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EU update

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A B S T R A C T

This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarizes recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

1. Copyright

1.1. *EU Commission proposes new EU copyright rules*

Teun Burgers, *Associate, DLA Piper Netherlands*

Technology has changed and is changing the way content (music, films, TV, radio, books, press etc.) is produced, distributed and accessed. Online services (music streaming platforms, video on demand platforms, news aggregators etc.) have become increasingly popular while consumers expect to access content across borders. Therefore, on 14 September 2016 – on the occasion of President Juncker's 2016 State of the Union address – the European Commission set out a draft proposal on the modernization of copyright.[1]

The draft Copyright Directive is aimed to provide:

(1) improved choice and access to content online and across borders;
(2) improved copyright rules on education, research, cultural heritage and inclusion of disabled people; and
(3) a more fair and sustainable marketplace in respect of creators, the creative industries and the press.

1.1.1. *Improved choice and access to content*

The draft Copyright Directive should enable content providers to obtain more easily the required authorization needed to transmit content online in EU Member States. Instead of negotiating with individual right holders, content can be licensed through collective management originations representing right holders. The Commission believes that such a negotiation mechanism is needed: if content providers are empowered to make the vast majority of their content available throughout the EU, consumers will be presented with more choices. Member States are to set up such negotiation bodies.

1.1.2. *Education, research, cultural heritage and disabled people*

The proposed Copyright Directive is aimed to help cultural institutions to digitalize and – without borders – publicize out-of-commerce works that are protected by copyright but not publicly available. Research bodies are to be given new rights to extract and reproduce copyright material from publications, datasets and other content they have lawful access to. The new text and data mining exception goes beyond existing exceptions that apply to uses of copyright material for scientific research purposes. This new exception would enable

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[1] Draft EU Directive on copyright in the Digital Single Market, Brussels, 14 September 2016, 2016/0280 (COD).

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reproductions and extractions made by research organizations in order to carry out text and data mining of works or other subject-matters for the purposes of scientific research.

1.1.3. *Marketplace*

The proposed Copyright Directive aims to strengthen the position of right holders to negotiate and be remunerated for the online exploitation of their content on online platforms such as YouTube. Such platforms will have an obligation to deploy effective technology to detect copyright infringements.

In this respect, the Commission also proposes to introduce a new ancillary right for publishers, similar to the right that already exists for film producers, record (phonogram) producers and other players in the creative industries. The draft Copyright Directive creates a new right lasting 20 years for press organizations to object to the reproduction or the communication to the public of the digital use of their publications.

The draft Directive also obliges publishers and producers to be transparent and inform authors or performers about profits they made with their works. It also puts in place a mechanism to help authors and performers to obtain a fair share when negotiating remuneration with producers and publishers.

1.1.4. *Subject to criticism*

The draft has encountered substantial criticism from various stakeholders including large tech companies and digital right groups and initiatives.

A major point of concern is the obligation for online platform to actively monitor their content. The shift of responsibility for identifying copyrighted content to the Internet platforms that host uploaded content, such as YouTube and Facebook, is considered disproportionate. Many suspect that Internet platforms will be forced to adopt a restrictive approach in accepting content (potentially limiting the free flow of information and free speech) rather than waiting to receive a takedown request from a rights holder, as is the case now.

The introduction of an ancillary copyright for online publications arguably places a heavy labor and financial burden upon content hosting services and search engines. The proposal could potentially make it unfeasible for content providers to do business in Europe. Due to a similar issue in Spain, Google stopped providing its news aggregator service (Google News) in that country. Another issue here could be that search engines will stop showing previews or will show less previews if they are required to pay for previews. This may result in fewer clicks and reads of the underlying website which in turn will lead to a drop in revenue of the publisher. In Germany, publishers utilized their ability to circumvent the consequences of similar laws through granting Google a free license to link to their sites.

Digital right groups also criticize the lack of an introduction of an EU-wide panorama exception. While some EU Member States provide for the legal means to photograph or film works which are permanently situated in the public space, not all Member States recognize this copyright exception.

Right now, the measures included in the draft Copyright Directive are still proposals. The European Parliament still needs to discuss them, and Member States will need to vote before any changes occur.

2. Internet

2.1. *Case report: GS media v Sanoma media Netherlands and others (C-160/15)*

Aaron Trebble, *Associate, DLA Piper Leeds*, and **Charlotte Woodfield**, *Trainee Solicitor, DLA Piper Leeds*

The CJEU has recently revisited the issue of hyperlinking to copyright material. In GS Media v Sanoma Media Netherlands and Others (C-160/15), the Court considered whether, and in what circumstances, posting a hyperlink to such material which has been reproduced on another website unlawfully without the copyright owner's consent constitutes a "communication to the public" within the meaning of Article 3(1) of Directive 2001/29/EC.

G operates a blog which is one of the most visited news websites in the Netherlands. S is a magazine publisher which had an exclusive license to publish certain photos. Those photos were unlawfully published without S's authorization on third party websites, to which G published hyperlinks from its website, which was operated for a profit. It appeared that G was aware the images were published without S's authorization. S pursued a copyright infringement claim against G.

The Court confirmed that the finding in Svensson and Others (C-466/12) that posting a hyperlink to works freely available on another website did not constitute "communication to the public", only applied to works which had been made available with the copyright holder's consent. It cannot be inferred from Svensson that hyperlinking to works made available without the copyright holder's consent is not a "communication to the public".

In such cases, where the hyperlinked work was made available on the third party website unlawfully, the Court held it is necessary to consider whether the person posting the hyperlink had knowledge of this fact and whether he/she was posting the hyperlink for a profit. If he/she knew or ought to have known that the content was made available unlawfully, for example as a result of being notified by the copyright owner, then hyperlinking to the same constitutes "communication to the public", whether or not this was for profit.

In addition, where the hyperlink is posted for profit, then it can be expected that the person posting the hyperlink will have carried out the necessary checks to determine the legality of the work. As such, where the hyperlink is posted for profit, there is a rebuttable presumption that it is posted in knowledge of the fact that the work was illegally placed on the Internet.

However, the Court reiterated that "communication to the public" also requires communication to a new public. As such, if the work to which the hyperlink allows access has already been made freely available to the general public on one website with the copyright holder's consent, then hyperlinking to it from another website does not constitute "communication to the public".

In the circumstances, the Court found that G had infringed copyright in the photos.

The decision can be found here: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d55f907f5d233149cb9de9817d3be940ba.e34KaxiLc3qMb40Rch0SaxyKa3z0