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Big data and nudging · Copyright and upload filter ·
Science policy · Content moderation

ALEXANDRA GIANNOPOULOU

The proposed Directive on Copyright in the Digital Single Market: a missed opportunity?

The debates about Article 13 of the proposed European Directive on Copyright in the Digital Single Market gained considerable attention in 2018, with YouTube being one of its most vocal critics. From a legal point of view this is not the only passage of the proposal that needs to be examined more closely.

The negotiations for the long-awaited European directive are progressively reaching their endpoint, with the closed-door trilogue process – between the European Parliament, the Council of the European Union and the European Commission – being the final chapter of the saga. In its current form, the proposal aims to modernise copyright rules in order to address the *value gap*. However, the end result risks being harmful to the way we communicate, create and build on the internet.

From memes to code and from content remix to distribution of news snippets, the effects of the new directive will be significant for all aspects of internet uses. It has been a long process and the fate of some of the most controversial provisions remains uncertain. What has happened so far? In July 2015, the European Parliament published its resolution on the assessment of the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. It was originally drafted by the Member of the European Parliament (MEP), Julia Reda. The text

evoked emotional reactions, indicating that an agreement on the precise content of the necessary revision would not be easy to reach. The European Commission introduced the initial proposal in September 2016. Two years later, and following various deliberations and voting processes, the trilogue negotiations are reaching an endpoint.

The reason why existing copyright rules were deemed necessary of modernisation relates to the reduction of the value gap. This term describes the disadvantageous distribution of revenue between copyright holders and the different players involved in the dissemination of content online, which has shaped the current image of the proposed text. In this context, the articles provoking the biggest controversy among MEPs, civil society and European citizens are Articles 11 and 13 of the proposal. At the same time, proposed amendments to the exceptions and limitations to copyright could prove beneficial for improving the desired balance between users and rightsholders. It also would contribute to establishing the desired digital single market.

THE CREATION OF A NEW PUBLISHERS' RIGHT

Article 11 of the proposed directive introduces an exclusive neighbouring

right for press publishers concerning the digital use of their publications.

Under this right, re-use of large-sized snippets will only be allowed after the negotiation of a license with the publishers. This right will last for 20 years from the date of publication of the news piece. The Explanatory Memorandum relates the creation of the right to a “fair sharing of value”¹ that is necessary to ensure the sustainability of the industry, as “press publishers are facing difficulties in licensing their publications online and obtaining a fair share of the value they generate”.

In principle, short excerpts from news articles such as the title or a single sentence, do not meet the originality requirement in order to be independently protected by copyright law. Therefore, and in accordance with case law from the Court of Justice of the European Union, the use of such short extracts from news articles does not amount to copyright infringement and a licence is not necessary. Unlike copyright, neighbouring rights do not require originality because they protect an investment and not the intellectual creation of a creator. Thus, in the case of press publishers, the introduction of a neighbouring right would create exclusive rights, even for small extracts or news headlines, and reusing these extracts would require explicit permission.

The introduction of a neighbouring right is used as a remuneration strategy against the declining market for commercial news and the predominant role of a small number of online platforms in that market. In the current normative framework, press publishers already possess legal tools to ensure remuneration. More specifically, they already have a non-negligible arsenal at their disposal via both the protection of the investment made through the European sui generis database right and the copyright agreements for original news articles.

BARRIERS TO FREEDOM OF INFORMATION

Notwithstanding its purported benefits, the proposed right has already been subject to heavy criticism: it seems unlikely to fulfil the purpose for which it was created nor will it foreseeably address the current issues afflicting commercial publications and their business models. For example, in countries where such a right has already been applied, no financial benefit to publishers and journalists has been observed (Calzada, 2016). More than 100 MEPs and the overwhelming majority (Academics against Press Publishers’ Right, 2018) of academics in Europe have spoken publicly against Article 11. They note that it will create very broad

intellectual property rights in news or other information and that it will block a vital feature of democratic societies, which is the free flow of information. What's more, the broad scope of the proposed right adds to the already existing uncertainty (Bently, 2016). If mainstream news publications are the main focus of this article in the directive, what about scientific publishers or blogs?

An unpublished study (Online News Aggregation, 2017), conducted by the Commission's Research Centre, contains evidence that raises concerns about the adoption of the new right. According to this paper, the objective behind such a right will not be achieved given that "the available empirical evidence shows that news aggregators have a positive impact on news publishers' advertising revenue. That explains why publishers are eager to distribute their content through aggregators".

Finally, the consequence of creating an insufficiently demarcated new right is that it becomes impossible to refer to a news article with its title or through a link, thus creating barriers to freedom of information on the internet. According to the proposed amendments and the current state of the negotiations, private and non-commercial uses along with hyperlinking and uses of insubstantial parts of a publication may be excluded from the scope of the right. However, the final version of this article is still subject to modifications as the negotiations move forward.

