Proposed Changes to EU Copyright Law – Implications for Rights Holders in the News and Media Industries

Kosta Hountalas, Lawyer, MinterEllison discusses some of the implications of the proposed EU Directive for Copyright in the Digital Single Market for the news and media industries

Introduction

The European Union (**EU**) Directive for Copyright in the Digital Single Market (**DSM Directive**) is a proposed European Directive forming part of a legislative package presented by the European Commission (**EC**), with the stated purpose of modernising EU copyright laws.[1]

The DSM Directive was first presented by the EC on 14 September 2016, before being introduced by the EP Committee on Legal Affairs on 20 June 2018. The DSM Directive was approved by the European Parliament (**EP**) on 12 September 2018.

The DSM Directive will now be the subject of formal 'trilogue' discussions (between the EC, EP and the Council of the EU), expected to conclude in January 2019. If it is formalised, each of the EU's member countries will then need to enact or amend current copyright laws giving effect to the DSM Directive.

Since its introduction, the proposed DSM Directive has been the subject of controversy, causing a strong divide amongst stakeholders and academics. Media headlines such as '*New EU copyright filtering law threatens the internet as we knew* [sic] *it*'[2] and criticisms from prominent media and technology figures (including the inventor of the World Wide Web, Tim Berners-Lee and Jimmy Wales, the founder of Wikipedia),[3] have presented the DSM Directive in a largely cynical light.

Key issues

Much of the debate has centred on three key issues:

- the proposed establishment of a new right that would expand the rights of content producers such as publishers of press publications to be compensated for the online use of their publications (**Press Right**);[4]

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- the proposed requirement that online content sharing service providers (such as YouTube, Facebook, Twitter, Amazon, eBay and Instagram) (**Service Providers**) implement new systems by which they will monetise and control online content distribution (**Monitoring Requirement**); and
- the creation of a new exception to copyright infringement for the use of text and data mining techniques in the EU, for research organisations acting for a research purpose (such as a tertiary education staff member scanning and analysing scientific articles).

This article will focus on the Press Right and Monitoring Requirement and, in particular, how these issues may impact the news and media industries.

Press Right

Article 11, which deals with the Press Right, provides the following:

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC so that they may obtain fair and proportionate remuneration for the digital use of their press publications by information society service providers.

1a. The rights referred to in paragraph 1 shall not prevent legitimate private and non-commercial use of press publications by individual users.

2. [...]

2a. The rights referred to in paragraph 1 shall not extend to mere hyperlinks which are accompanied by individual words.

3. [...]

4. [...]

1 European Parliament, 'Copyright in the digital single market' (July 2018) *Briefing – EU Legislation in Progress* <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593564/EPRS_BRI(2016)593564_EN.pdf>.

2 Sarah Jeong, 'New EU copyright filtering law threatens the internet as we knew it', *The Verge* (dated 19 June 2018) <https://www.theverge.com/2018/6/19/17480344/eu-european-union-parliament-copyright-article-13-upload-filter>.

3 'Article 13 of the EU Copyright Directive Threatens the Internet', open letter to Antonio Tajani MEP, President of the European Parliament, 12 June 2018 <https://www.eff.org/files/2018/06/13/article13letter.pdf>.

4 Article 11, DSM Directive.

4a. Member States shall ensure that authors receive an appropriate share of the additional revenues press publishers receive for the use of a press publication by information society service providers.

Effectively, the proposed Press Right in the DSM Directive introduces a right for publishers of press publications to authorise the digital use of their press publications where such use is not covered by existing 'communication to the public' rights. For example, the publisher of press publications will have the right to authorise Facebook's display of a snippet of a news story as part of its news aggregating service.

To date, the display of these snippets has not been captured by the exclusive rights currently provided to copyright owners.[5] The publishers of press publications claim that they are losing revenue due to these snippets of news being read by platform users (such as Facebook users), who then do not click through and proceed to the publisher website to read the full article.

The 'ancillary' Press Right proposed by the DSM Directive has already been implemented in two Member States so far:

- **Germany**: In 2013 the German Copyright Act was amended to provide that publishers of press publications are paid a fee for 'ancillary copyright' when searches engines and news aggregators display digital excerpts from newspaper articles.[6] Notably, this right does not apply to 'single words or small text excerpts' which can be shown without gaining permission from the publisher. In practice, however, many major publishers decided to waive their ancillary rights after Google declined to enter into licence negotiations with them.
- **Spain**: The Spanish Copyright Act was amended to limit the quotation exception and institute the payment of a copyright fee to online news aggregators and publishers for linking to their content. Publishers cannot opt out of receiving this fee, and as a result, the Spanish amendments make it mandatory to pay the copyright fees to publishers.

from the perspective of a publisher of press publications, the proposed Press Right may be a double-edged sword. On the one hand, it will provide copyright owners with an additional remuneration stream. On the other hand, it may cause friction between search engines or news aggregators, and publishers.

