NEW EU-DIRECTIVE ON COPYRIGHT

On 26 March 2019 the EU Parliament approved the new 'Directive on copyright in the digital single market'. The proposed Directive seeks to govern on a level playing field the use of copyright material on the internet. Normally this would be a technical affair, but the Directive has drawn more controversy than any other Directive in the EU history between internet freedom activists, speaking for freeloading, and those being in favor of a high level of copyright protection.

From the side of the EU legislative bodies, the Directive aims at ensuring that professionals in the creative industry, such as musicians or actors, and news publishers and journalists will enjoy the same benefits in the online environment as those available in the non-online environment; to this end the Directive introduces new, radical rules for the use of copyrighted material on the internet, envisaged to fundamentally change the status quo. In this doing it has caused serious upheaval and has raised sand to the key players in the tech industry, such as YouTube, Google, Wikipedia, and in general those exploiting content online, since the rightholders, thanks to the new copyright rules, will be in a stronger negotiating position, whereas online content providers will have to share their revenue with the rightholders.

Among the various changes envisaged to be brought about the following represent the most significant ones:

- As per **article 17** (ex. Article 13), being one of the most controversial issues during the making of said Directive, the increased liability of online content-sharing service

providers is set forth. In particular, online content-sharing service providers are made directly liable for user-generated, copyright infringing, content. Under this penalty, online content-sharing platforms will be required to take active measures to prevent copyrighted material from being uploaded without permission.

In particular, they will be required:

- to obtain authorization from the relevant right holders, *inter alia* by entering into licensing agreements;
- if no authorization is obtained, they will have to demonstrate (i) that they have made best efforts to obtain authorization; (ii) that they have made, in accordance with "*high industry standards of professional diligence*" best efforts to ensure that works of which they are notified by rightholders are not made available; and in any event (iii) that they have applied an expeditious notice-and-take down procedure, this meaning that they act quickly to remove copyrighted material when notified of specific content and then make best efforts to prevent future uploads.

The foregoing obligations apply to platforms, which are designed to enable users to upload and share a "large" amount of content with the purpose of obtaining profit therefrom, either directly or indirectly, such as YouTube, social media platforms, music-sharing and online audio and video streaming platforms, etc. It is obvious that in this way the 'safe harbor' rules, already outdated, can no longer be invoked, since the responsibility for the distribution of copyright material by users is transferred to the platforms, which should ensure the authorization of rightholders by paying them a fair remuneration.

Providers of services such as open source software development and sharing platforms, not-for-profit scientific or educational repositories as well as not-for-profit online encyclopedias, this including Wikipedia or GitHub, should be excluded from the scope of application of the Directive; the same applies to providers of business-to-business cloud services and cloud services or online marketplaces the main activity of which is online retail, and not giving access to copyright-protected content.

It is noteworthy that special provisions are made with regard to start-ups; in particular, new platforms that are less than three years old, with an annual turnover of less than 10 Mio Euros and no more than 5 Mio unique visitors per month shall be subject to less strict obligations.

Despite the fact that under an earlier version of the Directive referring to "*proportionate content recognition technologies*", the platform owners were kind of obliged to use automated filters to scan every piece of uploaded content and stop anything that might violate copyright from being uploaded, such a wide obligation of monitoring was not adopted in the final text of article 17.

The objective to be achieved through article 17 seems to be quite fair; yet lacking clarity e.g. for instance on the concept of "*best efforts requirements*", will inevitably lead to legal and commercial uncertainty until the underlying concepts are construed by

national courts and ultimately by the EU Court of Justice.

- **Article 15** (previously titled as article 11, referred to in the public debate as the "link tax") provides for the press publication right, i.e. a new right for press publishers in respect of their e-published works; said right expires two years after first publication.

  As per the new rules, for the sharing even of short extracts – such as headlines, short snippets of an article or photographs – online services and platforms making use of news articles and other press publication content (e.g. news aggregators, such as Google news, search engines) will in practice need to obtain licenses from press publishers and pay reasonable fees. Journalists must also get a share of any copyright-related revenue obtained by their news publisher.

  However, as per the final version of article 15, this new right does not prevent acts of hyperlinking. Further, said article does not apply to 'individual words' and 'very short' snippets of news articles. Free uploading and sharing of copyrighted material for the purpose of quotation, criticism, review, caricature, parody or pastiche is also excluded; thus the Directive ensures the use of web memes and GIF files in online platforms.

  The new rules are intended to give publishers greater leverage to negotiate licensing terms with news aggregators, search engines and other online platforms making use of their content. This applies undoubtedly to large-scale publishers; hopefully even smaller publishing entities will be in a position to negotiate significant license fees. The press publication right does not apply to private or non-commercial uses of press publications – a provision that is intended to ensure that it does not prevent sharing of articles by individual users.

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