



Interview with Roy Kaufman
Frankfurt Book Fair 2019 Preview
EU Digital Single Market Copyright Directive: Licensing in the Digital Age

For podcast release
Monday, October 14, 2019

KENNEALLY: The Directive on Copyright in the Digital Single Market, approved by the European Parliament in March, aims to promote a well-functioning marketplace for the exploitation of works in a wide range of media, from newspapers and books to music and film. As EU member states now begin to support the directive through passage of national legislation, opportunities, challenges, and unintended consequences are emerging.

Welcome to Copyright Clearance Center's podcast series. I'm Christopher Kenneally for Beyond the Book. On Wednesday, October 16th, at the Frankfurt Book Fair, Copyright Clearance Center presents the EU Digital Single Market Copyright Directive: Licensing in the Digital Age, a panel of specialists in law and publishing. Moderator Roy Kaufman, managing director of business development and government relations at CCC, joins me now with a program preview. Welcome to Beyond the Book, Roy.

KAUFMAN: Thank you for having me, Chris.

KENNEALLY: Well, we're looking forward to being at Frankfurt Book Fair – where a great deal is going on for Copyright Clearance Center. And your panel is Wednesday the 16th in Hall 4.2 at 11:30. You're going to be joined by Elizabeth Crossick, who is head of government relations for the EU at RELX Group in Brussels, as well as Mark Seeley, a public policy consultant based in Boston, and Carlo Scollo Lavizzari, who is a lawyer and well-regarded copyright attorney based in Basel, Switzerland.

For listeners who may have heard about the Copyright Directive but don't know some of the details, it might be good to step back a moment and look at how we got here and where we stand. So this is the rewrite of a 2001 directive. It's taken some time to find its final way through the European Parliament. A review of that 2001 directive began in 2012.



KAUFMAN: That's correct. And when you think of it, there's been a couple changes since 2001 to copyright law, but more importantly to copyright practice. In 2001, we didn't have the power of the platforms to create, to publish, to destroy, to do all those things that they're capable of doing. And we know things that we just didn't know back then. The world has moved on.

In 2001, copyright was kind of the domain of policy wonks and people in copyright industries much more than it is today. All of us are still certainly involved in copyright. But now you have this whole notion of user rights. You have these notions of – you've got Google and platforms that are quite significant. We've had changes in the newspaper publishing business, generally to the negative, where newspaper publishers have been struggling. We've seen huge changes in music publishing. We went from the days of recorded music bought on recorded media, to the days where that got destroyed by unlicensed peer-to-peer and other types of infringing use, to it coming back through streaming and high-quality audio sites.

So a lot of things have changed. Some things haven't. But everything's become a lot more politicized. Certainly, the fact that this review started in 2012, and the new DSM Copyright Directive wasn't passed until this year, I think is a good indicator that nothing – that people argue more. That people argue more, that there are stronger opinions on all sides, and it's harder to get consensus and movement.

KENNEALLY: And there are two pieces of this, Roy Kaufman. There's the Directive on Copyright, but there's also the Digital Single Market. And there are some important policy ambitions beyond copyright reform, if you will. This is about the EU's efforts to create a better, stronger economic union.

KAUFMAN: It is. If you think of what is the purpose of the EU in the first place, it's to have a harmonized single market. And when you are dealing with things that are relatively new – and I say relatively new. You can say, well, digital transactions have been around a long time, but tomatoes have been around longer. So the EU has been struggling to keep up, and one of the things that – and this is true of any regulation anywhere that involves particularly the digital age and e-commerce is sometimes you're just solving yesterday's problems tomorrow, that the markets move so quickly that it's a big struggle to get correct information, and then once you have correct information, to update it, (laughter) because it changes so quickly.

But the EU has to try to harmonize, needs to create a single market – DSM stands for Digital Single Market. That's the overwhelming push. But copyright law is local. The EU is a federal system. And there are variations, and the goal here is to smooth them out.



KENNEALLY: Well, Roy Kaufman, our listeners will be predominantly from North America and be familiar with US copyright law if they're familiar with copyright law at all. Can you give us an idea of how the EU's DSM Copyright Directive may differ in some important ways from what people are accustomed to in the US environment?

