The European Copyright Reform

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The copyright law in force in the EU is harmonised by various directives - but it dates back to 2001, and at that time there was no Facebook, YouTube or Twitter. Thus, it no longer adequately serves its purpose "*in this new digital environment*". The European Commission came to this conclusion after an evaluation of copyright law between 2013 and 2016 and initiated the reform as a result.

On 26 March 2019, the European Parliament has now approved the copyright reform submitted to it. The controversially discussed draft was adopted by a clear majority. If the Council of the European Union also confirms the draft, the legislative process would be completed and the Member States would have to implement the Copyright Directive within two years.

The aim is to adapt copyright at EU level to the "*new realities*", as the development of digital technologies has led to changes in the creation, production, dissemination and exploitation of works and other subject matter. There are new forms of use as well as new actors and business models.[1] In addition, authors and rights holders are to be better protected by being assured of fair remuneration for their content on the internet. The EU also wants to promote the digital single market and prevent the fragmentation of copyright in the Member States. For even if exceptions and limitations to copyright are harmonised at EU level, due to the emergence of new types of use in recent years, it is not certain whether these exceptions are still suitable for ensuring a fair balance between the rights and interests of authors on the one hand and those of users on the other. Moreover, these exceptions are only effective at the national level. Legal certainty for cross-border uses is not guaranteed.

The new EU Directive

The current draft Directive addresses measures on several new areas:

- Adapt exceptions and restrictions to the digital and cross-border environment,
- Improve licensing practices and ensure wider access to content, and
- Creation of a functioning market for copyright protection.

Four articles of the draft Directive are particularly noteworthy:

[1] Some text passages are taken from the explanatory memorandum of the Directive

Text and data mining (Article 3)

From a network policy perspective, Article 3 is particularly interesting; it provides for a new, EU-wide mandatory barrier regulation in favour of text and data mining.

In future, it will allow the automatic evaluation or analysis of already existing data for the purpose of non-commercial scientific research in order to gain new insights (*text and data mining*).

In addition, Article 3 indirectly affects the framework conditions for the development and application of analytical methods - when it comes to the use of artificial intelligence, the question is who may access which public data under which circumstances in order to develop, test or apply self-learning algorithms. However, since Article 3 only favours non-commercial scientific institutions, while the further development of artificial intelligence is largely driven by commercial data scientists and start-ups, the EU has created an opening clause in Article 4. This allows Member States to provide further exemptions for their domestic industry, science or the interested public.

Ancillary copyright for press publishers (Article 15)

Article 15 is directed at all services and internet platforms that earn their money from third-party content, such as Google, YouTube, Facebook or Instagram. The EU's intention is to no longer put publishers in the online sector in a worse position than other intermediaries of works, e.g. producers of sound recordings. After all, publishing services also cost time and money. In addition, the ancillary copyright is intended to secure the future of the press by opening up a new source of income for European publishers.

Following the German and Spanish model, the EU therefore wants to introduce an ancillary copyright for press publishers. This grants press publishers the exclusive right to make the press product or parts of it publicly accessible for commercial purposes, except in the case of individual words or very small text extracts. The rule serves to protect against systematic access to the publisher's performance by the providers of search engines and providers of such services on the net that prepare content in accordance with a search engine; because their business model is particularly geared towards also accessing the publisher's performance for their own value creation.

Private or non-commercial uses of press releases by individual users are not covered by the provision.

Compensation claims by publishers (Article 16)

The EU wants publishers to participate in statutory remuneration claims again.

To this end, Member States may now provide under Article 16 that where an author has transferred or licensed a right to a publisher, such transfer or licensing shall constitute a sufficient legal basis for the publisher's entitlement to a share of the remuneration for the respective use of the work.

Licensing obligation and upload filter (Article 17)

Under current EU copyright law, internet platforms are not liable for copyright infringing content, but users are responsible for the images, videos, texts or music they upload. With the copyright reform, the platforms are now to be responsible if content is uploaded for which they, the platforms, do not hold licences.

In order to comply with Article 17, platforms must then scan all content using software that uses an extensive database to check whether another person holds the copyright to the content; if this is the case, the filter prevents uploading (*upload filter*). Therefore, platform operators should acquire licences for the content that is uploaded by users and thus also give the authors a share of the revenues.

A platform can escape liability if it has made timely efforts to obtain licences from rights holders. In addition, platforms are to be exempt from upload filters if they have been in existence for less than three years, have an annual turnover of less than ten million euros and have less than five million users per month.

Points of criticism

While supporters see the current draft Directive as strengthening the position of rights holders vis-à-vis platforms such as Google, YouTube or Facebook, critics warn of the consequences of the reform: the consumer internet could become much smaller. The critics fear a restriction of freedom of expression, art and the press.

