

A Major Shift For EU Copyright Protection Online

By **Andrew Avsec and Tracey Starck** (April 16, 2019)

On March 26, 2019, the European Parliament adopted the Directive on Copyright in the Digital Single Market,[1] approving new copyright rules for materials posted on the internet. This new directive is intended to “achieve a well-functioning and fair marketplace for copyright,”[2] with a particular focus on digital and cross-border uses of protected content.[3] In short, the directive aims to make it easier for copyright holders to enforce their rights on the internet and to strengthen the rights that authors and performers have in their work.[4] Among several updates, the directive contains two significant and controversial changes:

1. Article 17 (known in a prior draft as Article 13) likely upends the long-standing and familiar safe harbor rules that protect online service providers from copyright infringement;
2. Article 15 (known in a prior draft as Article 11) limits the aggregation of news content without obtaining a license.

These changes are likely to alter the internet status quo and shift liability more squarely to online content-sharing service providers.

The Current Framework

The 2019 directive is not the first attempt to balance the rights of copyright owners with the benefits of a digital world. Signed in 1996, the World Intellectual Property Organization Copyright Treaty represented an international effort to address the digital revolution, and like the 2019 directive, it emphasized the importance of copyright ownership and protection in incentivizing creative activities.

Among other things, the WIPO Copyright Treaty required the protection of computer programs, prohibited circumvention of technological measures for the protection of copyrighted works, and prohibited the modification of rights management information contained in works. However, one of the most significant developments arose out of the United States’ implementation of the WIPO Copyright Treaty as part of the Digital Millennium Copyright Act.

As part of the DMCA, the U.S. passed the Online Copyright Infringement Liability Limitation Act, which created a safe harbor for online service providers that complied with certain requirements.[5] The safe harbor provisions of the DMCA created the current framework, which affords protection for online service providers from liability for copyright infringement. One safe harbor provision requires that online service providers designate an agent for copyright complaints and set up a mechanism by which copyright owners can submit takedown requests for copyright infringement. The alleged infringer in turn, has an opportunity to challenge the removal.[6]

In 2000, The European Parliament adopted the Electronic Commerce Directive 2000, which among other things, created a notice and takedown provision that created a safe harbor for online service providers,[7] similar to the safe harbor created by the DMCA.[8] To qualify for the takedown safe harbor, when a host becomes aware of copyright infringement, it must act promptly to remove or disable access to the infringing content. The burden for



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policing copyright infringement, thus, largely falls on the copyright owner to provide notice to the online service providers, which then must comply with the takedown request.

Article 17 (Previously Article 13)

Article 17 replaces the safe harbor found in the 2000 directive, and makes online platforms that host user-generated content directly liable for copyright violations of that uploaded content.[9] Article 17 states, in relevant part:

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

...

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have: (a) made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

Where currently online service providers are generally protected from liability if they set up a mechanism for promptly responding to allegations of copyright infringement, Article 17 will now require that online platforms take “effective and proportionate measures” to “prevent the availability” of infringing content, act “expeditiously” to remove infringing content, and show that “best efforts” have been made to prevent future availability of infringing content.[10]

This change represents a potentially significant shift in the responsibility for policing copyrighted works on the internet. Online services providers — particularly large online services providers — will now face the burden of proactively identifying and blocking or immediately removing, on their own initiative, material protected by copyright. For large platforms, it is infeasible to review each post to confirm that content does not infringe a third-party copyright — for example, 350 million photographs are uploaded to Facebook each day[11] (a rate of over 4,000 per second) — so companies will likely need to use automatic filters to remove content that contains copyrighted material.

Not surprisingly, many view this provision as requiring upload filters. Such filters cannot effectively evaluate fair uses, and many effectively eliminate any copyrighted works, even if the use would be a fair use under relevant laws. The use of upload filters has drawn criticism from U.N. officials[12] and led to protests in Germany[13] out of concerns that such software would infringe on freedom of opinion and expression online. Moreover, concern was expressed that smaller online service providers cannot afford the significant investment in filtering technology, and thus small and medium companies would be at a significant competitive disadvantage.

The 2019 directive tried to address some of these concerns. For example, the directive states that “[t]he application of this Article shall not lead to any general monitoring obligation.”[14] The 2019 directive also requires that member states include exceptions for quotation, criticism, and review and protection for the use of purpose of caricature, parody or pastiche.[15] Moreover, the 2019 directive indicates that member states should consider several factors before applying liability, including the size of the platform, the amount of content uploaded, and the effectiveness of the measures to prevent the posting of infringing material.[16]

Finally, the 2019 directive carves out small startup platforms (annual turnover below €10 million) from liability for complying with the filtering obligations as long as they satisfy traditional takedown requirements.[17] Despite these additions, Article 17 does not provide any guidance on how a larger platform can effectively filter uploads without removing uploads that constitute fair use, and significant ambiguity remains as to how these provisions will be interpreted and implemented.

Potential Impact on U.S. Businesses

As this 2019 directive touches the internet in one of the world’s largest economies, companies worldwide, including American companies, may, in the next two to three years, find themselves adapting to the new copyright climate in Europe.

