# Client Alert

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# Copyright: Europe Explores Its Boundaries

## Digital Single Market Update: The European Commission's Proposal to Modify and Harmonize EU Copyright Law

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Copyright reform is a key part of the European Union's package of measures designed to create a **Digital Single Market** (DSM) in the EU. The European Commission's view is of nothing less than a modernisation of EU copyright law to reflect the digital age. Until now, specific details of the Commission's plans have been thin on the ground.

But, like buses arriving together after a long wait, the Commission has now published a series of proposals designed to achieve its aim of a more modern copyright law that takes account of the features and potential uses of digital technology and widens the degree of cross-border access to protected works online.

In this Alert, we give an overview on the Commission's main aims in the copyright field and examine the potential impact that its proposals may have on content rights owners, online services providers and end users.

### WHAT'S NEW?

The Commission has issued a draft Directive on copyright in the digital market and a separate Regulation on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and re-transmissions of television and radio programmes. In addition, it has published a separate proposal for a Directive and a Regulation to implement the Marrakesh Treaty, facilitating the access of visually impaired people to protected content.

**1. Proposal for a Directive on Copyright in the DSM**

The Commission's proposal for a Directive on copyright in the DSM includes the following main features:

***Related right for press publishers***

The Commission follows the examples given by Germany and Spain and introduces a related right for press publishers in relation to the digital use of their press publications (also called "link tax"). This related right would be an original right of the press publisher, rewarding it for investing in and enabling the digital distribution of a press publication. This right – expiring 20 years after the initial digital publication – would exist alongside and not affect the author's copyright in the digitally published work.

The proposed directive awkwardly defines a "press publication" as a "*fixation of a collection of literary works of a journalistic nature […] within a periodical or regularly-updated publication under a single title […] having the purpose of providing information related to news or other topics […]*". This will include daily newspapers, weekly

or monthly magazines of general or special interest, news websites and certain blocks, but not periodical publications for scientific or academic purposes.

The creation of such a related right for press publishers stands in the tradition of similar related rights that already exist under the current copyright regimes of EU Member States (such as the rights of the producers of phonograms (music recordings), films and databases and of broadcasters) established to reward their financial, technical and organisational contributions in creating and selling the copyrightable works. This new "press publisher's right" aims to protect digitally published press content like news or other journalistic content from systematic licence-free exploitation by online platforms such as news aggregators, web search engines or social media platforms like Facebook or Twitter.

Based on such related right, third parties would have to obtain the original press publisher's consent to

- reproduce the digitally published press publication (whether in whole or part), or
- display and make available the digitally published press publication (whether in whole or part) to the public (*e.g.*, display it on websites, mobile websites, apps, etc.).

The press publisher's right would be subject to the statutory copyright exceptions (which are comparable to the U.S. doctrine of fair use), including an exception of quotation for purposes such as criticism or review, private use, use by non-profit educational organisations, etc.

The central question that's likely to arise as a result of the new press publisher right is what type of use is going to be considered a "digital use" of a press publication?

- In accordance with previous case law of the Court of Justice of the European Union (CJEU), the Commission emphasizes that hyperlinking of press publications would not be subject to this related right because hyperlinking is not considered to be a communication to the public. However, as we have written elsewhere, this principle may be changing as a result of recent cases before the CJEU.
- While, for example, the current German Copyright Act (where a comparable related right of press publishers was introduced with effect of 1 August 2013, *see* Sec.87f German Copyright Act) permits the digital use of individual words or small text clips without the press publisher's consent, the new Copyright Directive proposal does not provide for any such exceptions to the right. Would, therefore, a common search engine result or a news teaser in a social media account using the articles headline "*TV-Duell: Trump vs Clinton – winners everywhere?*" be a digital use requiring the press publisher's consent? And could permitting the search engine to crawl over and index the website of the press publication be considered an implied consent of the press publisher to a display a part of its press publication in the search results?

