



The new EU copyright rules – how to reconcile innovation and culture online

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Yesterday, the European Commission finally tabled its much awaited proposals for copyright reform. Businesses are already gearing up for what will be one of the toughest political battles during the Juncker mandate. To many, copyright rules are crucial to manage the challenges of digitisation as copyright provides the framework through which they produce and distribute their products in a digital single market.

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The copyright battle promises to be a re-run of the privacy debate, as it pits European players against (mostly American) online platforms. Content producers will paint the battle as Europeans standing up for their culture against American online monopolists, arguing for a change in the current ecommerce rules that impose minimal requirements on online platforms. Online players will play the innovation card – let's make sure Europe can reap the benefits the digital age holds.

The long awaited new copyright rules

While technology, the market and consumer behaviour have moved on, EU copyright has not. Aware of the discrepancy, the European Commission's President Jean-Claud Juncker tasked Günther H. Oettinger, Commissioner for Digital Economy and Society, and Andrus Ansip, Vice-President for the Digital Single Market to modernise copyright "in light of the digital revolution, new consumer behaviour and Europe's cultural diversity".

After some stalling – the Commission already put forward their copyright reform vision in a communication on 9 December 2015 together with a new proposal on the portability of content – Oettinger and Ansip finally presented their proposed copyright reform yesterday, which includes a new copyright directive and a broadcaster regulation.

The two legislative proposals contain many provisions, including mandatory exceptions for teaching and text and data mining for public research bodies. Further, the proposed regulation allows broadcasters to make their catch-up services, e.g. BBC iPlayer, available to other Member States without clearing rights with content owners.

These are some of the myriad of provisions that will certainly create heated debates between right holders, creators, online distributors and broadcasters.

However, two provisions stand out as particularly controversial: the value gap and neighbouring rights.

In the run-up to the proposals, they have already generated headlines in Europe: depending on which side you are on, these two provisions will either destroy the internet as we know it or protect European culture and its creators from their sure demise.

Value gap

Right holders complain that advertisement-based online services do not reward sufficiently for the use of their copyright-protected material, while subscription-based online services do. For example YouTube has close to 1 billion users and paid \$630 million to right holders last year. Compare this to Spotify, which has over 10 million users and paid right holders \$2 billion. This is known as the ‘value gap’.

Advertisement-based online services justify this differential on two grounds. Firstly it’s a different business model that secures its revenues through advertising, not through direct fees. Secondly, they believe the nature of their platforms provides an additional service by promoting the work of the artists, driving further demand.

Both Ansip and Oettinger have both sought to tackle the value gap, but clashed behind closed doors on how to do it. Oettinger preferred the “licensing option”. This would entail limiting the intermediary liability of video-upload sites, while Ansip pushed for the “identification option”. This would require video-sharing platforms to implement stronger identification requirements for users.

The final text is somewhat of a compromise between the two options. On the one hand, the text contains the identification requirements for online intermediaries. On other, it also provides for a series of tools that seek to give authors and performers a better bargaining position in the negotiations with online services, including transparency obligations, a contract adjustment mechanism and a dispute resolution mechanism for both. While short of the approach championed by Oettinger, it does represent an improvement for authors and performers.

Authors and performers will welcome the boost to their bargaining position, while music labels and online platforms will try to soften some of the requirements. Interestingly, the new identification requirements might further cement market leaders in the video-sharing services as not all players will be able to foot the bill for a technology that meets those requirements.

It thus seems that the attempt to protect European right holders risks undermining the Commission’s declared goal of creating European tech champions. EU legislators have a fine balancing act ahead of them, forcing them to make clear choices which side they want to support.

Neighbouring rights

The other major issue is the equally controversial debate on neighbouring rights, sometimes also referred to as ancillary copyright or simply a “link tax”. It’s complex, but in summary the issue surrounds the creation of new rights to protect traditional news publishers, seeking to ensure they secure all financial returns for their output. For example re-publication of feature articles on a news service that is not the originator of the story.

If enacted, the provisions would impose a special levy on online content distributors for displaying news snippets and linking press publishers’ content.

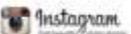
Critics of neighbouring rights point to barriers to competition, reduced media pluralism and consumer choice. Some even go as far as claiming that if enacted they could harm the internet at large.

Conversely, news publishers argue that neighbouring rights will stop intermediary services from “free-riding” on the work of professional journalists. New laws will merely provide the same protection from which broadcasters and film producers currently benefit under existing EU copyright law.