KAUFMAN: Yeah, I mean, there are many differences, so trying to figure out which ones matter most – one of the large differences is today with respect to infringing content on the web, we have the Digital Millennium Copyright Act, which has been interpreted to basically mean that a rightsholder – if there's infringing content found online, let's say on YouTube or on any other site, they send a notice requesting that that material be taken down. If the notice meets certain requirements, the material is taken down.

I think this is a misreading of the original law, but the way it's applied now is there's no obligation on the platform to keep that content down. So very often, particularly on the really piratical sites, content gets taken down and then reposted immediately.

One of the things that's been most hotly debated, particularly among the platform companies and the rightsholder communities, is what's known as the value gap provision. What this does is it provides certain obligations. The exact extent of the obligations aren't specified, but the larger you are as a platform, the more you are responsible for making sure you don't have infringing content, the more you are responsible for, having received a notice, making sure that similar materials don't get reposted. So that's a major difference.

Other differences are trying to address – in Europe, there is no fair use. Fair use is a US legal concept. It exists in maybe two or three other countries. So a lot of what you're trying to figure out is where the line's drawn in a system that always draws lines. Fair use is fact-determinant. You have to go through litigation to figure out if something's fair or not and then look at other cases to analogize. In Europe, particularly the continental system is pretty straightforward – you can do this, you can't do this, you need permission to do that.

KENNEALLY: Roy Kaufman, even though we have seen such a long process to create this legislation, to pass it, and to begin its formal adoption, we are not at the end of the story here for the EU. Each of the member states will need to adopt the law themselves and implement it in their own national fashion. Where do we stand with all of that?



A Copyright Clearance Center Podcast

KAUFMAN: Really very much at the beginning. As I said before, and as you've sort of alluded to in your question, it's a federal system, and copyright law is national. So now what's essentially happened is the European Parliament said your copyright law has to address the following things, and it also says it may address some of the other things. So first of all, not everything in the DSM has to be transposed into national law. Some of it's optional, and there are some choices that different nation-states can make based on their cultures and their priorities. So what's theoretically supposed to happen is the member states have two years to introduce and pass their changes to their laws to make their laws consistent with the DSM Copyright Directive.

Now, there is – as is typical in a lot of law, there's some ambiguity in the directive, so some people will perhaps transpose it in ways that are not necessarily consistent. So basically all the fighting that's been happening over this directive at the Brussels level now atomizes. Now, you're going to have all of these disputes sort of renegotiated at the member state level. There are a little bit more ring-fencing, because you have to do certain things, but it's kind of up to the member state to then say, oh, well, our law doesn't say that, but it says something almost the same, so this is good enough. So I like to say you've got two years of re-fighting all of this stuff at the national level, and then you're going to have 10 years of litigation trying to figure out what did the EU mean, how does the European Court of Justice interpret this? So it's the beginning, not the end by any long stretch of the imagination.

KENNEALLY: And for anyone attending Frankfurt Book Fair, a great way to begin watching more closely the machinations of European copyright law would be to drop into the presentation that Roy Kaufman will moderate on Wednesday, the 16th of October, in Hall 4.2 at 11:30. And we do hope that you can join Roy and his guests, Elizabeth Crossick, from RELX, Carlo Scollo Lavizzari, an attorney based in Basel, Switzerland, and Mark Seeley, a public policy consultant based in the Boston area. Roy Kaufman – sorry, that background noise. I'm going to just do it again.

Roy Kaufman, we look forward to seeing you there in Frankfurt. Thank you so much for joining me today on Beyond the Book.

KAUFMAN: Thanks for having me, Chris. It was a pleasure as always.

KENNEALLY: Beyond the Book is produced by Copyright Clearance Center. Our co-producer and recording engineer is Jeremy Brieske of Burst Marketing. Subscribe to the program wherever you go for podcasts and follow us on Twitter and Facebook. The complete Beyond the Book podcast archive is available at



A Copyright Clearance Center Podcast

beyondthebook.com. I'm Christopher Kenneally. Thanks for listening and join us again soon on CCC's Beyond the Book.

END OF FILE