In Germany, this press publishers' right has turned out to be a paper tiger insofar as it has done more to generate litigation costs than generate revenues. The online business model of many press publishers is to make press content available to users free of charge and to monetize that content through advertising on their websites and mobile platforms. This means that they highly rely on user traffic generated by search engines and the most prominent global social media platforms. Therefore, to avoid a "delisting" threatened by Google, the German press publishers granted Google a royalty-free licence to display small text clips in the search results.

Since the introduction of the related right three years ago, German press publishers have received in total only €714,540 in licence fees from other online news aggregators[1]. For the German market of about 52 million online users over the age of 14, this does not look like a significant income generator for press publishers.

In addition, the German Patent and Trademark Office – the DPMA, which is the competent supervising authority for rights management and collecting societies in Germany – decided that the practice of the rights management and collecting society VG Media (which manages the press publishers' right) to grant Google a royalty-free licence for digital use of press publications while other online services providers are required to pay a licence fee for such use is discriminatory and therefore prohibited. VG Media sued DPMA to challenge this decision[2].

The outcome of this conflict of economic interests and applicable law may be that press publishers will have to grant royalty-free licences to all search engines and news aggregators in order not to lose significant traffic and revenues on their websites.

These experiences in Germany make it questionable whether a related right of press publishers for digital use of their press publications will indeed be an effective instrument to protect their financial, technical and organisational contribution in their digital distribution. As regards the protection of a full press article or major parts thereof against unauthorized display on other websites and apps, such a related right is not necessary because the publisher can prevent their digital use based on the exclusive exploitation rights that the authors of the articles usually grant to the press publishers.

***Publisher's share in statutory compensation payable for uses under copyright exceptions***

The Commission plans to give Member States the option to introduce a right for publishers to claim a share in the statutory compensation payable for the use of protected works (such as literary works) under copyright exceptions.

EU and national laws provide for a number of exceptions to copyright that allow the use of protected works without the rights-holders' consent (for example for non-profit educational, freedom of speech and art, private use and non-profit scientific purposes) but require the commercial beneficiaries to pay the authors and other rights owners a statutory fee as compensation for the uses under such exceptions.

This proposal seems to result from a decision of the CJEU. In the "HP vs. Reprobel" case (C-572/13, decided in November 2015) the Court ruled that publishers are not entitled to claim a share in the statutory compensation for use of literary works under a copyright exception. The CJEU argued that under the current law (InfoSoc Directive (Directive 2001/29/EC)), only the authors as the original rights owners were entitled under the exceptions but not the publishers to whom the authors had assigned or licensed their rights in the literary works.

However, in some countries like Belgium and Germany, the applicable rights management and collecting societies distributed the revenues collected for use under the copyright exceptions not only to authors, but also to publishers when the author had assigned or licensed his or her copyright to the publisher. Thus, pursuant to this decision, the publishers are deprived of any compensation for the use of works published by them under copyright

[1] https://irights.info/2016/07/08/drei-jahre-leistungsschutzrecht-715-000-euro-einnahmen-werden-fuer-rechtsstreits-verwendet/27653

[2] http://www.golem.de/news/leistungsschutzrecht-vg-media-klagt-gegen-verbot-der-gratislizenz-fuer-google-1607-121916.html

exceptions. The proposal of the Commission would therefore legalize this practice, which, according to the CJEU, is currently non-compliant with applicable copyright law.

***User-generated content platforms (Art.13):***

The Commission proposes additional obligations for online service providers displaying large amounts of user-generated content, such as YouTube, Spotify, Soundcloud, Facebook or Instagram, with the aim of ensuring a better protection of third-party content against unauthorized use. The platform providers, in cooperation with the right holders, would have to take appropriate and proportionate measures to

- "ensure the functioning of agreements concluded with rights-holders for the use of their works or other subject-matter" or
- "prevent the availability on their services of works or other subject-matter identified by right holders through the cooperation with the service providers".

Such measures could include, for example, the use of effective content recognition technologies and would have to include adequate reporting tools and procedures once an unauthorized use of a work has been identified, including complaint mechanisms for users whose uploaded content is claimed to infringe third-party rights.