THE "CENSORSHIP MACHINE"

Article 13 of the proposed Directive addresses the "use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users". According to the relevant provision of the original text proposed by the European Commission, providers are required to take measures "such as the use of effective content recognition technologies" in an appropriate and proportionate manner in order "to ensure the functioning of agreements concluded with rightholders and to prevent the availability on their services of content identified by rightholders in cooperation with the service providers". The initial proposal of Article 13 thus requires that platforms hosting protected content enforce copyright infringement filters. Whether this provision will remain intact after the end of the trilogue discussions remains to be determined.

The potentially disastrous consequences of Article 13 in its current state have been highlighted by the Special Rapporteur (Mandate on the Special Rapporteur, 2018) on the promotion and protection of the right to freedom of opinion and expression, by the majority of European copyright academics (The Copyright Directive, 2018), internet pioneers (O'Brian, & Malcom, 2018), civil society organisations (The #SaveYourInternet, 2018), creators (Create · Refresh, n.d.), users (Stop the censorship-machinery, n.d.), and the media (Malik, 2018). Recently, a coalition of copyright holders from the audiovisual sector and from the sports industry have issued formal letters to the European Commission requesting that Article 13 be deleted or that exceptions be carved out for their respective sectors. The letter points out that in its current form, the article undermines the rightsholders and reinforces the power of platforms instead of addressing the value gap². More broadly, multiple sectors have emphasised the economic consequences, the legal risks and the overall damaging implications of the application of Article 13, “which can hardly be deemed compatible with the fundamental rights and freedoms guaranteed under Articles 8 (protection of personal data), 11 (freedom of expression) and 16 (freedom to conduct a business) of the Charter of Fundamental Rights of the EU” (Senftleben, Angelopoulos, Frosio, Moscon, Peguera, & Rognstad, 2018).

LEGAL REUSE OR COPYRIGHT VIOLATION?

The scepticism around copyright enforcement through automated content filtering also stems from the fact that there are (to date) no technological filters that can accurately make the distinction between legal reuse of copyrighted content and copyright violation. In most cases, human intervention is required to assess the validity of the violation claim and to examine whether specific content can be published as a result of the application of an exception to copyright. In this scenario, the removal of content that is legally produced and published risks being classified as a disproportionate limitation to the users' and creators' freedom of expression.

Furthermore, the use of automatic filtering by algorithms creates an unwelcoming environment for sharing content such as video remixes, memes, code, and open license projects. Due to their inherent function, content filters preemptively prevent material from being uploaded or automatically remove any seemingly unauthorised use of copyrighted material irrespective of the legitimacy of the

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THIS IS AN ARTICLE BY **ALEXANDRA GIANNOPOULOU**

The article was first published on 11 September 2018 on the Digital Society Blog of Alexander von Humboldt Institute for Internet and Society (HIIG), it was updated in December 2018.

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use. For example, if the use in question falls under one of the exceptions to and limitations of copyright, which are heterogeneous (Giannopoulou, Nobre, & Rammo, 2016) under member states' legislation, there is no need for an express authorisation. However, and as the famous example of memes demonstrates, if the parody exception cannot be invoked because the relevant provision is not incorporated in national law³, memes risk being considered a violation of the rightsholder's copyright, provided that no express license exists or that the disputed image is not already in the public domain.

Finally, because of the unclear scope of Article 13, content providers such as TripAdvisor and Instagram could be found subject to the filtering obligation. In order to ensure compliance, the platforms will have to conclude licences with all rightsholders on a global scale for a vast number of copyrighted works. The prerogatives of the licensing obligation have yet to be clarified in the negotiations. The current licensing landscape shows that it will be extremely difficult to reach such agreements. Additionally, and as it has been pointed out by multiple actors in the industry⁴, the risk of liability for platforms that fall within the scope of Article 13 could ultimately shrink future investments in new online services, especially ones developed by small and medium-sized businesses. Thus, the lack of diversity will ultimately prompt a stronger concentration of the market, centring on providers already in a significant position. Finally, Article 13 does not reflect the principles that led the Court of Justice of the European Union to develop its case law (Judgment of the court in case C-70/10, 2011) against the introduction of general monitoring measures.

IMPROVING ON THE EXCEPTIONS AND LIMITATIONS TO COPYRIGHT

The current version of the proposed directive has made significant steps towards addressing inefficiencies in the existing exceptions and limitations to copyright introduced by the 2001 directive. These advances signal progress in the member states' attitudes towards addressing the way that users engage with protected content.

