



The EU Digital Single Market Copyright Directive: Licensing in the Digital Age

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with

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KENNEALLY: My name is Chris Kenneally. I'm the host of Copyright Clearance Center's podcast series, Beyond the Book, and I'm very happy you can join us this morning for our discussion which is on the EU Digital Single Market Copyright Directive: Licensing in the Digital Age.

In March, the European Parliament approved the Directive on Copyright in the Digital Single Market with the stated intention of promoting a well-functioning marketplace for the exploitation of works. MEPs adopted the directive in plenary by 348 votes in favor, 274 against, and 37 abstentions. The Copyright Directive has its opponents and its supporters, from Google and Sir Tim Berners-Lee against to Agence France-Presse and Sir Paul McCartney in favor.

The discussion we hope to have today will not rehash the debate or restate the legislation

The first draft of the legislation that became the directive was released in September 2016. Three years later, it remains for the EU member states to pass national legislation that meets the directive's requirements. They must do so by the end of 2021.

My panel of specialists in law and publishing, however, have a scant 30 minutes to offer views on the opportunities, challenges, and unintended consequences that the Copyright Directive presents, and I will introduce them briefly to you now. From my left is Mark Seeley. Mark, welcome. Mark Seeley consults on science publishing and legal issues through SciPubLaw. Mark retired in January 2018 from his position as senior vice president and general counsel for Elsevier. Currently, Mark serves on the board of directors for Copyright Clearance Center. He also teaches international copyright law at Suffolk University Law School in Boston.



To his left is Elizabeth Crossick. Elizabeth, welcome. Elizabeth is head of government affairs in the Brussels office of the RELX Group, a global provider of information and analytics for professional and business customers across industries. Elizabeth is a UK-trained barrister, but for the majority of her working life, she's lived and worked in the policy world of Brussels.

And then to the very far end is Carlo Scollo Lavizzari. Carlo, welcome. Carlo is a lawyer who specializes in intellectual property protection with more than 17 years of work experience with law firms in Africa, Europe, Switzerland, and the United States.

With that as an opening, ~~I want to turn to you first, Carlo—sorry,~~ I want to start with Elizabeth, actually. So we have a new directive, but it raises the question, why do we need one? Tell us why.

CROSSICK: Thank you. Thank you for having me here. I'm going to leave some of the legal stuff to my real lawyers. I'm an ex-lawyer. So it's a very good kind of political question. The original Copyright Directive was adopted in 2001, so I think it's quite clear a lot had changed. Of course, we've gotten much more digital. The internet is much more pervasive. So there was a general feeling that the copyright laws needed to be updated to reflect the digital reality of today. And it was actually one of the centerpieces of the previous commission with a mandate to get this done within the commission's five years – which I'm glad to say they succeeded in doing.

I think what was interesting was it was the tension between, on one hand, understanding and protecting copyright, and on the other hand, looking at the more public policy objectives which the commission had to balance against this copyright protection regime. So there were lots of questions around more access to online content – how do we improve the access? How do we improve the licensing regime? And also, how do we ensure a fair marketplace? Those are probably the three buckets they were looking to address.

The previous directive had a number of exceptions. The majority of them, all bar one, were optional. So of course, in a single market, when you've got optional exceptions with 27, 28 member states adopting them, you can get a very fragmented single market. Some adopt and some don't. So one of the purposes is to say all the exceptions that already exist will be mandatory, and actually there are a few areas in which we need to add additional exceptions. The biggest one, and the one many people here will be familiar with, is text and data mining. What do



we do with text and data mining as far as it touches copyright? That was one big bucket.

As I said, the second big bucket was around licensing. And there was a tussle with subjects like out of commerce, with the parliament, for example, actually wanting an exception.

KENNEALLY: Out of commerce is also – out of print is another way to look at it.

CROSSICK: Yeah.

KENNEALLY: I'm just helping people in the audience.

CROSSICK: Right, exactly. Should we make an exception for that which is no longer in commerce, or should we deal with it by way of licensing?

