

European Commission proposal to modernise copyright

The European Commission has published a proposal to modernise copyright. The proposed package of legislation includes:

- a Directive on copyright in the digital single market;
- a Regulation for online transmissions and retransmissions of audiovisual content; and
- legislation to implement the Marrakesh Treaty for people with print disabilities.

The proposed Directive has divided opinion between owners and users of copyright works, as the proposed changes would, if adopted, strengthen the hand of content creators.

Background

On 14 September 2016, the European Commission published a Communication on promoting a fair, efficient and competitive copyright-based economy in the digital single market, alongside the proposed legislative package. The proposed changes aim, in the words of the Commission, to help “European copyright industries to flourish in the digital single market and European authors to reach new audiences, while making European works widely accessible to European citizens, also across borders”.¹

The copyright package is the latest phase of the Commission’s strategy for the digital single market, as set out in its December 2015 Communication entitled “Towards a modern, more European copyright framework”. The latest copyright proposals follow on from the draft Regulation on the cross-border portability of online content services, which marked the first step towards the Commission’s goal of wider access to content across the EU.

In the Communication accompanying the latest proposals,² the Commission cites three objectives: (a) ensuring wider online access to content in the EU and reaching new audiences; (b) adapting certain exceptions to the digital and cross-border environment; and (c) fostering a well-functioning and fair copyright marketplace. The Commission is also working on measures for an effective and balanced enforcement system.

Proposed Directive on copyright in the digital single market

The Directive would reinforce rights-holders’ negotiating position on payment for exploitation of their content via user upload platforms, introduce a new right for press publishers covering digital re-use, improve the remuneration of authors and performers through new transparency rules, and facilitate licensing of EU audiovisual works for VOD usage and cultural heritage purposes. It would also introduce copyright exceptions for teaching illustration purposes, text and data mining, and preservation of cultural heritage.

Measures to achieve a well-functioning marketplace for copyright

The Directive would introduce three such measures:

- *Streaming of content on user upload platforms* – The proposed Directive addresses the use of protected content by organisations (such as YouTube) that store and provide access to large numbers of works uploaded by their users. Such platforms would be required to ensure the

¹ <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>.

² <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-592-EN-F1-1.PDF>.

functioning of agreements concluded with rights-holders for the use of their works or to prevent their works from being made available. The measures taken to achieve this, such as content recognition technology, would need to be appropriate and proportionate.

- *Digital re-use of press content* – The proposed Directive would give the press a related right of reproduction and “making available by wireless means” for digital re-use of their press publications. This right would expire 20 years from the end of the year of publication.
- *Fair contractual remuneration of authors and performers* – The proposed Directive would introduce a transparency obligation, requiring member states to ensure that authors and performers receive sufficient information on the exploitation of their works from those to whom they have licensed or assigned their rights, including modes of exploitation, revenues generated and remuneration due. The proposed Directive would also entitle authors and performers “to request additional 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”. Member states would need to provide for an alternative dispute resolution procedure for both the transparency obligation and the contractual adjustment mechanism.

Availability of EU works on video-on-demand platforms

The Commission wants to increase the availability of EU works on VoD platforms. To this end, the proposed Directive would introduce a negotiation mechanism in each member state designed to make it easier to conclude licences for the online use of audiovisual works. Article 10 of the proposed Directive requires member states to ensure that, where parties wishing to make audiovisual works available on VoD platforms face difficulties in licensing rights, they may rely on “the assistance of an impartial body with relevant experience”, which should “provide assistance with negotiation and help reach agreements”. As Recital 30 explains, member states would be responsible for deciding how the negotiation mechanism would work, including the timing and duration of the assistance with negotiations and the bearing of costs.

Licensing out-of-commerce works

The proposed Directive would facilitate making out-of-commerce works available. When a collective management organisation (**CMO**) concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for making out-of-commerce works available, that licence would be extended to rights-holders of the same category as those covered by the licence who are not represented by the CMO. Where such a licence is granted, the cultural heritage institution would be permitted to use the work in all EU member states.

New copyright exceptions

The proposed Directive would introduce three new mandatory exceptions:

- *Exception for digital uses of works for teaching illustration purposes* – This would ensure that educational establishments can make content available to distance students in other member states through secure digital networks, such as a university's intranet or a school's virtual learning environment.
- *Exception for text and data mining carried out for scientific research purposes* – Member states would be required to permit research organisations acting in the public interest (such as universities and research institutes) to carry out text and data mining of copyright-protected content to which they have lawful access (e.g. scientific publications to which they subscribe) without needing prior authorisation.

- *Exception for digital preservation by cultural heritage institutions* – Such institutions would have a right to copy works in digital format for preservation purposes. This would cover works that were created directly in digital form, as well as the digitisation of analogue works.

