



EU Digital Regulation Versus Copyright: A Way to Reconcile Digital Economy and Copyright?

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Abstract

In September 2016, the European Commission presented a proposal for a Directive on copyright in the Digital Single Market, part of a package that also includes the transposition into European law of the Marrakesh Treaty and its effects on the European Union's relations with third countries, as well as the regulation on online transmissions of broadcasting organisations. The copyright directive is of major importance in the context of digital regulation as it proposes a new related right for press publishers and a new mechanism aiming to give rightholders better control over the use and remuneration of their works on Internet. The proposal also narrows the liability exemption under the e-commerce directive, which has given platforms that provide access to protected works a way out of concluding licensing agreements with rightholders. The draft directive proposes three exceptions to copyright to reinforce digital use in education, protection of the cultural heritage and text-and-data mining. The aim of this paper is to present and to comment on the copyright directive and offer an overview of the opinions that are starting to emerge among different stakeholders.

Published 22 December 2016

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DigitCult, Scientific Journal on Digital Cultures is an academic journal of international scope, peer-reviewed and open access, aiming to value international research and to present current debate on digital culture, technological innovation and social change. ISSN: 2531-5994. URL: <http://www.digitcult.it>

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Introduction: The European Copyright Framework

The European Commission presented its proposals for European copyright legislation on 14 September 2016.¹ We will focus on the directive on copyright in the digital single market in view of the fact that it introduces innovative measures for the protection of copyright and related rights in the context of digital distribution.² Before addressing the directive's content, however, it is important to note that the European Commission launched a "Digital Single Market" strategy in May 2015. According to the European Commission, the strategy aims to improve access for consumers and businesses across Europe to digital goods and services, to create the right conditions and a level playing field so that digital networks and innovative services can develop and flourish, and to maximize the growth potential of the digital economy.³ The Commission estimates that the digital single market could generate €415 billion by tearing down "digital barriers" across the European Union. The digital single market would be a way to retrigger growth, which remains weak in Europe.

The inclusion of copyright in the digital single market strategy was initially justified as aiming to remove obstacles to the creation of the European digital single market. Under the Barroso Commission (2004-2014), copyright was seen as a brake on digital growth, acting as a "barrier" to the creation of a digital single market:

"Copyright should not be seen as a convenient scapegoat, but it should no longer remain part of these obstacles either. Rather than being a hurdle, it must be a modern and effective tool to support creation and innovation, provide access to quality content across borders and encourage investment, freedom of information and cultural diversity." (Barnier, EU 2012)⁴

Previously, the European Commission had sought to harmonise copyright. Since the 1980s the European Community (now the European Union) has carried out an ambitious program of harmonisation of the law on copyright and related rights, with the primary aim of fostering the Internal Market by removing disparities between the laws of the Member States. This program has resulted in no fewer than seven directives on copyright and related rights that were adopted in a 10-year interval between 1991 and 2001. The seven directives have created a measure of uniformity between the laws of the Member States.⁵

¹ See: Communication "Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market" (<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-592-EN-F1-1.PDF>); Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (<http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-594-EN-F1-1.PDF>); Proposal for a Directive on copyright in the Digital Single Market (<http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF>); Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0595&from=EN>); Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (<https://ec.europa.eu/digital-single-market/en/news/proposal-directive-permitted-uses-works-and-other-subject-matter-protected-copyright-and>).

² We will disregard the other texts presented as part of the copyright package, namely the directive and the regulation on the transposition into European law of the Marrakesh Treaty and its effects on the European Union's relations with third countries and the regulation on online transmissions of broadcasting organisations, as these are beyond the focus of this article.

³ European Commission, 6 May 2015 "European Commission - Press release - A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen" (http://europa.eu/rapid/press-release_IP-15-4919_en.htm).

⁴ Extract from the speech by Michel Barnier (Commissioner for Internal Market, in charge of Intellectual Property Rights), European Commission - Press release - Adapting copyright to the digital age: the next steps – "Licensing Europe", 6.12.2012 (http://europa.eu/rapid/press-release_SPEECH-12-923_fr.pdf).