And then the third piece – so if you like, part of that was rightsholders giving more. On the other hand, the other piece of it was the balance of saying, OK, where are the real tensions and problems for rightsholders? You referred to the two most contentious articles. One was on a right for press publishers which they never had before. The other was helping rightsholders deal with online content – so platform-related content. Those were the areas which the commission touched upon.

KENNEALLY: And what's interesting about it is it's not simply legal changes, legal updates, but as you pointed out, public policy matters come into play. That is what's strikingly different, I think, about copyright in our age. At one point, it would have been a matter of who owns what and what they may be able to do with it. But copyright today really – and this is true for everyone here in the audience – really matters throughout our lives – our professional lives, our public lives as well.

CROSSICK: Yeah. No, I think that's right. And I think one of the more interesting debates that we were quite involved in is around text and data mining, because there's this automatic kind of assumption about what it is and what it isn't. I think we were very clear in the process that text and data mining is simply a technique. Where it touches copyright is where for the purposes of mining content, you need to make copies of that content. That, of course, becomes – it's a vulnerability for publishers, but it's also a need for miners to have access. And I think where we've ended up is actually a good middle ground which allows rightsholders to continue to protect that content which it has invested and is so valuable, but also allow on the other hand those who want to mine primarily for academic purposes, but also potentially beyond, to be able to do so.



KENNEALLY: You mentioned finding a middle ground on that particular topic. I wonder whether you have an assessment of how copyright has fared after this long debate. It got tense at points, finally reached a conclusion. Would you say copyright came out for the better? How has it evolved over this debate?

CROSSICK: Yeah, I think as so often in these cases, the commission comes up with something which is pretty pragmatic and tries to find a middle ground. Then you get the parliament attacking it, I suppose. We had a big push for what we would call copyright-left, so the breaking down and dismemberment of copyright as and where possible, with member states being a little more pragmatic and recognizing the value of copyright. And I think where we've ended up is actually in a sensible place.

But it is a directive. So that's important to note, because it doesn't just get implemented as is. All the member states now need to adopt laws to implement the directive. So I think it's early to say how it's going to pan out, but for the moment, I think we're in a good place. We will see – and I think you're going to touch upon it a bit, maybe – how member states are looking at implementing the directive. There's a lot of consultation going on at the moment. So jury's out, but where we are now I think is a balanced place for everyone.

KENNEALLY: So this is really the beginning of a process. We have not reached a finish line at all. But do you feel that publishers should be heartened by the way things have turned out, or should they continue to watch this very closely?

CROSSICK: I think you have to watch it closely, because it's the end of one process and the beginning of another. I think it's a sensible conclusion thus far, but publishers do need to make sure that things which were already aired and there was lots of battles over and lots of misconceptions – I was approached by kids, like 12, 13 – why are you breaking our YouTube? What are you doing? And other things like this is just a link tax, or this is against our free speech. A lot of it just was not really where the conversation was at, but it was very easy to play those in the public court, let's say. And I imagine we're going to see some of that rehashed as the implementation goes through. But I hope that member states will recall where they came out at in this process and stick to that.

KENNEALLY: It puts me in mind of some words from Winston Churchill at the end of a very important battle. He said it was not the end, it was not even the beginning of the end, but it might have been the end of the beginning. So, Carlo Scillo Lavizzari, is that where we are? We're at the end of the beginning. We now have to go through the implementation process. How is that panning out so far?



LAVIZZARI: Yeah, we're still early on in that implementation, but I do think there are sort of three types of provisions in the DSM broadly. One is an updating, as Elizabeth said, of exceptions and making sure they can apply in the digital cross-border world, at least within the EU. One is to fix case law that has gone wrong from the Court of Justice, so the couple of provisions on out of commerce and on publishers being also remunerated like authors in collecting societies. And then there are the sea changes, going from limitation of liability of platforms through a safe harbor to a place of platform responsibility, and to a place from search engines aggregating for free content and monetizing that through advertising to having to consider the sustainability of newspapers and their publications. That's what you see in the middle – the fair play part.

