

What Can We Make of the New Revised Draft of the Directive on Copyright in the Digital Market?

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On 12 September 2018, the EU Parliament adopted a revised draft of the directive on Copyright in the Digital Market. The proposed legislation includes some significant changes to the copyright regime and a couple of surprise additions introduced in the last minute by the EU Parliament. These issues will spark much debate in the months to come, particularly surrounding the likely impact of these reforms on the way content is shared, used,

disseminated and published on the internet.

Though this is a significant step in the legislation process, there is yet a long way forward. Firstly, the draft legislation itself now must be considered by the European Council representing each of the member states of the European Union. This may result in many further changes to the text, possibly significant ones, before the legislation is passed into law. Then, once the directive becomes law, it will have to be implemented through domestic legislation in each member states of the EU. Only then will the full practical impact of the provisions become apparent.

The proposed legislation covers several different issues. It introduces modifications to the list of exceptions to copyright protection particularly in the areas of education and research and also creates special new exceptions to copyright protection to allow for

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data mining activity premised on access to large amounts of copyright materials.

But the main emphasis in the draft directive is on reinforcing copyright and helping rightholders protect their works against unauthorised exploitation, particularly in the digital space. Some argue (particularly in the context of Article 13 that deals with the prevention of infringements by content sharing platforms) that this will translate into forcing technology platforms to apply filters and censorship in order to proactively prevent infringing content being shared by their users, which internet activists argue would stifle free speech. However, the legislation is much more nuanced than that and clearly seeks to put in place safeguards against over-protection. Further, the text sets out high-level ideas that will have to be broken down into practical legal rules. This will only happen when the directive is implemented by EU member states. It is very difficult at this stage to predict how some of the principles laid out in the draft directive will be implemented and what impact they will have on the way content is used on the internet.

The draft directive also seeks to create new rightholders. Publishers will have their own independent rights equivalent to those of authors, for a limited protection period of 5 years. This is intended to ensure that publishers can claim a fair share of the benefit from the dissemination of their publications by third parties through the internet. The revised text emphasises in this context that copyright protection will not prevent the free use of hyperlinks that lead to protected content published online. However, the new rights of publishers may force search engines and other digital players to pay royalties, for example, when published content comes up in search results.

The draft legislation, however, is not all good news for publishers. It introduces radical ideas for the protection of authors who grant exclusive licences to publishers. According to the proposal, authors who license their works to publishers will have statutory rights to receive annual detailed reports regarding the exploitation of their works and will have the right to revoke exclusive licences granted to publishers if the work is not properly exploited. Very similar ideas were recently adopted into law in Germany. The proposal was added only very recently to the draft directive by the EU Parliament. It was not included in the original draft directive published in 2016 by the EU Commission. Query whether other EU member states will agree to adopt a similar protective approach across the EU. The publishing industry, which is set to enjoy the creation of a special copyright protection for publishers, will surely balk at the idea of facing new onerous reporting requirements and potential disruption to their portfolios of works with many of their licences set to become revocable overnight.

Another surprise addition in the text of the directive is the novel idea that organisers of sports events will enjoy copyright protection for those events. Sports events do not generally attract copyright protection, although organisers of those events generate significant revenues from selling broadcasting rights (which they can do largely by controlling access to the events). It is not entirely clear why the EU Parliament decided that the sports industry requires additional protection by creating a special type of copyright for sporting events. The draft legislation offers no clue as to what that right

might consist of.

The new draft Copyright in the Digital Market directive opens up many questions and may indicate significant reforms to come. The legislation, however, is still a long way from being the final product. Stay tuned to the TMCA for more updates.