

The New EU Copyright Directive – A Threat to Free Flow of Information or A Fair Protection for Authors and Creators?

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On 21 June 2018, the legal affairs committee of the EU Parliament approved the much debated Copyright In the Digital Single Market Directive. It is a short step now before the Parliament itself approves the directive, which will then need to be implemented into the domestic laws of EU member states.

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The Directive aims to bring copyright law in Europe up to date in respect of the digital

use and distribution of copyright materials. The directive covers different issues, including introducing some new (limited) exceptions to copyright protection to allow greater freedom for research organisations to engage in text and data mining (albeit only for scientific purposes), to allow use of digital content for teaching and illustration purposes and to allow reproduction by “cultural heritage institutions” for preservation purposes.

Most of the attention, however, and a fair amount of heated debate, have been directed at Article 13 of the Directive, which introduces changes in the responsibility of online platforms in relation to infringing content posted by users. There has been widespread alarm that this proposal will have the effect of censoring the internet. Such concerns may be exaggerated, but the provision will certainly shift the balance in favour of authors and rightholders and will place a more direct burden on operators of online platforms that host large amounts of user-contributed content to ensure that content that infringes copyright is blocked.

The digital industry objects to these changes, which are designed to reduce online piracy and prevent online operators from passively sharing the spoils of the distribution of pirated materials on their platforms (mainly through advertising revenue) and to force them to make an effort to clean their stables.

At the same time the changes are not as far reaching as some would suggest. The current law (not only in the EU but also in the US, under the Digital Millennium Copyright Act) requires online platforms to act “expeditiously” to “remove or disable access” to infringing content when alerted of any suspected infringements by rightholders. To meet this requirement, online platforms already have in place extensive screening technologies that regularly block or remove infringing content from the platforms.

The change in the law proposed in the EU Directive would only slightly shift the balance of power in favour of authors and publishers to ensure that the anti-piracy systems used by online operators are effective. Article 13 does not impose a general obligation to screen platforms for infringing content. It requires relevant operators to “take measures” to prevent infringements where they have agreements with rightholders or where rightholders identify specific works they wish the platform operators to police. Accordingly, platform operators will still only be required to take action at the rightholders’ initiative.

Over time, it is possible that this change in law might lead to a reduction in the level of availability of unlicensed (or pirated) copyright content online. At the end of the day, however, the manner and extent to which infringements are policed on the internet will depend (as it depends today) on platform operators and rightholders. The two sides have been fighting over the issue for many years. Both know that there can be no perfect solution. Rightholders cannot expect all unauthorised materials to disappear. They also know that excessive protection could harm creators and publishers as well as outright pirates. Online platforms on the other hand know that they cannot act with impunity in providing a marketplace for unlawful content. There is also an area of uncertainty as to what amounts to infringement and what type of content that uses copyright material

might enjoy the protection of the law. Clearly any system for policing infringements would need to take account of these issues. Hopefully, the new law might contribute to putting a little order into the online systems. It is unlikely to mark the end of free speech in the digital sphere.