What will be the impacts of these proposals?

The value gap provisions are aimed at “information society services that store and provide to the public access to large amounts of works or other subject matter uploaded by the users”. The table below lists platforms which host content – of many different types of media - uploaded by their users. To the extent they host large amounts of copyright protected content; the Commission believes it “necessary to guarantee that authors and right holders receive a fair share of the value that is generated by the use of their works and other subject matters”. Platforms will also have the obligation to put in place content identification technologies to ensure the functioning of these agreements.

Table 1: Examples of hosting-sharing platforms

Social networking	    
Professional networking	 
Photo sharing	   
Video platforms	    
Audio platforms	  
Cloud services	  
Blogging	  
E-commerce	  
Wikis	  

Source: FTI Consulting

The concept of fair sharing of value is not well understood but it possibly has to do with the increased bargaining power of hosting sharing platforms due to the liability exemption of the e-Commerce directive. The terms of agreements concluded between right holders and online service providers which do not fall under the exemption would be useful starting points; however they are often not disclosed or transparent enough.

Analogous examples include the licensing of technology standards and the collective licensing of content; in both cases the licensors are required to negotiate terms which do not reflect the increase in bargaining power arising from obtaining standard status and from the collective nature of licensing.

Concerning the neighbouring right, it is difficult to see why the impacts would be different from those of its comparable version introduced in Germany a few years ago. There, several publishers joined a collecting society, VG Media, which proposed that search engines and similar services be required to pay 11% of their annual revenue generated, directly or indirectly, from displaying snippets of news articles. This has led to a series of negative consequences:

- Google asked VG Media members to consent to the display of their content (thumbnails and snippets). Publishers eventually granted this consent to Google but not to other news aggregators;
- several news aggregators restricted their services or exited the market;
- publishers are understood not to have collected any significant licensing fees;
- publishers and aggregators incurred transactions costs; and
- consumers’ access to news aggregation services has been restricted increasing search time and restricting media pluralism.

The most visible impacts of the neighbouring right in Germany are restricted services by and closure of several news aggregators. Paying a fee equivalent to 11% of their revenues to display snippets and other content, as proposed by VG Media, is unsustainable for many aggregation services. A number of news aggregators, such as rivva.de, reduced their listings to headlines with no accompanying snippets, while others, like T-Online and 1&1, removed content of VG Media members. Several news aggregators have also closed.

It seems likely that the new rights will not lead to more meaningful negotiations between publishers and online content distributors until there is some greater understanding of what constitutes “fair compensation”. It is difficult to see that question being resolved quickly.

Copyright - a new battleground for EU v US?

Copyright contains all the ingredients for Europeans to indulge in Anti-Americanism. On the one hand, you have American online platforms who want continue to benefit from the light-touch rules. On the other hand, European content producers and creators feel at best cheated out of the opportunities the internet promises and at worst under existential threat.

However, a simple US-EU dichotomy does not work anymore. European players like Spotify are at the forefront of online distribution of content, blurring the line between US and European businesses.

Brexit further complicates the picture. The UK played the role of the heavyweight champion for internet companies, protecting them from more onerous requirements called for by Germany, France and Spain. With their traditional European ally weakened, digital players will struggle to find an equally influential friend in Europe. They will have to highlight their contribution to European culture to win over sceptics; innovation-based arguments will not be good enough anymore.

Conclusion

It is clear that the EU needs to update its copyright laws. There is widespread support in order to prepare Europe for the challenges ahead. There is also broad agreement that this is best delivered at a European level to ensure the scale to deliver real change and that many of the issues raised are cross border.

But here lies the nub of the challenge. There are a considerable number of vested interests and as usual multiple views between member states, right holders, broadcasters, online platforms, publishers and artists as well as the consumers themselves in terms of what they want and what they are prepared to pay for. The stakes could not be any higher.

The first reactions to leaked versions of the new copyright rules indicate that the battle ahead will be a difficult one. Compounding the business concerns is an overt belief in some quarters that content producers are fighting for the survival of European culture; combined with those who firmly believe that this is a fight to protect the internet as a free and open space for all.

If Europe is to find a solution it will need to strike a pragmatic tone that finely balances the needs for innovation while protecting cultural concerns. In such a crowded and emotive space, anyone who wants to engage needs to stand out. Taking an integrated approach, seeking partners and common ground, combining commercial rationale, economic analysis and messaging that resonates amongst a broad spectrum of interested parties and policy makers will be essential. Make sure your voice is heard!

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