Text and data mining

When the Commission's initially restrictive proposal on text and data mining was extended to include a national opening clause, this earned approval. Soon, however, the thought arose how long commercial data scientists, start-ups and the like should wait for their national governments to enact their own regulations allowing them to develop and apply artificial intelligence, especially since the clause merely offered an exception to the rule. It is up to the Member States to decide whether to accept it.

Ancillary copyright for press publishers

The motives for an ancillary copyright for press publishers are entirely supportable.

However, opponents of the ancillary copyright argue that the models have already failed. While the Spanish law is now known to have had a negative impact on the visibility of news and access to information in Spain, and to have harmed smaller and independent media in particular, the German ancillary copyright has only led to publishers in Germany making their content available again for free after a short time. Moreover, it is about to be declared null and void in court. In reality, the ancillary copyright has not generated any additional revenue for publishers.

It is also feared that, contrary to the original intention to cover only commercial users, bloggers, small businesses or, for example, private users who collect, share and comment on other people's content on the net could also be indirectly affected by Article 15.

In addition, the ancillary copyright law makes the use of search engines and platforms more burdensome in everyday life. In future, they would no longer be allowed to display titles or entire sentences if they had not acquired licences from the rights holders. According to the EU reform, only individual words or short text excerpts may be displayed. Furthermore, links, but again no link previews, which usually show the title and the headline of an article. The user would therefore hardly have a chance to find out exactly what the shared article was about before clicking.

Compensation claims by publishers

The introduction of compensation claims by publishers was already declared illegal by the European Court of Justice in 2015. The Court argued that this compensation, which at the time was up to 50% depending on the country and the type of work, should benefit authors alone.

Licensing obligation and upload filters

Opponents see the introduction of upload filters as a threat to internet culture. The fundamental problem is that upload filters, as automated computer programmes, cannot recognise irony, satire or even sarcasm. For this, it must be possible to put content into context.

Critics are also concerned that platforms will be more cautious about deleting too much content - including legal content - than too little (*overblocking*), given the risk of potential liability. Although the affected user could take action by means of a complaint or lawsuit, such steps would tend to scare off many users. A decline in the diversity of opinion on the internet is feared.

Concerns remain about automated censorship of critical voices. Proponents argue that the control should be appropriate and transparent. Moreover, in most cases the platforms would acquire licences for the copyrighted material anyway, so there would be no need for blocking. On the other hand, they argue that

it is unclear how platforms should have sought licences in time if they only know at the moment of uploading what kind of content is being uploaded.

At the beginning of 2012, the European Court of Justice had already spoken out against upload filters. It justified this with the prohibition of a general monitoring obligation as well as an impairment of entrepreneurial freedom, since expensive and complicated IT systems are necessary for such monitoring. Accordingly, many fear a further growth of the market positions of already large platforms such as Google, Facebook or Amazon. This, in turn, could weaken the negotiating position of rights holders, as content would either be uploaded at the platforms' conditions or not at all.

Alternative proposals

The draft Directive was adopted unchanged on 26 March. There were alternative proposals.

More generous text and data mining

Although the introduction of the opening clause was praised by many experts, it was not enough for them. Because in order not to make it even more difficult for the - already few - skilled workers and innovators in the IT sector, it was suggested that the opening clause should not remain at national level, but be raised to EU level.

To prevent a feared shift of commercial research to jurisdictions whose copyright laws are more generous than the EU's, such as the US or Asia, experts suggested exempting commercial mining in exchange for compensating rights holders.

Capture only affected platforms

From the ranks of the European Parliament, it was suggested that the definition of "service providers for sharing online content" formulated in the Copyright Directive should be more narrowly defined. In this way, only those platforms that are affected by a particularly high number of copyright infringements could be obliged to introduce an upload filter. This would significantly reduce the conflict.

Introduction of flat-rate licence fees

According to a proposal by the Christian Democratic Union of Germany for the national implementation of the copyright line, the principle in Germany should be: "Pay instead of block". According to this, all content should first be able to be uploaded in principle, without upload filters or the risk of censorship. In a second step, platform operators would have to compensate authors for the use of their works. This would not apply if the use had already been released through the purchase of a licence. In addition, uploads that are below a certain time limit should be free of licence fees.

Outlook

After Parliament's approval of the copyright reform, it is now the turn of the Member States. They must approve the draft once again. They had already done so once in February - also with a German "yes". A possible date for the new vote is 9 April 2019. The opponents of reform hope that the German Government will refuse to give its consent this time. Especially since a German "no" would make the necessary majority among the Member States uncertain. However, a German "no" is considered unlikely.

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