⁵ 1. Protection of topographies of semiconductor products (Council Directive 87/54/EEC of 16 December

This harmonisation effort has resulted in improved coordination of copyright rules in the single market. However, it is important to point out that the European Union is not working from scratch in this field. Indeed, efforts to codify copyright began as early as the 19th century.⁶ But while there are common European rules leading to the implementation of copyright, the exercise of copyright continues to be based on a territorial dimension. Logically, when the debate opened on the creation of the digital single market, the question of the exercise of copyright was perceived as a key issue in a context where the “digital market” implies the creation of a cross-border market theoretically free of national and/or territorial barriers.

The territoriality of copyright therefore came under fire: “The Member States have largely ignored the single-most important obstacle to the creation of an Internal Market in content-based services: the territorial nature of copyright. Despite extensive harmonisation, copyright law in the Member States is still largely linked to the geographic boundaries of sovereign states. Consequently, copyright markets in the EU remain vulnerable to compartmentalisation along national borders. (...). If the Community is serious about creating an Internal Market for copyright-based goods and services, it must inevitably confront the problem of territoriality in a fundamental way. This would imply the adoption of a Community Copyright Regulation (or European Copyright Law) to replace the existing directives and partially pre-empt the national laws on copyright of the Member States”.⁷

The Juncker Commission initially took up the slogan inherited from the Barroso Commission - “to break down national silos in copyright”, in other words to eliminate the territorial aspect of the exercise of copyright:

- “1. We must create a digital single market for consumers and business, making use of the great opportunities of digital technologies which know no borders.
2. To break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law.
3. If we do this, we can ensure that consumers can access music, movies and sports events on their electronic devices wherever they are in Europe and regardless of borders.” (Juncker, EU 2014)⁸

1986 on the legal protection of topographies of semiconductor products, OJL 24/87,24.01.1987);

2. Computer Programs Directive (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42, 17.05.1991);

3. Rental Right Directive (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61, 27.11.1992);

4. Term Directive (Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9, 24.11.1993);

5. Satellite and Cable Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15, 6.10.1993);

6. Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20, 27.03.1996);

7. Resale Right Directive (Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272/32, 13.10.2001).

The Information Society directive (2001/29/EC) defines the right of communication and the right of making available to the public and introduces the WPPT and WCT into European law. It defines a set of exceptions for optional application by Member States.

⁶ The Berne Convention for the Protection of Literary and Artistic Works was signed on 9 September 1886. The text has been revised or added to seven times since then. Added to this is a corpus of sector-based agreements, the most noteworthy being the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) (1996).

⁷ Bernd Hugenholz – “Towards an Intellectual Property Rights Strategy for Innovation in Europe” – EP, STOA (2009), p. 28 (http://www.eurosfairer.prd.fr/7pc/doc/1280392513_stoa2009_02_en.pdf).

⁸ Jean-Claude Juncker – “A new Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change”, European Commission, Press release, 15.7.2014 (http://europa.eu/rapid/press-release_SPEECH-14-567_en.pdf).

Towards the Contemporary Copyright Model

The digital single market strategy presented in 2015⁹ nevertheless states the need to “reduce” differences between national copyright regimes, not to abolish them. The strategy highlights the importance of improving cross-border access to copyright-protected content services, facilitating new uses in the fields of research and education and clarifying the role of online services in the distribution of protected works and other subject-matter.¹⁰ In December 2015, the European Commission published in this context a communication entitled “Towards a modern, more European copyright framework”.¹¹

Gradually, with the presentation of the digital single market strategy, followed by the communication on copyright, the Commission sought to strike a new balance in the objectives of copyright reform. The initial approach of tearing down the copyright “barrier” was replaced by one more respectful of the exercise of intellectual property rights. The draft directive on copyright has three objectives in this regard: (a) to allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audiovisual works and cultural heritage; (b) to facilitate digital uses of protected content for education, research and preservation in the single market; and (c) to ensure that the online copyright marketplace works efficiently for all players and gives the right incentives for investment in and dissemination of creative content.¹² Easier access to protected online content and the digital use of protected content are in keeping with the approach of creating a digital single market. The idea is to ban the “barriers” of territory-based exploitation of works for certain uses, hence the difficult exercise of trying to reconcile the exploitation of rights on a territorial basis with easier cross-border access. These objectives also seek to enhance the functioning of the online copyright market for “all actors” (these are not defined but include online platforms and traditional distributors such as broadcasters, as well as content producers and music collecting societies, for example) with the ultimate aim of contributing to investment in creative content and innovation in dissemination modes.

