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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 summarises 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 consultation on publishers rights and the panorama exception*

Teun Burgers, *Associate, DLA Piper Netherlands*

The European Commission has launched an open consultation on the role of publishers in the copyright value chain and on the 'panorama exception' that will run until 15 June this year. The main goal of the consultation is to gather views on the impact that an EU neighbouring right could have on the publishing sector, citizens and creative industries. Secondly the consultation aims to gather views as to the challenges faced by traditional publishers in the digital environment as a result of the current copyright legal framework. Thirdly the consultation is targeted to gather views on the need for intervention in the press compared to the need for intervention in other publishing sectors. Lastly the consultation serves to collect input for the analysis of the European Commission of the current legislative framework of the so-called 'panorama exception'.

All stakeholders involved in the publishing sector and the digital economy are targeted respondents for the consultation but more in particular the member states and public authorities, authors (such as writers, journalists, professional photographers, visual artists, architects etc.), publishers of press and other print content, libraries and cultural heritage institutions, online service providers, owners or managers of works made to be located permanently in public places, academia and researchers, consumers and end-users and citizens. A short summary of the results of the consultation will be published one month after the consultation closes. A report with the qualitative analysis of the contributions will be issued in due course.

1.1.1. *Neighbouring rights and ancillary copyrights*

The consultation covers "the role of publishers in the copyright value chain". The copyright value chain refers to the so-called neighbouring rights, and more specifically the notion of 'ancillary copyright'.

Neighbouring rights are rights similar to copyright but that do not reward an authors' original creation (a work). Instead neighbouring rights reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (for example by a producer) which may also include participation in the creative process. Current EU copyright law grants neighbouring rights to performers, film producers, record producers and broadcasting organisations.

For further information see: http://www.dlapiper.com/.

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Publishers do not currently benefit from neighbouring rights which are similar to copyright but do not reward an authors' original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (for example by a producer) which may also include a participation in the creative process.

Ancillary copyright is a concept that "institutes a copyright fee to be paid by online news aggregators (such as Google News) to publishers for linking their content within their aggregation services". This concept has been introduced in Germany as the 'Google Tax' and Spain, but was rejected in countries such as France and Austria.

Not everyone is in favour of such an ancillary copyright law. Different members of the European Parliament (83 in total), from six political groups co-signed an open letter to the European Commission to urge the EC not to introduce EU-wide ancillary copyright laws or copyright rules around hyperlinks. The signatories reminded the EC of the Parliament's rejection of the notion of ancillary copyright. Publishers are not pleased with the fact that news aggregators collect links to articles from different news sources and present them including titles, snippets and advertisements thereby profiting from such collection. An EU ancillary copyright shall give publishers the sole right to market their products. In Germany only Google is allowed the exception of copying "single words or snippets". Experts say that these rules make little sense and only fuel legal uncertainties and hinder innovations.

1.1.2. *The panorama exception*

The panorama exception in EU copyright law[1] allows Member States to lay down exceptions or limitations to copyright where people are allowed to photograph or film certain types of artistic works permanently located in public spaces – such as buildings, sculptures and monuments – without infringing copyright in these works. This could be for example uploading images of monuments online. However, while some Member States guarantee the panorama exception, others do not and if they already did so, they did it in different ways. Therefore the issue here is that there is an un-harmonised exception in the EU copyright legislation. This part of the consultation aims at seeking views as to whether the current legislative framework on the "panorama exception" gives rise to specific problems in the context of the Digital Single Market.

The Commission is now considering clarifying "the current EU exception permitting the use of works that were made to be permanently located in the public sphere" to "take into account new dissemination channels". It therefore asks for conceived problems with the present legal situation and whether improvements are possible, either under a commercial or non-commercial right of use. The Commission's plan for the Digital Single Market includes 16 targeted initiatives to create better access for consumers and businesses to digital goods and services across Europe; setting the right conditions for digital networks and innovative services to flourish and maximise the potential of the digital economy. One of these measures is the modernisation of the EU copyright framework, to make rules fit for the digital age. This consultation will contribute to initiatives and decisions made by the Commission to achieve this objective in the course of 2016.

Views expressed and information gathered will help the Commission assess the need for, or prepare initiatives, as part of its efforts to modernise and harmonize EU copyright rules under the Commission's Digital Single Market strategy.

[1] Article 5(3)(h) of Directive 2001/29/EC.

2. Data privacy

2.1. *Irish Data Protection Authority to refer legality of Model Clauses to CJEU*

Dr. Thomas Jansen, *Partner and* **Mari Martin**, *Associate, DLA Piper Munich*

On May 25, 2016, the Irish Data Protection Authority issued a press release stating its intention to seek declaratory relief in the Irish High Court and a referral to the CJEU to determine the legal status of data transfers under Standard Contractual Clauses. At issue is the continued mass surveillance by the U.S. government, the same basis on which the Safe Harbor arrangement was struck down.

This is the latest development in the original 2013 legal challenge brought by petitioner Max Schrems, which resulted in Safe Harbor being struck down by the Court of Justice of the European Union in October 2016. Following the CJEU's ruling on Safe Harbor, Model Clauses remained one legal basis available to organizations seeking EU–U.S. data transfer.

In a press release from May 25, Schrems stated, "I have received the draft decision by the Irish DPC yesterday night and we were informed that the DPC is intending to file the necessary proceedings with the Irish courts within the next days."

After the CJEU invalidated the Safe Harbor scheme, many organizations, including Facebook, began using Model Clauses as the new basis of transfer for EU data. The EU Article 29 Working Party has stated that it is also assessing the legality of the Model Clauses but that organizations may continue to use them in the interim.

Binding corporate rules and obtaining consent from data subjects remain unchallenged mechanisms of data transfer to the United States. However, mass surveillance by the U.S. government remains the common core issue.

More than a year may be likely to pass before the CJEU issues a ruling on this matter. The Irish DPA referred the original case brought by Schrems to the CJEU on June 18, 2014, and the Court issued its decision October 6, 2015. Unless and until the CJEU issues a decision striking down the EC decisions establishing the Model Clauses (Decision 2001/497/EC, Decision 2004/915/EC and Decision 2010/87/EU), the Model Clauses remain valid. Until this time, organizations may continue to rely on them for data transfer.

The European Commission and United States have also been negotiating a new data transfer arrangement to replace Safe Harbor, the EU–US Privacy Shield. Negotiations currently remain ongoing.

In addition, U.S. President Obama signed the Judicial Redress Act into law in February, in effect giving select U.S. allies the same protections under the Privacy Act offered to U.S. citizens. The Act was seen as key to final approval of the Privacy Shield by European DPAs. It could also have an effect on the