YouTube, Facebook and Twitter, platforms whose users post collectively post a billion times every day, could be most directly affected by Article 17. At the same time, many other companies operate internet sites that permit the posting of content (e-commerce sites, dating sites, music sharing sites, etc.). These companies will need to evaluate whether their takedown mechanisms will be sufficient to avoid liability under the new directive or whether a more proactive copyright policy will need to be implemented. These companies in turn may create more stringent requirements or create stronger indemnification obligations for businesses and other users posting content to their sites.

Further, practical issues may arise as online platforms begin filtering content in order to attempt to prevent copyright infringement. For example, a business may complain about an infringing work posted in one context (e.g., a copyrighted photograph to sell counterfeit product). However, that same work could actually be beneficial to the business and noninfringing in a different context (e.g., use of the same photograph by licensees to advertise the legitimate product, or by consumers to comment on the product). However, because the work was blocked due to the infringing use, the otherwise permissible use may also be blocked. In short, the ramifications of shifting liability for online platforms may create over-filtering that, on one hand may mean that it is easier for businesses to protect their works on the internet, but on the other hand, may create practical headaches for the legitimate use of those same works.

Article 15 (Previously Article 11)

Article 15, referred to by critics as the “link tax,” governs the way copyrighted news content is treated on the internet. The revision of Article 15 grants publishers direct copyright over “online use of their press publications by information society service providers.”[18] This extends the relatively limited protections of the 2001 Directive On The Harmonisation Of Certain Aspects Of Copyright And Related Rights In The Information Society.[19]

Under current EU law, news publishers rely on authors assigning a copyright to them and have the burden of proving right ownership for each individual work when published or republished on a site. The revised Article 15 may grant protect publishers’ copyrights in news blurbs and headlines, meaning aggregation platforms, like Google News, would have to compensate news outlets in order to share such articles. Moreover, the 2019 directive requires that authors of press publications “receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.”[20]

Those opposed to the Article 15 “link tax” believe the new provisions will force online news aggregators to go through a cumbersome licensing process to post news, which may slow the flow of news or cause some news aggregators, such as Google News, simply to not operate in Europe. On the other hand, news media companies have applauded the change, which stand to benefit from the provision’s added protections and licensing requirements. Of course, there are exceptions to these protections. Article 15 explicitly is not intended to apply to “private or non-commercial uses of press publications by individual users,” they hyperlink itself, or “very short extracts of a press publication.”[21]

Parliamentary Approval Is Still Not the Final Word

Parliamentary approval, though a significant step, is not the final word. It still is up to the EU member states to approve the Parliament’s decision. If the member states accept the new directive, the changes will take effect 20 days after publication in the official journal, and then member states will have up to 24 months to incorporate the directive into their laws. If a country does not meet this deadline, the European Commission can initiate proceedings against the country, leading to various judicial hearings within the Court of Justice of the European Union to enforce adoption of the new directive. Furthermore, many of the controversial provisions turn on phrases such as “very short,” “best methods” or “expeditiously.” It could take years and many court battles before the meaning of the 2019 directive is fully interpreted.

In short, the change has not taken place just yet, and, depending on the actual implementation and interpretation of the national laws stemming from this directive, the change may or may not be as drastic as many fear. Still, companies which may be affected should monitor this new legislation as it develops and the practical business impact comes into better focus.

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[1] Provisional Directive P8_TC1-COD(2016)0280 of the European Parliament [hereinafter 2019 Directive] (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0231+0+DOC+PDF+V0//EN>).

[2] Id. Preamble, at 3.

[3] Id. art.1, at 1.

[4] Id. Preamble, at 3.

[5] Digital Millennium Copyright Act, H.R.2281, 105th Cong. (1998).

[6] Id. at §512(c).

[7] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 On Certain Legal Aspects of Information Society Services, In particular Electronic Commerce, In The Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1-16.

[8] 2019 Directive, *supra* note 1, art. 14.

[9] 2019 Directive, *supra* note 1, art. 17, at 1-4.

[10] Id. art. 17, at 4.

[11] Cooper Smith, Facebook Users Are Uploading 350 Million New Photos Each Day, Business Insider, Sep. 18, 2013, <https://www.businessinsider.com/facebook-350-million-photos-each-day-2013-9>.

[12] Emma Woollacott, Copyright Directive Threatens Freedom of Expression, UN-Official Warns, Forbes, Mar. 12 2019, <https://www.forbes.com/sites/emmawoollacott/2019/03/12/copyright-directive-threatens-freedom-of-expression-un-official-warns/#46a54930b672>.

[13] Morgan Meaker, Inside the giant German protest trying to bring down Article 13, WIRED, Mar. 26 2019, <https://www.wired.co.uk/article/article-13-protests>.

[14] 2019 Directive, *supra* note 1, art. 17, at 8.

[15] Id. art. 17, at 7.

[16] Id. art. 17, at 5-6.

[17] Id. art. 17, at 6.

[18] 2019 Directive, *supra* note 1, art.15, at 1.

[19] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 On The Harmonisation Of Certain Aspects Of Copyright And Related Rights In The Information Society, 2001 O.J. L 167, 22/06 p.10-19.

[20] 2019 Directive, *supra* note 1, art. 15, at 5.

[21] Id. art. 15, at 1.