The provisions through which these different objectives are meant to be achieved are set out in Title II and Title IV of the draft directive. Title II establishes an exception for reproductions and extractions made by research organisations to carry out data mining for the purposes of scientific research (article 3);¹³ it also creates an exception for the digital use of works for the sole purpose of illustration for teaching (article 4)¹⁴ and an exception allowing cultural heritage

⁹ “A Digital Single Market Strategy for Europe” (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>).

¹⁰ “A Digital Single Market Strategy for Europe”, p. 8 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>).

¹¹ “Towards a modern, more European copyright framework”, 9.12.2015 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0626&from=EN>).

¹² Commission Staff Working Document – “Executive summary of the Impact Assessment on the modernisation of EU copyright rules”, 14.9.2016 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0302&from=EN>).

¹³ Article 3 - *Text and data mining*

“1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.

2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.

3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

4. Member States shall encourage rightholders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3.”

¹⁴ Article 4 - *Use of works and other subject-matter in digital and cross-border teaching activities*

“1. Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC and Article 11(1) of this Directive in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:

(a) takes place on the premises of an educational establishment or through a secure electronic network

institutions to make copies of works for the purpose of the preservation of such works (article 5).¹⁵

These provisions have the greatest impact on copyright as they introduce mandatory exceptions. The exceptions defined previously in Directive 2001/29 (Information Society Directive) were optional. Further, the aim of these exceptions is to secure a cross-border effect that undermines the territoriality (see, e.g. the exception for teaching (article 4.3): “The use of works and other subject-matter for the sole purpose of illustration for teaching (...) shall be deemed to occur solely in the Member State where the educational establishment is established”). On the other hand, the application of the Three-Step Test (article 6) is required. Some experts observe that the exceptions as defined are too narrow, especially for text-and-data mining limited to science and research.¹⁶

Title IV provides for the creation of a related right for press publishers for the digital use of their publications (articles 11 and 12);¹⁷ it also provides that platforms that store or give access to works uploaded by users must, in cooperation with the rightholders, take measures to enter into agreements with the rightholders for the use of their works or to prevent the availability of their works. Platforms must provide rightholders with adequate information on the functioning and deployment of the measures and provide adequate reporting on the recognition and use of

accessible only by the educational establishment’s pupils or students and teaching staff;
(b) is accompanied by the indication of the source, including the author’s name, unless this turns out to be impossible.

2. Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific types of works or other subject-matter, to the extent that adequate licenses authorising the acts described in paragraph 1 are easily available in the market. Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure appropriate availability and visibility of the licenses authorising the acts described in paragraph 1 for educational establishments.

3. The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation for the harm incurred by the rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.

¹⁵ Article 5 - *Preservation of cultural heritage*

“Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 11(1) of this Directive, permitting cultural heritage institutions, to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation”.

¹⁶ See Alain Strowel, ERA Annual Conference on Copyright Law (17-18 November 2016), written submission. See also, Commission’s comment on TDM: “The need to better reflect technological advances and avoid uneven situations in the single market is also clear with text-and-data mining (TDM), through which vast amounts of digital content are read and analysed by machines in the context of science and research” (Towards a modern, more European copyright framework – COM(2015) 626 final, p. 7).

¹⁷ Article 11 - *Protection of press publications concerning digital uses*

“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 for the digital use of their press publications.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.”

Article 12 - *Claims to fair compensation*

“Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a license constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right.”

the works (article 13).¹⁸ These provisions seek to address the so-called loss of value of music collecting societies.

Title IV also establishes transparency obligations in contractual relations between authors and performers on the one hand and producers and publishers on the other, with the aim of ensuring better remuneration of authors and performers (articles 14, 15, 16).¹⁹

Title IV contains three separate measures. We will comment on the two provisions impacting digital use and digital regulation. The third, establishing transparency obligations in relations between authors and their contractual counterparts, has no consequences on digital regulation and will not be considered here.