So I think it is the second stage, if you will, because while the law has been passed, and there have been many attempts to stop this from the side of big tech, the acceptance of this law is not there yet. So there continue to be dialogue between the platforms, the large tech companies, and the creative sector to now go to the nitty-gritty – how is this going to work? We have the sea change in the principle, but the detail still needs to be done at member state level.

KENNEALLY: Can you give us a quick update, then on the member states' adoption or pushback that's going on? If I understand correctly, France has adopted the directive, and Poland, we're seeing some pushback.

LAVIZZARI: Countries are not obliged to adopt at once all provisions. In fact, France has started with the publishers-related rights already. That's the fair play, Article 11, to make sure content aggregation is remunerated. And there's already been an exchange of fire in France, with the search engines saying we're going to de-index all newspapers. That did go down really badly within the French context. So we've seen an exchange of fire there. But the law was passed.

In Germany, I think due to the high value that is placed in Germany on freedom of expression, there is unease about the value gap and content identification. So there will be a discussion how to do this respecting users' privacy rights and issues like that.

KENNEALLY: So at the end of the day, we may still end up with – rather than a fully single market, there may be some variations. Is that possible?

LAVIZZARI: Yes. So if we come bluntly to the name Digital Single Market, I think it will be a step towards that, but the 27, 28 member states are still to some extent going to remain fragmented. But it'll be a little bit easier to do cross-border business.



KENNEALLY: You just mentioned something we'll come back to – 27, 28. We will pick up the B-word in just a short while. But I do want to turn to Mark Seeley and ask you, Mark, from your perspective now teaching law at Suffolk University in Boston and understanding as well as anyone the US laws and how they compare and contrast with where we're going with the directive, call out for us some important elements that perhaps have found their way into the directive or that may not have, and why not?

SEELEY: I think that what's really interesting – a big topic in the directive and in a lot of the public policy debate, as both Elizabeth and Carlo have mentioned, is the area of platform responsibility. From a US perspective, it's probably not a big surprise, given the size and scope of the US tech industry, that they played quite a large role in lobbying and advocacy here in Europe.

What I think the tech industry has done is that they've built on the idea of a safe harbor for platforms that are entirely neutral – that are simply conduits and pipelines.

KENNEALLY: Mark, just so we have everyone on the same page, the safe harbor is basically a get-out-of-jail-free card, if you want to put it that way, for publishers – I'm sorry, for platforms. Their responsibility is very limited for the work that's posted to their sites.

SEELEY: That's right. And it's not only under US law. There's a couple of different laws here that are relevant, including one that has to do with old telephone communications and one that's the DMCA. But they're all based on this idea that some platforms, like a big telephone company, are not really responsible – are not digging into the content that's passing over their pipes. They're merely acting as a conduit. So that's where this idea of a safe harbor from liability – and by the way, it's not just about copyright issues. It's also about defamation and obscenity and a whole number of other issues like that.

So what seems to be happening if you look at the international environment, given that at the moment, anyway, there's no significant push in the US to look at this question again about platform responsibility, we do seem to have a bit of a divide between the European approach, where I think it's been recognized that the idea that the platforms are entirely neutral – it's been recognized that that is really kind of a naïve idea that probably comes from the late '90s. The reality, of course, nowadays is much different. So I think we are going to see, or we have seen, a divergence between the US and Europe.



The other dimension to that, as we all know, is that many of those primarily US-based tech industries have sort of exported the idea of a safe harbor through their terms and conditions and through the way that you log onto the service, regardless of where you as a consumer as a user are. So it's kind of an interesting export of almost a soft law kind of approach.

KENNEALLY: We have to reexamine this notion of a single market, because when it comes to copyright in the digital age, it's a single system – the entire world. One's market doesn't exist outside of that.

Our title for the program has a subtitle – Licensing in the Digital Age. You and Carlo have already mentioned the licensing aspect, particularly related to the so-called press right. There's some challenge there as well. And I wonder for the publishers in the audience what your expectations are regarding the chances for licensing and how that's going to work out. Sorry, I was going to ask Mark.