The Commission points out that the second obligation also applies to so-called host providers of third-party content who can claim safe harbour under Article 14 of the E-Commerce Directive (Directive 2000/31/EC) and are not obliged to monitor and search for copyright-infringing third-party content on their platform. Platforms like YouTube already provide for content recognition technologies and claims procedures allowing rights-holders to block or monetise the infringing content on YouTube[3]. However, there are content categories like remixes or heavily edited videos where the efficiency of such technology is (still) limited.

The proposal seems to include an obligation for the platform providers to **take down** the specific content using the protected work without the rights-holder's consent when identified. But there would also be an obligation to take appropriate and proportionate measures to ensure the **stay down of such work**, *i.e.*, to take measures to prevent the identified work being repeatedly uploaded thereafter as part of the same or other user-generated content, for example by using adequate filter technologies (see the wording above "*prevent the availability … of works… identified*"). However, this obligation should not be understood as imposing a general monitoring obligation on the platform providers because such an obligation would not be in compliance with Article 14 of the E-Commerce Directive[4].

In recital 38 of the proposed directive, the Commission confirms the CJEU decision[5] regarding the application of Article 14 of the E-Commerce Directive, according to which the application of the safe harbour privilege requires verification of whether the service provider plays an "*active role, including by optimizing the presentation of the uploaded works or promoting them*". If the service provider plays such an active role, the safe harbour privilege of Article14 does not apply.

[3] https://support.google.com/youtube/answer/2797370?hl=com

[4] *See* CJEU judgement, 12 July 2011, C-324/09 – *L'Oréal/eBay, recital 139*

[5] CJEU decisions, dated 23 March 2010, C 236-238/08 – *Google France*, and dated 12 July 2011, C-324/09 – *L'Oréal/eBay*

***Fair remuneration of authors and performers***

The EU Commission also aims to strengthen the contractual rights of authors and performers whom it considers to be usually in a weaker contractual position.

- It proposes a *transparency obligation* to provide authors with the right to obtain information on the exploitation of their works on a regular basis, including how the works have been exploited and what revenues were generated. Member States may exclude authors and performers whose contributions to the work are not significant (*e.g.*, background singers, stunt performers, etc.).
- Authors and performers will have the right to request from their contract partners payment of additional remuneration for the assignment or licence of rights to their works if the fees that the parties originally agreed upon are disproportionally low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works. This means that authors and performers would have a right to request the adjustment of their contracts that would be enforceable in court.

The courts would have to define what "disproportionally low" means. As a result, we would expect several years of uncertainty during which it would be unclear when and what level of additional fees may be payable for the successful exploitation of a work until the first CJEU decisions will have been received. This may make business planning difficult.

Remember also that many content-exploitation business models (*e.g.*, in the film or music industries) depend upon revenues generated by one or two really successful works to finance the production and marketing of another 8 to 10 flops that generate little to no revenue. From the proposed wording, it's unclear whether the fee adjustment right would be triggered by a slight disproportion of the originally agreed fees or only in case of a significant disproportion when the exploitation of the work was exceptionally successful and such success was not reflected in the originally agreed fees.

In Germany, where the Copyright Act already provides for a fee adjustment right of authors and performers in case of a *significant* disproportion, such right has been successfully enforced in court only in a few exceptional cases.

Member States are also required to provide for a voluntary dispute resolution mechanism for disputes about these fee adjustment rights.

***Negotiation mechanism for parties making available audiovisual works on VoD platforms***

The Commission aims to increase the number of available European movies (motion pictures and TV movies) on Video-on-Demand (VoD) platforms and proposes that the Member States set up a negotiation mechanism introducing a separate impartial body "*with relevant experience*".

If the VoD platform provider and the film content provider cannot reach an agreement on the licensing of the film content on the VoD platform, they should have the possibility to reach out to this body and obtain its assistance in the contract negotiations. The Commission assumes a decisive role of the VoD platforms in the dissemination of European works across the EU. It states in recital 29 that "s*uch issues may, for instance, appear when the holder*

*of the rights for a given territory is not interested in the online exploitation of the work or where there are issues linked to the windows of exploitation*".