On 11 December 2014, Google announced that due to the introduction of the ancillary right fees, it had removed Spanish publishers from Google News and closed the Spanish version of Google News.[7] Academics and commentators have generally been very critical of the Spanish legislation. A study commissioned by Spanish publishers concluded that the introduction of the ancillary right fees had resulted in a negative impact on the publishing sector overall.[8]

As can be seen, from the perspective of a publisher of press publications, the proposed Press Right may be a double-edged sword. On the one hand, it will provide copyright owners with an additional remuneration stream. On the other hand, it may cause friction between search engines or news aggregators, and publishers.

Monitoring Requirement

The DSM Directive deals with the Monitoring Requirement in the proposed Article 13. After the last round of negotiations, Article 13 relevantly provides:

1. Without prejudice to Article 3(1) and (2) of Directive 2001/29/EC, online content sharing service providers perform an act of communication to the public. They shall therefore conclude fair and appropriate licensing agreements with right holders.
2. Licensing agreements which are concluded by online content sharing service providers with right holders for the acts of communication referred to in paragraph 1, shall cover the liability for works uploaded by the users of such online content sharing services in line with the terms and conditions set out in the licensing agreement, provided that such users do not act for commercial purposes.

2a. Member States shall provide that where right holders do not wish to conclude licensing agreements, online content sharing service providers and right holders shall cooperate in good faith in order to ensure that unauthorised protected

5 See Articles 2 and 3(2) of Directive 2001/29/EC.

6 Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 1 September 2017 (Federal Law Gazette I p. 3346) <https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html>.

7 'An update on Google News in Spain', *Google Europe Blog*, 11 December 2014 <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html>.

8 Nera Economic Consulting, 'Impact of the New Article 32.2 of the Spanish Intellectual Property Act' (2015 study commissioned by the Spanish Association of Publishers of Periodicals AEEPP) <https://www.copyrightevidence.org/evidence-wiki/index.php/Nera_Economic_Consulting_(2015)>.

works or other subject matter are not available on their services. Cooperation between online content service providers and right holders shall not lead to preventing the availability of non-infringing works or other protected subject matter, including those covered by an exception or limitation to copyright.

2b. Member States shall ensure that online content sharing service providers referred to in paragraph 1 put in place effective and expeditious complaints and redress mechanisms that are available to users in case the cooperation referred to in paragraph 2a leads to unjustified removals of their content. Any complaint filed under such mechanisms shall be processed without undue delay and be subject to human review. […]

3. […]

It should be noted that Article 13 underwent a significant transformation before it reached its final form on 12 September 2018. One of the critical points was the proposed requirement that Service Providers include 'appropriate and proportionate content recognition technologies' in their formulation of a best practice approach, to ensure that right holders were being adequately compensated, particularly as there was evidence to suggest that such technology – where it was being used – was unreliable.

Further, the previous incarnation of Article 13 went on to state that in order for Service Providers to avoid liability for acts of communication to the public or making available to the public within the meaning of Article 13, they would need to demonstrate the measures they had in place to prevent access to works or subject matter identified by rights holders.

In relation to the Monitoring Requirement, on balance, and notwithstanding the removal of the reference to 'content recognition technologies', Article 13 (in its amended form, as of 12 September 2018), has implications for the issue of liability. Under current law, Service Providers are not liable when their users infringe copyright so long as they do not have knowledge (actual or constructive) of the infringement, and, once they are informed, they act quickly to remove it.

The proposed Article 13 would see Service Providers inherit a much larger proportion of the cost and responsibility for monitoring and policing copyright infringement, as they will be expected to proactively police what is being uploaded on their servers.

Whilst not quite a perfect mechanism, the general consensus has been that under the current system, the cost of copyright infringement is spread across the three main players – rights holders, Service Providers and users. Rights holders such as news and media companies and publishers of press publications inform the platforms of infringing content. The Service Providers then take action once they are notified, and users are mindful that they are ultimately responsible for what they do and say on the Internet.

The proposed Article 13 would see Service Providers inherit a much larger proportion of the cost and responsibility for monitoring and policing copyright infringement, as they will be expected to proactively police what is being uploaded on their servers. Effectively, the locus of Service Provider liability would shift from one based on actual or constructive knowledge of copyright infringement (such as the current 'notice and takedown' system) to liability based on a failure to have preventative measures in place to stop the publication of infringing content. This, in turn, would mean that platforms will have strong incentives to be overly restrictive so as to avoid being held liable and fined. It follows that Service Providers may also seek to recoup those extra costs by revising their subscription packages or increasing their ad content.

Conclusion

It is unclear what the DSM Directive will look like in its final, approved form, or how it will be implemented at a national level and then interpreted by the judiciary. Despite this, news and media organisations will need to be cognisant of the potential challenges it may raise. Based on the experience in Germany and Spain, the negotiations arising out of the Press Right will not be straightforward and will likely be contentious.

On the Monitoring Requirement, this could potentially lead to increased revenue for content producers, particularly the less established press players that may have seen their content uploads slip through the cracks. However, it is yet to be seen whether the practical issues of technological implementation can be overcome in the short term.

In any event, it may be some time before the effects of the DSM Directive are fully felt – with the 'trilogue' discussions concluding in January 2019, and the process of implementing corresponding legislation in each EU member country to follow.

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