SEELEY: That's a question. Oh, OK. I do think that a lot of this discussion is sort of seen as a clash between culture and creativity and tech. And I do think that there's a big question here about the degree to which licensing activity and real-world discussions will take place. Certainly, the directive suggests that it should, and I think the commission also takes the view that that's quite important. As Carlo mentioned, Google in particular and some of the other search engines are not convinced, I think, that they really need yet to enter into the licensing fray. Hopefully they will.

KENNEALLY: Carlo, your thoughts?

LAVIZZARI: I think when it comes to enabling markets, licensing works really well also cross-border. So it is perfectly possible to agree a pan-European license, or let's pick the French-speaking countries or German-speaking countries – to have a license that covers people who are interested. For television without borders, there is a whole separate directive that was adopted that goes somewhat into this direction with portability of subscriptions. I think the text and data mining that Elizabeth mentioned is also a prime example of where licensing will play a role, because big data is really what is changing outside this world of the DSM and will impact all countries around the world. There, licensing even beyond European borders will be key, as researchers and companies that use text and data mining are operating really on a global scale.

KENNEALLY: Elizabeth, please?



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CROSSICK: Yeah, if I can just kind of pick up on two points. One, on text and data mining, we're seeing from a policy perspective this morphing into the discussions on artificial intelligence and how do these two overlap? So from a kind of what's coming up perspective, I think that's a space where we're watching and looking and contributing to the debate. And on the platforms piece, it's not over yet. We've had the Copyright Directive, but around the same time was adopted the e-Commerce Directive, which actually also has safe harbor. That is also going to be updated. So the new commission is going to be looking at that. That touches many other areas as well, but that is also another place where there will be a debate, for want of a better word, between how the platforms are going to behave and how we the rightsholders are going to work with the platforms.

KENNEALLY: Carlo, you did allude to something that's hanging up in the air at the moment still, which is Brexit, our B-word – 27, 28. When these negotiations began and that digital single market was imagined, it included the UK. We may see Brexit happen the end of this month. We don't know. We may see extensions. It's hard to say. When it comes to copyright law and the European marketplace outside of the EU notion of a digital single market, can you raise some questions that people should be asking themselves and some points people should be watching for when it comes to Brexit finally happening?

LAVIZZARI: I mean, we don't know what will happen, but if there is some kind of a new jurisdiction or if the UK would not implement this directive, then indeed there would be two territories where previously there was one. And I think for people who make contracts, contracts usually – licensing agreements mention the territory where the licenses apply – should already now try and see between contractual partners, what are we going to do depending on how this is going? And if they're sound business partners, and both have a good interest, they should find accommodating conditions.

I think for copyright, the situation is not as dramatic as perhaps in other areas of IP law. I think for trademark law, this is a much bigger deal than for copyright law.

KENNEALLY: But I do want to be sure we understand the situation, because if I understand correctly, if and when Brexit happens, there's the great flip or something like that, where they're going to put into British law all standing EU law. But if they haven't adopted the directive, then – is that not true? You're shaking your head no?

CROSSICK: No, go on.



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KENNEALLY: What I was just asking was that because this is still in the adoption process, it just makes the questions even foggier, really.

LAVIZZARI: It does. Whether the UK would really implement, we don't know. They may see a benefit in having entirely compatible law. Maybe not. That would remain to be seen. But given that the UK is a significant area where research is done, where innovative business takes place, and frankly where popular media content is made, it will remain an important exchange between the possibly two territories.

KENNEALLY: Did you want to clarify?

CROSSICK: No. We don't know, but my understanding is this is not a priority, so we have to see. That's my understanding from the last few weeks. But it's very hard to predict.

KENNEALLY: I want to thank our panel – Mark Seeley, Elizabeth Crossick, and Carlo Scollo Lavizzari. I'm Chris Kenneally for Copyright Clearance Center. Thank you very much for joining us. Thank you.

(applause)

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