Article 11 grants a specific related right to press publishers for the digital use of their protected content. The related right for press publishers for their online content is intended to boost press publishers' bargaining power in dealing with aggregators of press content or press sites. Since 2002, Google News (used either directly in the search engine or through its application) has offered news produced by press sites. Web users can therefore access the content of articles published in major daily papers without any remuneration being paid to the press publisher and with consequences on the sales of dailies (both on paper and online). Following in the footsteps of Google News, Facebook developed an Instant Articles service and Apple launched Apple News in 2015, offering a selection of five to ten articles available on iPhone. New practices like Web crawlers are emerging and undermining the press sector.²⁰

¹⁸ Article 13 - *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*

"1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.

3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments."

¹⁹ Article 14 – *Transparency obligation*

"1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.

2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.

3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.

4. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU."

Article 15 – *Contract adjustment mechanism*

"Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances."

Article 16 – *Dispute resolution mechanism*

"Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure."

²⁰ Web crawlers are software that browse the web to collect resources (web pages, images, videos, data). Crawlers index press content, archive it and disseminate it to their customers in the form of a structured

Press publishers have sought to obtain financial compensation, with different approaches being taken from one country to the next. In France, the press sector signed an agreement in 2013 under which Google must make a financial contribution of €60 million to the sector. In Spain, a law adopted in 2014 requires content aggregators to remunerate press publishers for the right of redissemination. Shortly thereafter, in December 2014, the Google Noticias portal was shut down. In Germany, the March 2013 revision of the copyright law granted a related right to press publishers to obtain remuneration from search engines or aggregators. But the devolution of this right under national law in Spain and in Germany has failed to consolidate the ownership right of press publishers.

Following the more or less blatant failures of these national regulation attempts, the Commission decided, notably under pressure from German press publishers, to introduce the related right in European law. This related right gives press publishers the right of reproduction and the right of making available to the public as defined in the 2001 copyright directive.²¹ The grant of a related right contributes to recognition of the press publisher's role in the digital value chain and helps guarantee the rights to the content being exploited. By granting a related right to press publishers at EU level, the Commission intends to change relations with aggregators, which would no longer be able to react as they have been able to do to date at the level of a single Member State. *Mutatis mutandis*, the related right has demonstrated its legal effectiveness, notably in court cases, with respect to audiovisual communication companies (broadcasters), protected by the related right granted to them under the unitary right. It will be interesting to see whether this right provides sufficient leverage to strengthen the bargaining power of press publishers. As a result, publishers' groups welcome the attribution of a related right as "a necessary and historically important step in guaranteeing media pluralism as an essential basis for freedom of opinion and democracy in the digital world".²² The European Consumer Organisation (BEUC) questions this right and its impact on the availability of news aggregators, access to content and media pluralism.²³

The draft directive clarifies that the protection of the new right does not extend to acts of posting hyperlinks, which do not constitute communication to the public under current EU law (see Recital 33). This is in line with the recent CJEU ruling in *GS Media* in which the Court held that posting a hyperlink to copyrighted content published online without consent of the copyright holder does not in principal constitute a "communication to the public". However, the exact scope of the new publishers' right still raises some questions. Several clarifications are needed, including whether or not the new right applies to publication on blogs, whether end-users will still be free to use snippets (i.e. small fragment of a text) and what type of use is going to be considered "digital use" of a press publication.

Article 13 sets up a framework striking a fair balance between platforms and rightholders and more specifically the music sector, which suffers from the online exploitation of works considering that platforms provide little or no compensation to creator. The measures proposed are complex but can be described as creating two obligations: the first requires platforms to negotiate fair agreements with rightholders for adequate payment of their works disseminated online. The second obligation aims to ensure greater transparency on the protected content stored by platforms by encouraging the use of content recognition technologies (such as the content ID technology developed by YouTube) and by responding to rightholders' requests on works stored and thus held by platforms, possibly against the will of the rightholders.

These measures responds to the pressing demands of the culture sector (authors, producers, publishers and notably the collecting societies in the music sector),²⁴ which has seen widespread pillaging of copyright-protected content with the emergence of platforms. The strong growth in the online market over the last decade has multiplied the importance of cultural content and of the services providing access to it. Due to their influence and dominance, online platforms have become the main portal to access online content and they carry significant economic weight. The total market value of online platform services in Europe is estimated at

press panorama. The press panorama market is worth €163 million, of which only 13% benefits press publishers.

