

ALERT

European Parliament Approves New Copyright Directive That Fundamentally Restructures Online Copyright Rules

March 27, 2019

This alert is an update to the February 15th alert "European Union Negotiators Strike Deal to Fundamentally Restructure Online Copyright Rules."

On March 26, 2019, the European Parliament approved a new Copyright Directive that fundamentally restructures the rules for online copyright protection. Once the new Copyright Directive is formally endorsed by the EU Council and published in the EU Official Journal, Member States will have two years to implement the new rules into their national law.

The two most important provisions of the Copyright Directive cover:

- (1) new rules for user generated content sites (Article 17), and
- (2) new rules for online use of press publications (Article 15).

The new Copyright Directive will greatly impact the online legal ecosystem for copyright owners – including media companies, record companies, and news publishers – and internet service providers – including user generated content sites, news aggregators, and other media monitoring services.

New Rules for User-Generated Content Sites

The Copyright Directive will require internet service providers that allow users to upload and post copyrighted content to negotiate licenses with or otherwise obtain authorization from the copyright holders. However, there are several exemptions, such as for cloud

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services that “allow users to upload content for their own use.” Also, the new rules do not apply to “quotation, criticism, review” or “use for the purpose of caricature, parody or pastiche.”

If an internet service provider fails to obtain authorization from a copyright holder, it will be liable for infringing that copyright holder’s works unless the service provider shows that it did three things: (1) “made best efforts to obtain an authorization,” (2) “made ... best efforts to ensure the unavailability of specific works” for which the copyright holder provided “the relevant and necessary information,” and (3) “acted expeditiously” to remove and prevent reupload of unauthorized works upon “receiving a sufficiently substantiated notice from the” copyright holder.

That service providers can avoid liability by taking these three steps means that the new rules are far from a strict liability standard. Instead, they provide a “liability exemption mechanism,” or safe harbor from liability. In determining whether a service provider has taken these three steps, a court is to take into account “the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service,” and “the availability of suitable and effective means and their cost for service providers.”

Notably, the new rules contain a liability carve-out for service providers that are less than three years old, have an annual revenue of under 10 million euros, and have an average number of monthly unique visitors over the prior calendar year of under 5 million. While these new, relatively small service providers must show that they made best efforts to obtain authorization from a copyright holder and that they acted expeditiously to remove unauthorized content once notified by the copyright holder, they need not show that they made best efforts to ensure the unavailability of and prevent reupload of specific works identified by the copyright holder. This carve-out would appear to exempt such new, relatively small service providers from needing to employ technologies to filter out unauthorized content.

Internet service providers that permit user-generated content will also have to provide “an effective and expeditious complaint and redress mechanism” for users who dispute the removal or blocking of their uploads. Complaints submitted under this mechanism “shall be processed without undue delay,” and “decisions to . . . remove uploaded content shall be subject to human review.” Users must be provided with “out-of-court redress mechanisms” to settle disputes, and may also go to court.

New Rules for Online Use of Press Publications

The Copyright Directive provides new online copyright protections for “journalistic publications,” including “daily newspapers, weekly or monthly magazines of general or special interest, including subscription based magazines, and news websites.” Articles appearing in such publications are protected from unauthorized online copying and distribution by news aggregators and other media monitoring services (e.g., Google News) for two years after the articles’ publication.

These new protections do not apply to “acts of hyperlinking,” or to “use of individual words or very short

extracts of a press publication.” The new protections also do not apply to “private or non-commercial uses of press publications by individual users,” and leave unaffected “the existing copyright rules in [EU] law applicable to” such uses, “including where [individual] users share press publications online.”

As a practical matter, these new rules may require online news aggregators and other media monitoring services who do more than hyperlink or use very short extracts to enter into licenses with journalistic publications or face potential liability for unauthorized copying and distribution.