EU DSM Copyright Directive: the use of protected content by online content-sharing service providers

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Background

The evolution of digital technologies has changed the way copyright-protected contents are produced, distributed and exploited. In order to govern this economic sector, the EU Commission in September 2016 (no. 0280/2016) proposed modernizing EU rules on copyright as a key pillar of the Digital Single Market strategy.

On March 26, 2019, after a huge debate within EU institutions and member states, the EU Parliament approved a revised text of "*Directive on Copyright in the Digital Single Market*" (hereinafter EU Copyright Directive), aimed at improving the position of rightholders to negotiate and be remunerated for the exploitation of their copyrighted works by online service providers. According to Mariya Gabriel (EU Commissioner for Digital Economy), the Copyright Directive "protects creativity in the digital age and ensures that EU citizens benefit from wider access to content and new guarantees to protect fully their freedom of expression online. The new rules will strengthen our creative industries, which represent 11.65 million jobs, 6.8% of GDP and are worth €915,000 million per year."

This post focusses on one of the most debated provisions of the EU Copyright Directive, the use of protected content by online content-sharing service providers (Article 17). For a general overview on the EU Copyright Directive and a specific analysis of the provisions related to "link tax", please refer to our articles written by Fabia, Constantin and David (DSM and "link-tax": protection for copyright or for leading publishers? and Agreement on new EU copyright rules).

The use of protected works in the context of "online content-sharing" platforms

Pursuant to Article 17 of the EU Copyright Directive, online content-sharing service providers (hereinafter Providers, e.g. YouTube, Twitter and Facebook) are considered to carry out an act of communication to the public, anytime copyrighted content is uploaded on their platform by users. Therefore, Providers are required to obtain authorization from the rightholders—for instance, by concluding a licensing agreement—in order to make available the relevant works through their platforms.

Providers storing and giving access to large amounts of works uploaded by their users are also required to take appropriate and proportionate measures to ensure the effectiveness of the agreements with rightholders. Practically speaking, Providers shall demonstrate to have in place suitable contractual and technical/organizational measures to avoid the unauthorized publication of protected content.

Whilst the EU Copyright Directive eventually approved does not contain an *ad hoc* web-filtering/monitoring obligation against Providers (as the initial EU Commission proposal), the adoption of such measures may be deemed compliant with the same EU Copyright Directive. It therefore cannot be excluded that Providers will implement such filtering measures autonomously (in order to avoid the infliction of sanctions). This conclusion is confirmed also by Art. 17(8), stating that EU Copyright Directive shall not be interpreted as a derogation to the "*No general obligation to monitor*"

principle as laid down by Directive no. 2000/31/CE (and has been further clarified by the EU Parliament in its February 13, 2019 press release).

In more detail, Providers, in order to be compliant with the above obligation to contract with rightholders, are required to:

(i) make best efforts to obtain an authorization;
(ii) make, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of unauthorized content regarding which rightholders have provided necessary and relevant information; and
(iii) act expeditiously to remove any unauthorized content following a notice received and also make their best efforts to prevent future uploads.

Even if it is a less rigid provision than the insertion of “copyright filters,” this is at any rate a decisive reversal of liability against Providers (even before the unauthorized uploading takes place). Moreover, Providers are required to put in place an effective “notice and take-down” mechanism.

Guidance on the application of Article 17—for example specifying the meaning of "best efforts" (which does not prescribe any specific means or technology such as the "copyright filters")—are expected from EU institutions and member states to avoid legal uncertainty or inconsistency application of the EU Copyright Directive. As a preliminary remark, it should be highlighted that:

A. The EU Copyright Directive introduces a very high standard criterion to assess the possible liability of Providers, *i.e.* “*high industry standards of professional diligence*.” For instance, it seems to widen the scope of the qualified degree of skill and care as detailed under Article 1176(2) of the Italian Civil Code. It will be interesting to monitor the Italian legislative process for the implementation of the EU Copyright Directive, which may introduce a “new” standard of qualified care (to be coordinated with those already existing);

B. The EU Copyright Directive should be also read along with the recently approved Audiovisual Media Services Directive (hereinafter AVMSD) no. 2018/1808/EU, which contains (Article 28a) specific obligations against “video-sharing platform services”, *i.e*. a service whose principal purpose is “*providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility.*” It will be important to monitor the implementation by member states of the AVMSD along with the EU Copyright Directive, in order to clarify whether the lack of editorial responsibility of the video-sharing platform service provider is (a) aligned with the “no general monitoring duty” recalled by EU Copyright Directive, and (b) compliant with the duty-to-contract imposed on Providers.

Fair remuneration and exceptions

Whilst one of the key objectives of the EU Copyright Directive is to provide authors with a “fair remuneration” to be paid by Providers, it is not aimed at restricting the freedom to provide goods and services in the EU or freedom of expression. Indeed, Article 17 does not apply to:

- start-ups and “small” Providers—*i.e*., (a) incorporated in the last three years; or (b) with a turnover of less than €10 million; and (c) with less than five million monthly unique viewers—benefit from a lighter regime in case there is no authorization granted by rightholders. Such Providers will only have to prove they have acted expeditiously to remove the unauthorized works notified by right holders from their website (no “best effort” obligation to execute license agreements is set forth), also ensuring that works already notified by rightholders will not be re-uploaded onto the platform;
- non-commercial online encyclopedias (such as Wikipedia);

- open source software developing and sharing platforms;
- not-for-profit educational and scientific repositories;
- electronic communication service providers (such as WhatsApp);
- online marketplaces; or
- business-to-business cloud services and cloud services which allow users to upload content for their own use.

Lastly, member states shall ensure the possibility to upload memes and other content (like GIFs or similar) generated by users for purposes of criticism, caricature, parody, quotation, review and pastiche (without being subjected to the aforementioned obligations).

What happens now?

In the forthcoming week, the EU Council should approve the EU Copyright Directive formally. Once confirmed and published on the Official Journal of the EU, it will become legally binding, and member states will have two years to adopt local laws required to implement the EU Copyright Directive.

This two-year period of implementation will be particularly challenging, especially because most of the rules concerning the "fair remuneration" need to be adopted at the local level, and member states sometimes have different approaches to this topic (e.g. in Italy fair remuneration is generally subject to a general agreement involving rightholders, collecting societies of the relevant stakeholders, Ministries, etc.)

Do you have further questions, or do you want to share your thoughts on this article? Contact our Dentons Italy TMT Team at tmtbites.italy@dentons.com, and do not forget to sign up to our TMT Bites Newsletter!

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