

New EU Copyright Directive: harmony or discord?

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The new Directive on Copyright in the Digital Single Market (2016/0280/EU) (the Directive), which has now been adopted by the Council of the EU, is the first comprehensive harmonisation of copyright laws at EU level for nearly 20 years. Following its publication in the Official Journal of the EU, EU member states will have 24 months to implement the Directive.

The Directive seeks to bring a better balance in the relationships between authors, publishers and online platforms. There has been much controversy around the Directive as the various stakeholders assess their perceived gains and losses.

Key objectives

Technology has undergone huge transformation since the Copyright Directive (2001/29/EC) was adopted in 2001, and there is no surprise therefore that copyright laws need an upgrade to align with the new digital age. The Directive forms an important strand of the European Commission's digital single market initiative. The key objectives of the Directive are to:

- Improve the functioning of the digital copyright marketplace by recalibrating the rights and responsibilities of publishers, authors and online platforms.
- Enhance the data economy by introducing exceptions to copyright infringement for text and data mining (TDM).
- Improve cross-border and online access to copyright-protected content.
- Provide access to copyright material for education, research and cultural heritage (see box "Other key changes").

Rebalancing the marketplace

The change to the digital copyright marketplace is the most contentious, given its potential impact on freedom of expression. Stakeholders on both sides have lobbied on the issue for years. By providing enhanced rights, protections and fairer remuneration, the Directive leans firmly in favour of creators. Although there are concessions to address some of the more controversial aspects, there remain significant concerns from freedom of expression campaigners.

Publishers' new rights

Publishers now have a reproduction right and a right of communication to the public in respect of online use of their press publications (*Article 15, the Directive*) (Article 15). Each right expires two years after 1 January of the year following the date of publication. It protects publishers from online platforms reposting published content without compensation: online platforms must now negotiate a licence with publishers to re-post their content. Some campaigners have described this as a "link tax".

Article 15 does not apply to individuals reposting published material for private or non-commercial purposes. Nor does it apply to acts of hyperlinking or to the use of individual words or very short

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extracts of a press publication. However, no definition of “very short extracts” is given. This may provide some reassurance that a headline or short sentence accompanying a hyperlink will not fall within the scope of Article 15. Still, this ambiguity signals that Article 15 is ripe for dispute and also suggests a lack of harmonisation in how member states may ultimately implement the Directive.

Member states must also legislate to provide that authors of works incorporated in a press publication will receive an appropriate share of the revenues for subsequent use of their works. However, the Directive again fails to define “appropriate share”, which risks member states adopting different approaches.

Bridging the value gap

Another area of controversy is the provisions seeking to narrow the value gap between creators and online platforms. These reinforce the position of creators to negotiate and be remunerated for online use of their content.

Article 17 of the Directive (Article 17) addresses the liability of online content sharing service providers (OCSSPs). These are platforms that store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by their users, which they organise and promote for profit-making purposes, for example, YouTube. Not-for-profit online encyclopaedias, such as Wikipedia, not-for-profit educational and scientific repositories, electronic communication service providers and cloud services are not subject to Article 17. There is also a lighter regime for smaller online platforms.

OCSSPs are deemed to communicate a copyright work or make the work available to the public by giving access to a copyright-protected work. OCSSPs will be unable to invoke the “hosting” limitation of liability in Article 14 of the E-Commerce Directive (2003/31/EC). However, OCSSPs without authorisation from the creator will not be liable for infringing material shared by users if they:

- Make best efforts to obtain authorisation from the creator.
- Make best efforts in accordance with high industry standards of professional diligence to ensure the unavailability of specific works highlighted by rights holders.
- Have acted expeditiously to remove access to notified works and to prevent future uploads.

The conditions are onerous: online platforms must now bear the best efforts burden of obtaining authorisation and preventing the sharing of infringing content. OCSSPs have argued that Article 17 amounts to a general monitoring requirement and critics claim that the legislation will represent a “ban on memes”, restricting freedom of expression of the internet. The Directive expressly states that Article 17 is not a general monitoring provision. Nevertheless, it will be a challenge for online platforms to police uploaded content without employing filters to automatically block copyright-protected content. Currently, these filters are generally not sophisticated enough to detect when material falls within important copyright exceptions, such as, parody and criticism.

The Directive also contains a number of mandatory exceptions to provide fair treatment for authors and performers, for example provisions entitling authors to appropriate and proportionate remuneration (*Article 18*); transparency obligations (*Article 19*); a mechanism to adjust contracts where payments become disproportionately low compared to the revenues generated from their works (*Article 20*); an alternative dispute resolution procedure (*Article 21*); and a right to revoke exclusive licenses where works are not exploited (*Article 22*).

Text and data mining

TDM is the process of deriving high-quality information from text and data, typically through deriving patterns and trends in those data. It represents an important foundation in data analytics and many artificial intelligence (AI) solutions. However, TDM often involves

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reproducing and extracting data, some of which may be copyright protected.

The exception in Article 3 of the Directive (Article 3) ensures that TDM will not infringe copyright if it is carried out for the purposes of not-for-profit research by research or cultural heritage institutions. However, the exception only applies if the user already has lawful access to the copyright-protected material. As Article 3 is so narrow in scope, a further exception for TDM is set out in Article 4, which applies to any person with lawful access to copyright-protected material.

However, Article 4 is subject to more conditions than Article 3: the rights holder must not have reserved its rights over the material; the purpose must be for TDM; and data must be stored only as long as is necessary for the purpose of TDM.

The Directive does not offer guidance on the full set of means by which a rights holder may reserve its rights. However, it indicates that where material is publicly available online, it is appropriate to reserve rights only by machine-readable means, for example, by including metadata in the terms and conditions of a website or a service.

Other key changes

The Directive on Copyright in the Digital Single Market (2016/0280/EU) will introduce a number of useful changes affecting a range of sectors:

- A mandatory exception for educational establishments covering digital cross-border uses of copyright-protected content for the purposes of illustration for teaching, including online (*Article 5*).
- An exception for libraries and other cultural heritage institutions to make copies of the works in their collections (*Article 6*).
- Provisions that include a mechanism for licensing for works from a cultural heritage institution which are still copyright-protected but cannot be found commercially anymore (*Article 8*).
- New provision on collective licensing with an extended effect which enables EU member states to allow collective management organisations to conclude licences covering rights of non-members, under certain conditions (*Article 12*).
- New negotiation mechanism to support the accessibility of audiovisual works on video-on-demand platforms (*Article 13*). A provision confirming that any material resulting from an act of reproduction of a work of visual art in the public domain which is no longer protected by copyright of art is not subject to copyright (*Article 14*).

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Rob Sumroy
T +44 (0)20 7090 4032
E rob.sumroy@slaughterandmay.com



Laura Balfour
T +44 (0)20 7090 4018
E laura.balfour@slaughterandmay.com

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