Proposed Regulation on online transmissions and retransmissions

The proposed Regulation would govern the exercise of copyright and related rights applicable to online transmissions of broadcasting organisations and retransmissions of TV and radio programmes. This aims to make it simpler and faster to clear the rights that are required for programmes transmitted online by broadcasters at the same time as their broadcast, and for re-transmission services via means such as IPTV (Internet Protocol Television).

The proposed Regulation aims to create favourable conditions for new online means of cross-border distribution of TV and radio programmes by providing for a system of rights clearance similar to that for more traditional transmissions via satellite and retransmissions via cable under the Satellite and Cable Directive (93/83/EEC). This would make it easier to clear rights for: (a) programmes in online simulcast and catch-up services; and (b) for re-transmission services via means such as IPTV.

In the FAQs published alongside the proposals, the Commission explains that, while broadcasters are increasingly offering their broadcasts online, their online programming often remains unavailable in other member states.³ A single episode of a TV programme, for example, may incorporate many different audiovisual, musical, literary or graphic works that are protected by copyright and/or related rights under EU law. A broadcaster will therefore need to clear rights from a multitude of rights-holders and for different categories of protected content.

Additionally, retransmission services, which aggregate TV and radio channels into packages, are increasingly provided under technologies other than cable (for example IPTV), but the current rules facilitating rights clearance for operators are limited to cable retransmissions. So the complexity in rights clearance is hampering the development of these services across borders.

The proposed Regulation addresses the clearance difficulties by extending two principles in the Satellite and Cable Directive to TV and radio programmes provided over the internet:

- (a) *Country-of-origin principle* – The rights required for online services of broadcasters that are directly related to their broadcasts (e.g. simulcasting and catch-up services) are to be cleared for the broadcaster's country of principal establishment. This will help broadcasters to make the vast majority of their content available online in other member states. Still, as the country-of-origin principle applies to services strictly related to broadcasts, it will not apply to VoD services, which are legally treated as having different characteristics.
- (b) *Compulsory use of CMOs* – The Regulation will also extend the system of compulsory use of CMOs (which currently applies only to cable retransmission) to other equivalent digital retransmissions. This will make it easier for retransmission operators to clear rights in programmes from other member states, and to offer their users more channels from across the EU.

³ http://europa.eu/rapid/press-release_MEMO-16-3011_en.htm.

Proposed legislation to implement the Marrakesh Treaty

The package contains two further legislative proposals – a Regulation and a Directive – to implement the Marrakesh Treaty⁴ into EU law, by making certain copyright-protected works more accessible and available to persons who are blind, visually impaired or otherwise print disabled.

The Treaty requires its signatories to introduce exceptions supporting people with print disabilities to access books and other print material in formats that are accessible to them. So the proposed Directive would establish a mandatory exception and ensure its functioning for the making and exchange of copies in such accessible formats within the single market. The proposed Regulation would permit the cross-border exchange of such copies between the EU and third countries that are parties to the Treaty.

Comment

Industry reaction has focused on the measures of the proposed Directive to achieve a well-functioning marketplace for copyright. Copyright holders (and their representative bodies) have praised the measures for addressing the “transfer of value” issue, as well as the intention to redress the current imbalance of interests between user upload platforms and rights-holders. They argue that upload platforms such as YouTube should ensure the functioning of agreements with rights-holders to make works available, and that a rights-holder’s remuneration should be proportionate to the revenue that upload platforms generate by exploiting that content. Google’s response is that this would effectively turn the internet into “a place where everything uploaded to the web must be cleared by lawyers before it can find an audience”.⁵ If the proposal is adopted, it could represent a significant victory for the creative industries.

Another key element of the proposed Directive, which has not yet received the same level of discussion, is the proposal to give authors and performers the right to request “appropriate remuneration” where contractual remuneration is disproportionately low in comparison with the revenue and benefits derived from exploitation. It remains unclear how such a principle would work in practice and how far recording artists, composers, writers and other creators might be able, in the future, to challenge the terms on which they are remunerated.

As the proposals go forward to the Parliament and EU Council, discussions may focus on the obligation on online service providers to take “appropriate and proportionate” measures to protect third-party copyrights, as well as the related right for press publishers “to conclude licence agreements” with – and so, in effect, to demand payment from – online service providers that reproduce press content on their services. That would particularly affect search engines and news aggregation sites that include snippets of text alongside hyperlinks to published content. Critics are referring to this as a “link tax”.

Finally, as with all current EU legislative proposals, implementation of the Directive in the UK is not only subject to adoption by the European Parliament and the Council of Ministers, but also, following a Brexit, UK government approval of the relevant provisions.

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⁴ To which the EU became a signatory in April 2014.

⁵ <https://europe.googleblog.com/2016/09/european-copyright-theres-better-way.html>.