become "best-sellers"?
- A new text and data mining exception -- is this a missed opportunity or a danger for nascent business models?
- The impact of Brexit and the UK's implementation of these proposals.

Topic overview

In September 2018, the European Union Parliament voted in favour of its proposed Copyright Directive, designed to update the EU's copyright laws. The Directive, as amended by the Parliament from the European Commission's original proposal, aims to clarify the scope of the communication to the public right, to reduce online copyright infringement, and to redress the balance of power between authors and publishers. The Directive has been polarising, pitting large parts of the tech industry against authors and rightsholders. A further draft Directive has been proposed by the Council of the European Union. At the time of writing, the three institutions are engaged in "trilogue" negotiations with a view to agreeing on a version of the Directive to be returned for approval to the Parliament. Expectations are that trilogue needs to be completed by January 2019 for the Directive to have sufficient legislative time available to be adopted.

The commentary which follows considers the version of the proposed Directive which was approved by the European Union Parliament in September 2018.

Article 13: The License or Cooperate Regime

Why the new law?

Article 13 addresses the liability of certain platforms for content uploaded by users that infringes copyright. Under the existing law, platforms that merely host such content enjoy a safe harbour from copyright infringement on condition that (a) they do not have actual knowledge of the infringement or awareness of facts or circumstances from which the infringement is apparent, and (b) upon obtaining such knowledge or awareness, they promptly remove or disable access to the content (Directive 2000/31/EC).

The exemption only applies to hosting content. Platforms taking an active role, such as optimising or promoting uploaded content, or reviewing content, risk being fixed with knowledge or awareness and losing the benefit of the provision (see *L'Oréal v eBay* (Case C-324/09)).

This exemption is often cited as the single most valuable law to the technology industry and has enabled a number of platforms to flourish. However, creators and copyright owners have long been lobbying for it to be narrowed, arguing that they are not being fairly remunerated for use of their works (the so-called "value gap" or "transfer of value") and that platforms should take more responsibility for identifying infringing content. They also argue that some platforms are hiding behind the safe-harbour exemption to avoid taking content licences even though they are not mere hosts.

Who does Article 13 apply to?

The European Parliament's version of Article 13 applies to any platform "one of the main purposes of which is to store and give access to... a significant amount of copyright protected works... which the [platform] optimises and promotes for profit-making purposes". A number of platforms have now been specifically excluded from the scope of Article 13, including those providing non-commercial services (such as online encyclopaedia), small-sized enterprises (fewer than 50 employees / turnover not over EUR 10m) and microenterprises (fewer than 10 employees and turnover not over EUR 2m). Furthermore, online market places whose main activity is online retail of physical goods are not caught by the Directive. Notwithstanding these exclusions, most online content sharing service providers of any real size will be caught.

What does Article 13 say?

First, the European Parliament's proposal would make clear that platforms caught by Article 13 do not fall within the "safe-harbour" exemption. This was effectively the position under the *eBay* case but it is now clearer.

Secondly, since those platforms perform an "act of communication" to the public (one of the rights reserved to copyright owners), they themselves are liable for copyright infringement even when the infringement originated from their users. Such platforms must therefore obtain "fair and appropriate" licences from rights holders if they wish to give access to copyright protected content. The proposed Directive proscribes that these licences must cover works uploaded by users (but only where they are used for non-commercial purposes).

Thirdly, where rights holders do not wish to grant licences, affected platforms must "cooperate in good faith" with rights holders to ensure that unauthorised protected works are not made available on the platform (while also ensuring that non-infringing works are not prevented). The previous version of the Directive put this obligation solely on platforms and provided that it could be fulfilled by the use of content recognition technologies. That wording has now been removed and the obligation instead is to "cooperate". However, the effect of "cooperation" is unclear. Guidelines will be issued once the Directive is in force setting out best practice for such "cooperation". There is, however, no indication as to what those guidelines might contain

(other than that they must take account of fundamental rights, exceptions to copyright and ensure that the burden on SMEs is appropriate and that automated blocking is avoided).