The most notable example is the restructuring of the educational exception. According to the proposed directive, educators and learners are free to use copyrighted material for educational purposes. Besides the positive amendments to the existing provision, a lot of inefficiencies remain unaddressed. Firstly, the

narrow interpretation of educational institutions leaves out of the scope of the exception all non-formal public education as well as online dedicated material, thus limiting access options for learners both in the digital sphere and in the physical world. Second, the restrictive framing of the permitted uses of digital material to “the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment’s pupils or students and teaching staff” leaves ample room for restrictive interpretations that would leave a lot of digital education uses out of the scope of the exception. Third, the relevant provision in the article, which specifies that the copyright limitation does not apply when “adequate licences” are available in the market, brings an additional layer of complexity to the harmonised enforcement of the educational exception. For example, there is no public-interest safeguard limiting rightsholders from concluding licences that further restrict the educational exception provisions described in the directive. In practice, there are big variations in existing collective licensing agreements in terms of the interpretation of standard terms related to the scope of the right or to its subject matter (Nobre, 2018). Consequently, fragmented licences may hinder the harmonisation of the legal framework of exceptions and minimise the impact of the introduction of a uniform educational exception provision in the directive.

A MILESTONE FOR TECHNOLOGY

In a similar context, the addition of the text and data mining (TDM) exception constitutes a milestone towards better collaboration between technology and copyright. TDM refers to an ensemble of computer science techniques. It is used to extract knowledge from large digital data sets, by looking for patterns that are usually difficult for individual researchers to notice. According to the directive, TDM practices shall no longer require a separate licence for the reproduction and extraction of copyright-protected works if the acts are performed by researchers in the context of scientific research for public research institutions. Current licensing practices for TDM have been proven to create “a negative association between copyright and innovation” (Handke, Guibault, & Vallbé, 2015). For example, in the case of scientific publishing, text and data mining is often expressly left out of licensing agreements and “gaining permission to mine content from various publishers can be hugely complex” (Geiger, Frosio, & Bulayenko, 2018, p. 13). A chilling effect then occurs, making the research output based on data mining practices significantly smaller than would otherwise be the case because of the

lack of proper legal tools and permissions (Handke et al, 2015). Admittedly, introducing the exception in question is “essential to unlock the potentiality of European research and unburden researchers from legal encumbrances and uncertainties” (Geige, Frosio, & Bulayenko, 2018, p.24).

INNOVATION POTENTIAL FOR SOCIETY

However, there are limitations that risk hampering (Margoni, & Kretschmer, 2018) the efficiency of introducing such an exception to copyright. For example, the introduction of an exception that is not mandatory for all member states does little to help us achieve the overall goal of benefiting from the potential of text and data mining because of the risk of fragmentation among different territories. Also, the European legislative body focuses exclusively on mining practices engaged in by researchers and it provides a narrow definition of research organisations. Consequently, the context of the exception disregards the fact that TDM is not only an important tool for research. It is also essential in the context of journalism, independent research or library uses. The endeavour to create a “digital single market” falls short when it comes to recognising the innovation potential that TDM holds for society in general. What’s more, creating a legal framework favourable to TDM requires the creation of safeguards against both contractual and technical obstacles overriding the implemented exception.

Finally, the reluctance of lawmakers to introduce exceptions in favour of remixing copyright-protected works or publishing pictures of artworks found in public places signifies that European copyright will still rely predominantly on licences in order to foster a digital remix culture and that the exceptions will play a more limited role. Licensing represents a more traditional approach to copyright and culture and does not fully correspond with the current norms of content production and dissemination. The legal uncertainty and the high transaction costs in securing licensing agreements for modern uses of copyright content is creating a chilling effect for users and creators. While more inclusive exceptions such as the one regulating user-generated content or the freedom of panorama were proposed by the report drafted by Julia Reda, they were not included in the proposed reform of the directive because they were viewed “as a polarising example of the extension of users’ rights online” (Dulong de Rosnay, & Langlais, 2017). This approach does not correspond with the purported goals of the reform: to ensure wider access to content, to adapt exceptions to a digital and cross-border environment, and to achieve a well-functioning marketplace for copyright.

The last set of trilogue negotiations did not manage to arrive at a consensus on the multiple controversial issues related to Article 11, Article 13 and others. The next set has been scheduled for 14 January 2019 and it will be presided over by the new Romanian presidency, which replaces the Austrian one. How the change of the presidency will affect the fate of the text and the negotiations remains to be seen. ♦

FOOTNOTES

1 Unless otherwise noted, citations refer to the Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (European Commission, 2016).

2 See letters issued on 1 December 2018, “Proposed Copyright Directive – Value Gap Provision Audiovisual and Sports Sectors Proposed Way Forward for the Value Gap Provision: European Commission proposal or music-sector specific approach” and on 10 December 2018, “Audiovisual sector proposed way forward for the value gap provision: no new safe harbour or sector carve-out”.

3 The parody exception is implemented in various member states such as France and Belgium but does not exist in others such as Greece.

4 For example, the Computer & Communications Industry (CCIA) have submitted an opinion to the Office of the US Trade Representative related to a new trade agreement with the EU, noting that “if the final EU reform does include these provisions, there would likely be a corresponding increase in risk for US platforms doing business in the EU, resulting in significant economic consequences for the US digital economy, which depends on the EU market”.

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