In reality, it's probably doubtful whether VoD platform providers and film content providers have a real need to involve a third-party in their contract negotiations, so the practical relevance of such a body seems very questionable.

***New Copyright Exceptions***

The Commission proposes three new mandatory copyright exceptions for the use of works without having to acquire the rights-holder's consent:

- Scientific research organisations (such as research institutes or universities) will be granted the right to carry out text and data mining of works (only) for scientific research purposes either on a non-for-profit basis or that serve certain public interests (recognized by a Member State).
- Educational organisations may use materials to illustrate teaching through digital tools and in online courses across borders, provided that the use serves non-commercial educational purposes and that the use is restricted to the premises or the closed-user electronic network of the organization (*e.g.*, the Intranet of a school accessible by students and teachers only).
- Cultural heritage institutions have the right to digitally preserve the works that are permanently in their collections. However, the exception is restricted to the purpose of preservation, meaning that, under this exception, the institution is not entitled to use the digital copy, for example, for advertising for its institution, display it on its website or show it as part of its exhibition.

**2. Proposal for a Regulation regarding online transmissions and re-transmissions of TV and radio programmes**

Services like podcasts or TV catch-up services are transmitted online in individual Member States alongside traditional broadcasting by satellite, cable or terrestrial, whereby broadcasters license programmes from others or produce them themselves. However, such broadcasted programmes are rarely available online in other Member States. The Commission's new proposed Regulation aims to make such broadcasted programmes also available online in the other Member States by extending the existing regulations on satellite transmissions and cable re-transmissions to online transmissions of broadcasting programmes.

Under the Satellite and Cable Directive (Directive 93/83/EEC), a satellite transmission is deemed to occur only in the EU or EEA Member State where the transmission is carried out (even if the signals can be received by users in other Member States). Thus, the broadcaster must only acquire a licence from content rights-holders for that single Member State. Furthermore, the Satellite and Cable Directive provides that the cable re-transmission right may be exercised only by a collective rights management and collection organisation but not by the individual rights-holders (except for rights of the broadcasters).

In accordance with the Satellite and Cable Directive, the Commission proposes that

- the copyright-relevant uses for the online transmission of an ancillary online service (*e.g*. necessary reproductions and the display to the public online) will be deemed to occur solely in the Member State where the broadcaster has its principal establishment, and
- the right to the digital (simultaneous, unaltered and unabridged) re-transmission of TV and radio programmes over closed-circuit IP-based networks (IPTV) by a party other than the broadcaster are to be exercised solely by a collective rights management and collection organisation.

"*Ancillary online service*" is defined in the Regulation as the online transmission of radio or TV programmes *simultaneously with or for a defined period of time after the broadcast* (*e.g*., so called catch-up services). Recital 8 of the proposed Regulation states that these are services "*which have a clear and subordinate relationship to the broadcast*". Consequently, the online transmission of the programme has to be carried out shortly after the original broadcast. However, the exact time period is not regulated by the proposed Regulation.

The Regulation does not extend the scope of rights that the broadcaster has acquired for its programme in the country of origin, *i.e.*, if the broadcaster does not have the right to transmit the programme online in its home country, the Regulation does not grant the broadcaster the right to transmit the programme online in other Member States.

The proposed Regulation does not apply to online video on demand services – in respect of these services, the cross-border use will be ensured by the proposed Regulation on Cross-border Portability of Online Content Services.

**3. Proposals for easier access for disabled persons to protected works**

Additionally, the Commission has proposed a Directive and a Regulation to implement the Marrakesh Treaty into EU law to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled.

The Directive proposes a mandatory exception in favour of the aforementioned disabled persons allowing them to access books and other content in formats accessible to them (*e.g*., braille books, large print, audio books, etc.), while the Regulation governs the cross-border exchange between the EU and other countries party to the Marrakesh Treaty.

As the group of entitled persons under the Directive is very narrowly defined – only the visually impaired person, the persons acting on their behalf and non-profit organisations for education or training – the impact on content rights-holders seem rather limited.