²¹ 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.

²² See EUObserver, 15 September 2016 – "EU targets Google in copyright reform" (<https://euobserver.com/digital/135089>).

²³ See BEUC's oral statement – ERA Annual Copyright Conference, 18 November 2016.

²⁴ See GESAC's contribution to the debate on "Value Gap" (<http://www.authorsocieties.eu>)

€22 billion.²⁵ An average of 23% of this value is generated directly from the exploitation of cultural content.

Two types of services are offered by platforms: on the one hand are cultural content providers like Spotify, Deezer, Netflix or iTunes, which are licensed to use works and consequently have the authorisation of rightholders; on the other are online platforms like YouTube, DailyMotion and Facebook, which provide access to aggregated or user-uploaded content, in this case without the authorisation of rightholders.

Online platforms attract users by offering access to cultural content that they have organised, aggregated and recommended. They draw direct economic benefit from such content. Unlike access providers, online platforms provide little or no compensation to creators for the use of their works. This inequality of treatment stems from use of the liability exemption for hosting services in the electronic commerce directive.²⁶ This clause is stretched beyond what the legislator intended by being applied to copyright-related acts by online platforms. Platforms claim the status of mere technology intermediaries having no economic activity as the result of placing users in contact with the works to which they have access and they consequently refuse to negotiate compensation agreements with the rightholders concerned.

The result is that only a small share of the income generated by online exploitation is returned to creators, particularly for the exploitation of musical works. This also leads to a competitive disadvantage for access providers that negotiate licenses, which pay the license rights agreed with rightholders. Under article 13 of the draft directive, platforms that store and provide access to works must enter into agreements with rightholders for the use of these works. This provision imposes a best endeavours obligation on platforms: they must negotiate agreements with rightholders for the use of their works (as is already the case, notably for music with traditional distributors such as radio). Recital 38 states in this regard that platforms “are obliged to conclude licensing agreements with rightholders”.²⁷ To prevent platforms from

²⁵ The total market value of platform services in Europe is estimated at nearly €22 billion [Search Engines: €16.140m | Social Media: €3.160m | Personal Lockers: €1.740m | Video Platforms: €845m | Content Aggregators: €100m | Total = €21 985m]. See: Cultural Content in the Online Environment: Analyzing the Value Transfer in Europe, Roland Berger 2015 (https://www.rolandberger.com/gallery/pdf/Report_for_GESAC_Online_Intermediaries_2015_Nov_EUR.pdf)

²⁶ 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”, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>).
Article 14 – *Hosting*

“1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

²⁷ Recital 38 - *Directive on Copyright (COM(2016) 593 final)*

“Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council. In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation

shirking their responsibilities by claiming the liability exemption under article 14 of the electronic commerce directive, recital 38 details what an “active” role means in the case of a platform. This active role exists if the platform “optimises” the presentation of the uploaded works or subject-matter or promotes them online. The crucial question is whether these criteria of optimisation of presentation or promotion of works are sufficient to demonstrate the active role of platforms, thereby prohibiting the use of article 14 of the electronic commerce directive.

Article 13 imposes additional measures. Paragraph 1 provides that platforms that store works must take measures in cooperation with rightholders to prevent the availability on their services of protected works identified by rightholders. Content recognition technologies, such as the content ID technology developed by YouTube, must be implemented. Platforms must provide sufficient information on the functioning and deployment of such measures and, where relevant, adequate reporting on the recognition and use of the protected works. Recital 39 seeks to make clear the conditions for implementing these recognition technologies. Platforms would be responsible for providing information on the technologies used, the way they are operated and their success rate for the recognition of rightholders’ content. Rightholders, on the other hand, would have to provide the necessary data to allow recognition of their content.²⁸ These provisions are expected to strengthen transparency on how platforms use the works they store. The liability exemption defined by the e-commerce directive is not called into question, but it is clear that platforms will no longer be able to use it at their discretion, notably before courts, to shirk their responsibilities with regard to rightholders’ claims.

It can be argued that the burden of proof is reversed. Platforms find themselves in a situation of having to justify their use of protected works and rightholders are consequently in a stronger position. These arrangements must also contribute to improving the fight against piracy, which continues to represent a major drain on intellectual property rights due to the massive illegal downloading of protected works (both musical and audiovisual).