Possible practical impact

Though there are, as yet, uncertainties and potential inconsistencies in the proposed law, and much will depend on what the guidelines will say, it seems unlikely that Article 13 will have the sort of dramatic impact suggested in some newspaper headlines. It might make life particularly hard for the medium sized platforms, potentially reducing competition. It might also result in increased filtering. If that happens, we could see a shift in complaints made to platforms from rights holders to end users, with end users trying to persuade platforms to accept content (such as lawful memes) rather than rights holders trying to force them to take down infringing content.

At the very least, the new law is likely to alter the balance in favour of rights owners and mean that platforms cannot simply claim the benefit of the "safe-harbour" and refuse to engage. These platforms will now have to make a commercial decision as to which content, if any, they wish to license from rights holders. It may mean new options for end users to consume content and an increase in paid-for services.

Articles 14 to 16: Fair and Proportionate Remuneration

The Parliament's version of the Directive also contains several proposals designed to ensure that authors are fairly remunerated for their work. Article 14 creates a 'transparency' obligation, which requires publishers to provide regular updates concerning how their works are being exploited, including on modes of exploitation, revenues generated and remuneration due. A new article -14 requires member states to ensure that authors receive 'fair and proportionate remuneration' for exploitation of their works.

Article 15 provides an adjustment mechanism so that authors can claim additional, appropriate and fair remuneration from their publishers if the agreed remuneration is disproportionately low in comparison to what the publisher is receiving. Article 16a, another addition by the Parliament, provides a right of revocation, a use it or lose it provision, whereby a creator may revoke an exclusive agreement if the work is not being exploited or if the publisher is not complying with Article 14. This right may only be used after a reasonable time and only upon written notification setting an appropriate deadline for the exploitation to restart.

These Articles are designed to adjust the balance between rightsholders and creators. They could change how the publishing industry operates its author contracts: licences may need to be renegotiated and new disclosure requirements may need to be implemented. Whilst the adjustment mechanism might not have too great an effect on royalty bearing agreements, fixed-fee contracts are more likely to be influenced. This could give authors a stronger negotiating position, although it is likely that existing arrangements already provide many of these types of arrangements.

Article 3: Text and Data Mining

Article 3 of the Directive would allow research organisations to carry out text and data mining, defined as 'any automated analytical technique which analyses works... in digital form in order to generate... patterns, trends and correlations' using material to which they have lawful access only for the purposes of scientific research. This is a limited exception and does not extend to independent researchers or journalists.

Next Steps

Now that the Parliament has approved this version of the Directive, it must go to three-way negotiations between the Parliament, the Council and the Commission before facing a final

vote of the Parliament, likely early next year. Given the differences in the three proposals, it is likely the text will be changed before then.

Whilst it is possible that this might be achieved pre-Brexit, EU Member States will be given at least a year, and the EU Parliament proposes two years, to implement the Directive into national law. If the transposition deadline is during the anticipated transition period (assuming that there is a withdrawal agreement between the EU and the UK) the new Copyright Directive would be implemented into UK law. However, if the deadline is after this period, or if there is no deal on the UK's withdrawal, there will be no obligation to do so. It will be up to the UK Parliament to make the political decision whether to introduce equivalent provisions to the Directive in UK law.

Table of contents of supporting materials

1. European Commission's Proposal for a Directive on copyright in the Digital Single Market, 14 September 2016
2. Council of the European Union's agreed negotiating mandate on the Proposal for a Directive on copyright in the Digital Single Market, 14 September 2016, 25 May 2018
3. Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive on copyright in the Digital Single Market
4. European Commission Staff Working Document, Executive Summary of the Impact Assessment on the modernisation of EU copyright rules
5. European Commission Factsheet – A Digital Single Market for the benefit of all Europeans
6. *L'Oréal SA and Others v eBay International AG and Others* Case C-324/09 Judgment of the Court of Justice (Grand Chamber) of 12 July 2011