

The New EU Directive on Copyright

On 12 September 2018, the European Parliament approved the draft “Directive of the European Parliament and of the Council on Copyright in the Digital Single Market” no. 2016/0280 (COD), aimed at harmonizing copyright law in the European Union, by adopting a series of amendments to the initial proposal of the European Commission dated 14 September 2016.

The Directive has the huge advantage of defining fundamental copyright rules common to all member States, in light of the rapidly changing development of technologies and the Internet, with which regulations need to adapt and keep pace.

The Commission’s proposal however gave rise to an animated debate between the various stakeholders and interest groups, specifically publishers, music producers and artists on the one hand, and web platforms and activists for the freedom of the Internet, on the other. The highly contentious areas focus especially on the following two articles.

Article 11 (link tax): Protection of press publications.

Contents: article 11 provides publishers of press publications with the right to receive appropriate and fair remuneration for the use of their materials by service providers in the information society. This provision would affect so-called snippets, i.e., the previews of news articles that online platforms, like Facebook and Google, systematically give their users.

A user license mechanism would apply to the publication of these previews that online platforms would have to obtain from press publications, which will become holders of actual rights connected to copyright on previews.

The latest amendments, approved in September 2018, have however excluded the application of the provision to personal uses of links and their non-commercial use, for instance in (“wiki”) shared knowledge projects, such as Wikipedia.

Rationale: the purpose of the provision is to redefine the balance in relations between online platforms and publishers. In this respect, on the one hand, publishers complain that their content has been exploited for years by online service providers with no fair remuneration; platforms, on the other hand, claim that their activity already provides a strong economic return to publishers, thanks to the advertising generated by the publication of these previews and increased exposure for the publishers on social networks or on the pages of search engines.

Issues: these provisions could lead to a disengagement of online platforms, which would eventually harm small publishing groups the most. In recent years, some member countries have attempted to introduce a right connected with copyright having similar content in order to protect publishers, with a rather negative impact in some instances on the publishing industry: in Spain, specifically, Google refused to negotiate licenses with publishers to post previews, and preferred to remove any items from Spanish publishers from its news, in addition to shutting down the Spanish version of Google News. So, the big question, in light of the Directive, is whether Google would shut down Google News all over the European Union.

Article 13 (upload filter): Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users.

Contents: Article 13 attempts to make up for the

so-called “value gap”, meaning the lack of control and monitoring filters by on online platforms for unlawfully uploaded subject-matter protected by copyright. It now includes the obligation for online platforms to ensure control on everything that is uploaded by users, introducing filters on posted content, where such platforms have not entered into license agreements with copyright holders for shared content. Each online service provider would therefore have to set up a system similar to “Content ID”, the technology that YouTube has been using for years that, thanks to its analysis algorithm, automatically checks if user uploaded content may contain subject-matter that is protected by copyright.

Rationale: the provisions aim at protecting authors of intellectual works, enabling them, through appropriate monitoring systems, to become more aware of the actual use, commercial success and economic value of their creations, and therefore to claim fair remuneration for granting rights over or in respect of such works.

Issues: academic groups have suggested that imposing a general monitoring obligation would be against the European Charter of Fundamental Human Rights, limiting the freedom of online expression, especially because of the risk that automated upload filters are not capable of making the distinction between an actual copyright infringement and the lawful use of protected works based on statutory restrictions

and exceptions (for instance, quotes, parodies, criticism). Moreover, these provisions could be a significant barrier for smaller platforms and startups, which are not in a position to make the necessary investment to implement appropriate monitoring systems¹.

The EU Parliament’s approval of the amended text of the Directive is only one of the steps in the process towards its adoption. Now it is up to the Council to either itself approve the position of Parliament or to adopt a different one. The final text will only emerge and be defined at the end of negotiations among the EU Parliament, the Council and the Commission, which are due to start in the next few weeks. The text will then be closely scrutinised in the framework of the various negotiations between the European institutions and member states for the adoption of implementing measures in each country.

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¹ YouTube spent several million dollars to develop “Content ID” and, even if it is the best system on the market, it does not always work well and at times it unreasonably blocks certain contents.