There have been few reactions to date to the provisions of article 13 of the new directive. We can quote the European Group of Societies of Authors and Composers (GESAC) who called the proposal the “Europe’s first step to end tech giant free riding”.²⁹ Google’s Vice-president, Caroline Atkinson wrote: “This would effectively turn the exempti into a place where everything uploaded to the web must be cleared by lawyers before it can find an audience”.³⁰ BEUC (The European Consumer Organisation) voices doubts about the protection granted to consumers under the complaint and redress mechanism foreseen under article 13.2, noting that it applies only on an ex-post basis and will be difficult to implement since users have no specific rights. In a letter sent to the Commission a group of academics state that article 13 “imposes a general monitoring obligation upon a great number of providers of intermediary services. Such an obligation is not a special monitoring obligation but a general monitoring obligation as it does require the monitoring of the activities of all users.” Article 13 would therefore be in contradiction with article 15 of the electronic commerce directive³¹ which may contribute to the violation of all

should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.”

²⁸ Recital 39

“Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the recognition of rightholders’ content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.”

²⁹ The European Authors’ Societies – “Copyright package: Europe’s first step to end tech giant free riding”, 14.09.2016 (<http://www.authorsocieties.eu/mediaroom/262/33/Copyright-package-Europe-39-s-first-step-to-end-tech-giant-free-riding>)

³⁰ EUObserver – “EU targets Google in copyright reform”, 15.09.2016 (<https://euobserver.com/digital/135089>)

³¹ Article 15 - *No general obligation to monitor* (Directive 2000/31/EC)

“1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
2. Member States may establish obligations for information society service providers promptly to inform

internet users' human rights.³² The criticism is significant as it invokes respect for human rights, notably the right of freedom of opinion and expression, by referring directly to the European Charter of Human Rights: the provisions of article 13 would apply not only to organising more balanced relations between rightholders and platforms, but would also call into question users' access rights to a free internet.

Article 15 of the E-commerce Directive prohibits service providers from implementing general monitoring obligations. The CJEU ruled in two separate cases (*Scarlet v. SABAM*, 2011 and in *SABAM v. Netlog*, 2012) that the prohibition on general monitoring derives from Articles 8 and 11 of the European Charter of Fundamental Rights, which safeguard personal data and freedom of expression and information, and that a balance must be struck between the preventive measures imposed on technical intermediaries and fundamental rights. However, platforms routinely perform monitoring action through content-recognition technologies at the request of rightholders or on court injunctions in order to prevent particular infringements. For instance, videosharing platforms like Google and Dailymotion implement sophisticated copyright-management systems (e.g. Content ID, Audible Magic, etc.) that provide rights-holders an automatic means of monetising their content or for removing it in case of infringement.

Conclusion

The measures proposed by the Commission on rightholders' loss of value (article 13) and on compensation for press publishers (article 12) open up new horizons in the digital economy: this attempt to halt the pillaging by Google, Amazon, Facebook and Apple (GAFA) of the European cultural and information resources is commendable. The question is whether the instruments proposed are strong enough and of adequate scope to achieve this objective. This initiative is nevertheless courageous in a political and social environment in which consumer organisations are committed to the principle of free use on internet, policy-makers largely condone the economic reality of piracy and GAFA exerts strong pressure on policy-makers, leaving the Commission little room to manoeuvre. The EU executive should be supported and encouraged in its efforts. The exceptions to copyright aimed at improving protection of the cultural heritage in the digital environment, facilitating data mining and facilitating educational practices are nonetheless debatable. An exception to copyright should be the ultimate solution, used only when others - notably licenses negotiated between users and rightholders - are not possible. The European Commission fails to demonstrate the merit of these exceptions. It would seem that the idea is to compensate for the provisions granted to rightholders with measures benefiting the public, as though the Commission did not want to be accused of acting in the sole interest of rightholders. These proposals will have to be debated in the Council of Ministers of the European Union (which acts in this framework as legislator) and in the European Parliament. It will be interesting to see the outcome of these proposals.

the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.”

³² “Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society”, 30.9.2016 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483).