

European Union Negotiators Strike Deal to Fundamentally Restructure Online Copyright Rules

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After years of negotiations, the European Union's (EU) main governing bodies reached a political deal on Wednesday, February 13, to fundamentally restructure the rules for online copyright protection. The new Copyright Directive will become law only if it is finally approved by the European Parliament and the Council of the EU. The deal covers two main areas:

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

The final text of key provisions of the new Copyright Directive was released by a member of the European Parliament and provides the basis for this alert.

Assuming that the new Copyright Directive becomes law, it will greatly impact the online legal ecosystem for copyright owners - including media companies, record companies, and news publications - and internet service providers - including user generated content sites, news aggregators, and other media monitoring services.

New Rules for User-Generated Content Sites

The deal 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 services that "allow users to upload content for their own use." Also, the new rules do not

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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 authorization,” (2) “made ... best efforts to ensure the unavailability of specific works” identified by the copyright holder, and (3) “acted expeditiously” to remove and prevent reupload of unauthorized works once notified by 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.

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.

New Rules for Online Use of Press Publications

The deal 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 “uses of individual words of very short extracts of a press publication.” The new protections also do not apply to “private or non-commercial uses of press publications carried out by individual users,” and “leav[e] unaffected current copyright rules in [EU] law applicable to” such uses, “including when [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.