COPYRIGHT COMMENT

Playing catch up?

Simon Clark and **Sarah Blair** explore if EU copyright can keep up with technology

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Following two years of intensive lobbying and several redrafts, the new directive on Copyright in the Digital Single Market[1] was ratified in April 2019.

The controversy surrounding the directive in the tech sector centres on four articles:

Article 17 which provides that certain online platforms – online content-sharing service providers – (OCSSPs), perform acts of infringement when giving public access to copyright-protected works uploaded by their users unless they obtain authorisation from the rightholders (Article 17(1)) or take the steps prescribed by Article 17(4). Such steps include "best efforts" to ensure the unavailability of specific works, to act "expeditiously" to disable and remove access to such works and "best efforts" to prevent their future upload. As a result of Article 17, OCSSPs can no longer simply rely upon the safe harbour exceptions in Directive 2000/31 which previously excluded them from such liability provided certain conditions were met.

The article was championed by rightsholders as a mechanism to enable better enforcement and monetisation of their content online. Others opposed it on the basis of onerous technological requirements (does it impose content filtering technologies?), its potential stifling effect on new platforms (can they afford to develop such technologies?) and its restriction on freedom of information (will it reduce the availability of content online or remove content which benefits from an exception to infringement?).

Some of these concerns were, at least in part, addressed in the redrafts of Article 17: reduced obligations for new platforms; extensive exceptions to being an OCSSP; and mandatory exceptions for quotation, criticism, review and caricature, parody and pastiche. However, many are unclear as to what actions must be taken to comply with Article 17(4). On the one hand, best efforts might change as technology develops, allowing the law to keep up with technology. On the other, it could remain perennially unclear. Many await the guidance on Article 17 to be produced by the European Commission following stakeholder dialogues which have now begun.

Article 15 which gives publishers of press publications rights to enforce copyright for the online use of their press publications by information society service providers. Critics of Article 15 argued that it would suppress freedom to information and news circulation. This provision was significantly diluted in the redraft: for example, it no longer applies to acts of hyperlinking or in respect of the use of "individual words or very short extracts".

> **"For now, the directive is set to stay."**

Articles 3 and 4 provide mandatory exceptions for reproductions and extractions of lawfully accessible works for the purposes of text and data mining (TDM). However, rightsholders can reserve their rights as against commercial companies. Tech companies relying on TDM (eg, for the development of artificial intelligence which often requires deriving patterns through the TDM of information contained in online databases) will have to continually review the T&Cs of the databases they are mining to confirm access for TDM.

The amendments and restrictions briefly discussed above have resulted in a stalemate in the ongoing battle between the tech sector and rightsholders. While the directive imposes new obligations on some tech companies, many rightsholders consider that the final amendments seriously diluted the rights that they had eagerly anticipated.

Notwithstanding many member states' objections to the directive during its passage through the EU legislative process, the directive passed with 20 votes in favour. Member states now have two years to transpose the directive into their national laws. In preparation for such implementation, tech companies have begun considering whether the directive applies to them and what practical steps they might need to put in place to comply with the directive. The lack of clarity in the directive's provisions makes it very difficult for lawyers to advise on these issues and many eagerly await the Commission's guidance. Undoubtedly, there will also be numerous references to the Court of Justice of the European Union (CJEU) for clarification.

Poland has recently filed a complaint against the directive with the CJEU (C-401/19). The text of the complaint has not been made public but is understood to target Article 17 for concerns over censorship. Under Article 263 of the TFEU,[2] the CJEU can review the legality of legislative acts on certain grounds. The CJEU could therefore repeal Article 17 or it could take the opportunity to offer some much-needed clarification to the directive.

For now, and despite the geo-political controversy surrounding it, member states must fall in line with the directive's objectives. If they do not implement the directive they will be subject to review by the European Commission and could face financial penalties. For now, the directive is set to stay.

Footnotes

1. Directive 2019/790.
2. Treaty on the Functioning of the European Union.

Simon Clark heads up the brands, designs and copyright group at Bristows and Sarah Blair was (until her recent move to Bermuda) an associate in the group.