COPYRIGHT IN THE DIGITAL SINGLE MARKET: ORIGINS AND EVOLUTION OF THE NEW DIRECTIVE

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New Directive?

Proposal for the Directive on copyright in the Digital Single Market (CDSM)
DIGITAL SINGLE MARKET (DSM)
Digital Strategy for Europe (2010-2014)

Europe 2020 Strategy (2010)
origins of the DSM idea
launch of the Digital Agenda for Europe with the aim of creation of a “true single market for online content and services”

removal of barriers created by copyright to take advantage of technology development and secure rightholders remuneration
idea of a single copyright title considered
Digital Strategy for Europe (2010-2014)

Copyright framework for the DSM – two tracks of actions:

1. Review of the copyright rules: territoriality, harmonisation, limitations and exceptions, fragmentation of EU copyright market and enforcement

2. Stakeholder dialogue „Licenses for Europe“: portability, UGC, audiovisual sector and heritage institutions, TDM

2014: White Paper on a copyright policy for creativity and innovation
Political Guidelines for the next European Commission (2014)

2nd priority: creation of “A Connected Digital Single Market”

The goal: “to break down national silos in telecoms regulation, in copyright and data protection regulation (…)”

Required step: modernisation of copyright rules

Promise of „ambitious legislative steps“
Digital Single Market Strategy for Europe

Three pillars:

1. better access for consumers and business to online goods and services across Europe
2. creation of right conditions for digital networks and services to flourish
3. maximising the growth potential of the European Digital Economy

Promise of legislative proposals for reform of copyright regime by 2015:

• Reducing differences but no overcoming barriers
• Securing wider online access but no forfeiting territoriality
• Harmonisation but no single copyright title
LEGISLATIVE HISTORY OF THE CDSM
## TIMELINE

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Towards a modern, more European Copyright framework (2015)

Outline of targeted actions and proposals

Four areas requiring EC’s intervention:

- Ensuring wider access to content across the EU
- Adopting exceptions to digital and cross-border environments
- Achieving a well-functioning marketplace for copyright
- Providing effective and balanced enforcement system
Public Consultations

2013/2014: Public Consultation on the review of the EU copyright rules

- Part of copyright review process launched in 2012 by Communication on Content in the Digital Single Market
- Broad in scope (80 questions), two main issues:
  - the rights and functioning of the single market
  - limitations and exceptions as applied in the digital environment
- 9500 replies in total
- Report made available July 2014

2016: Public consultation on the role of publishers in the copyright value chain and on the "panorama exception"

- Questionnaire available online via EUSurvey
- 6203 replies in total
- Synopsis reports made available September 2016
- Reports very brief, general summary of responses per category of responders
Proposal for the CDSM (2016)

Published by the EC on 14 September 2016

Part of a legislative package, accompanied by a Communication on Promoting fair, efficient and competitive European copyright-based economy in the DSM and an Impact Assessment

Immediately after the publication, criticism & controversies followed
The Proposal discussed since November 2016

25 May 2017: adoption of the Council position and negotiation mandate

Most controversial points: art. 11 (press publishers right) and art. 13 (value gap). Separate discussions held on these points.

After adoption of the Council position, changes of opinions among the MS (eg Italy)
Legal Affairs Committee (JURI) responsible

Rapporteur: MEP Comodini-Cachia (October 2016) replaced by MEP Voss (June 2017)

More than 250 amendments considered

March 2017: draft report

20 June 2018: final vote in JURI, report passes in a tight vote

Opinions by: IMCO, ITRE, CULT, LIBE
European Parliament: Plenary

July 2018: JURI report rejected in a plenary vote
Additional amendments tabled
12 September 2018: CDSM compromise adopted
Compromise adopted following a highly-polarised debate

Trilogue

Four rounds of trilogue scheduled:
  2 October
  25 October
  26 November
  13 December

Possible to follow trilogue via website of MEP Julia Reda
https://juliareda.eu/2018/10/copyright-trilogue-positions/

Early 2019: final vote in the EP
CONTENT OF THE CDSM
Objectives of the CDSM

Establishment and functioning of the internal (digital) market
→ The CDSM proposal based on art. 114 TFUE, and not art. 118 TFUE providing a special competence of the EU for the IPRs

Further harmonisation of copyright in the MS
Respect and promotion of cultural diversity in the EU
Modernisation of copyright framework to reflect technological development and removal of legal uncertainties surrounding digital, especially cross-border uses
Ensuring a wider access to content
Structure of the CDSM: „three prongs”

I. Adaptation of exceptions and limitations to the digital cross-border environment
   i. Text and data mining (TDM)
   ii. Teaching activities
   iii. Cultural heritage institutions

II. Improvement of licensing practices and ensuring a wider access to content
   i. Out-of-commerce works
   ii. Negotiation mechanisms

III. Achievement of a well-functioning marketplace for copyright
   i. Press publishers right
   ii. Value gap/filtering obligation
   iii. Fair remuneration of authors
CORE PROVISIONS OF THE CDSM
Art. 3: Text and Data Mining (TDM)

Problem:
Use of the TDM technologies is likely to infringe copyright and database right. Exceptions and limitations applicable to the TDM technologies not harmonised.