## WHAT'S MISSING?

**Exception for Freedom of Panorama**

The Commission has chosen not to impose an EU-wide "freedom of panorama" copyright exception to guarantee people the right to take and share photographs of public spaces. Some Member States, including Germany, have introduced such an exception, while others (*e.g*., Italy) have not.

The exception of freedom of panorama allows not only taking photographs or videos, but also creating other works, such as paintings of buildings or other art works located in the public for a permanent time that are protected by copyright. Usually, the rights owner is authorized to permit the creation and distribution of derivative works. This is not applied to copyright-protected works that are part of public scenes or places when freedom of panorama is guaranteed.

The confused legal situation within the EU in this respect therefore remains unchanged.

**Use of copyrightable content by linking and framing:**

Though the Commission refers to the decisions of the CJEU on linking and framing[6] in its Impact Assessment underlying the proposed Copyright Directive, the Commission does not see a need to redefine the public performance rights ("Communication to the Public" and "Making Available to the Public") and does not make any proposals specifying when the online use of a work such as linking or framing is considered a copyright-relevant act that requires the rights-holder's consent.

The CJEU decided in 2014 that hyperlinking and framing, generally speaking, do not constitute a copyright infringement as long as:

- the content is not made available by technical means different from those used for the original communication to a public, and
- no new audience (other than the one addressed by the original communication) is granted access to the content.

In a recent decision, the CJEU further decided[7] that setting a hyperlink to copyright-protected content (*e.g.*, videos, photos, texts, etc.) displayed on a website without the rights-holder's consent infringes the copyright in this content if the party responsible for the hyperlinking knew or should have known that the display of the work on the other website is illegal. If the hyperlink is posted for profit (*i.e.*, for generating revenues through advertising), it will be presumed that such party had full knowledge of the copyright-protected nature of the content and possible lack of the rights-holder's consent unless this presumption is rebutted.

This judgement requires providers of websites that use hyperlinks to generate traffic (and thereby advertising revenues) on their website to carefully review whether the content they link to might be subject to copyright protection and whether there are any indications that the rights-holder has not agreed to the display of the linked content on such website.

This still leaves open the question of whether a provider may frame content on its website that is legally available on another website and use such framed third-party content for advertising purposes on its website or whether the commercial use of such framing has to be considered a copyright-relevant act requiring the rights-holder's consent.

[6] CJEU, 13 February 2014, C-466/12, *Svensson* 21 October 2014, C-348/13, *BestWater International*

[7] CJEU, 8 September 2016, C-160/15, *GS Media*

The Commission could have closed down debate on the extent of third-party rights in this area, but it clearly chose not to do so and to leave further developments of EU law in this area to CJEU decisions.

**Private Copying Levy**

The Commission had also announced a plan to review EU Member States' implementation of the optional copyright exception to make copies of protected works for private, non-commercial use (the so-called "private copying exception").

Under current EU law, if a Member States decides to introduce a private copying exception, it must provide for a compensation of the copyright owners. The existing compensation schemes in the Member States are different from state to state, which is an administrative burden for the businesses subject to paying such levies (*e.g.*, levies on mobile phones and tablets).

However, the Commission does not address this topic in the proposed directive on copyright.

## NEXT STEPS

The Commission's proposals will need to be approved by the European Parliament and the Council. The regulations will be directly applicable, whereas EU Member States have to implement the provisions deriving from the Directives into national laws within a year after they enter into force.

**Read previous Alerts in our series "Copyright: Europe Explores Its Boundaries":**

European Court Rules That Hyperlinking May Constitute Copyright Infringement

What's the Cost of Free Wi-Fi?

EU Expands Principle of Pan-European Jurisdiction over Copyright to Online Materials

No Resale of Digital Content Except for Software? How Does the European Court of Justice Decision on Exhaustion of the Distribution Right upon First Sale Impact the Resale of Digital Copies?

"Meltwater" – EU rules that browsing does not need a licence – a victory for common sense (or for pirates)?

New UK Infringement Exceptions - The Ones That Got Away (and Came Back Again)

The Umpire Strikes Back: European Court Rules That ISPs Can Be Forced to Block Pirate Websites

Hyperlinking and Link Hubs

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