Proposal:
**Mandatory exception** covering reproduction and extraction from a database made to use the TDM technologies by research organisations for scientific purposes

Issues:
Limited to research organisations, narrowly defined
Lawful access
Possibility to apply technical measures
Art. 3: Text and Data Mining (TDM)

Council:
New exception approved
Introduction of art. 3a: optional exception for public and private entities covering reproduction and extraction from a database made to use the TDM technologies;
applicable to lawful content in the absence of rightholder’s restriction to the contrary

EP:
New exception approved
Lawful access for the purpose of TDM
Introduction of art. 3a: optional exception similar to the Council proposal
Art. 4: Teaching activities

Problem:
Legal uncertainty surrounding digital uses of works in education hampers the development of digitally-supported teaching and distance learning

Proposal:
Mandatory exception covering reproduction, communication and making available to the public necessary for the purpose of illustration of teaching (non-commercial)

Issues:
Only institutionalised forms of teaching: premises of educational institutions & their secure networks
Might apply only when there are no adequate licenses available
Mandatory remuneration
Art. 4: Teaching activities

Council:
New exception approved
No significant changes

EP:
New exception approved
Principle of teaching activities under the responsibility of educational institution remains, but might be located outside the institution’s venue
Licenses: need to be tailored to the needs and specificities of educational establishments; cover collective licensing
Availability of royalty-free licenses
Cultural heritage institutions can be considered as educational institutions
Art. 11: Press publishers’ right

Problem:
1. threat to free and pluralist press
2. need for sustainable press sector
3. unreliable licensing and enforcement environment

Proposal:
Related (neighbouring) right in digital uses of press publications covering making available and reproduction lasting 20 years after publication
Art. 11: Press publishers’ right

Issues:

- Broad definition of a press publication:
  - only examples (journalistic nature, newspaper, any topic, any media) fixation
- **Lack of threshold**: originality and/or substantial investment
- No personal scope limitation
- Covers all uses involving digital technologies
- Material scope of the right:
  - Links covered only when an act of communication to the public
  - Covers reproduction, also partial: **snippets**
- Length of the term
- Retroactive effect
- No causal connection & no empirical evidence
Art. 11: Press publishers’ right

Council:
New right approved
Online uses
Explicit exclusion of "insubstantial parts"; definition by MS based on originality requirement and/or length
No retroactive effect
Term of 1 year

EP:
New right approved
Applicable solely to information society service providers
Explicit exclusion of private, non-commercial individual uses
Explicit exclusion of mere hyperlinks accompanied by single words
Guarantee of authors’ share in the revenues
No retroactive effect
Term of 5 years
Art. 13: Value gap/filtering obligation

Problem:
Value gap: platforms using, at no cost, content produced by the third parties and uploaded by users, and not-sharing revenues generated by distribution of this content

Proposal:
Obligation to use appropriate and proportionate measures preventing availability of copyright-protected works, such as content recognition technologies
Applicable to internet service providers storing and providing access to large amounts of content uploaded by users
Obligation applicable irrespective of liability exemptions from eCommerce Directive
Obligation to enter licensing agreements and to cooperate with rightholders
Art. 13: Value gap/filtering obligation

Issues:
Use of vague language and **undefined concepts** („large amounts of content“)

(Possible) imposition of a **general monitoring obligation** incompatible with art. 15 of eCommerce Directive

Interference (violation) of fundamentally protected **freedom of expression and information** (art. 11 of the Charter of Fundamental Rights): technologies prone to disregard parody, criticism etc..

Preference to a **particular technical solution**: costs likely to set entry barriers to the market

General obligation to conclude licenses when liability exemption is not-applicable
Art. 13: Value gap/filtering obligation

Council:

Platforms carry out an act of communication to the public when providing access to content uploaded by users.

By default, platforms are not eligible for liability exemption of eCommerce Directive.

Platforms not liable if they apply the proportionate and appropriate measures, act expeditiously after notification of infringement and make best affords to exclude future availability.

EP:

Platforms carry out an act of communication to the public and they need to enter licenses with the copyright holders.

Explicit mention of "appropriate and proportionate measures" and "content recognition technologies" removed.

Need ensure lack of availability of works for which licensing agreement was not concluded.
Is the CDSM an „ambitious legislative step“?
Referred to as a „missed opportunity“

Lack of **clear, coherent vision** for EU copyright in the DSM
  - Fragmentary, problem-based approach
  - No consistency with *acquis* and jurisprudence of the CJEU

**Double-layering** of rights & enhancing complexity of the copyright system
  - **Fragmentation** of sources of law

Lack the **causal link & empirical data** to support proposed solutions

Upsetting of the **balance** between content producers and users

Preservation of **territorial character** of copyright
Missing elements of the CDSM

No definition of the right of communication to the public
Lack of clarity on definition noted in 2015 Communication
Continuing reliance on the CJEU case law
No explicit exclusion of linking from the scope of copyright

No panorama exception
Exception permitting the use of works permanently located in public spaces considered in 2015 Communication
2016 Post-consultation report recommended that the MS to adopt appropriate exception
EU-level intervention deemed not necessary, as most MS already have appropriate exception

No exception for user-generated content (UGC)
UGC as a matter of enquiry within Digital Strategy for Europe
2014 White Paper recommended removing grey areas surrounding UGC (exception, licensing mechanisms)
THANK YOU FOR YOUR ATTENTION