EU Digital Single Market copyright law: “Impressionist”, but not impressive

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On May 6th, 2015 the European Commission revealed its eagerly anticipated plans for the EU digital single market. The EU Digital Market strategy, which aims to open up digital opportunities for individuals and businesses and enhance Europe’s position as a world leader in the digital economy, is built on three pillars: (1) better access for consumers and businesses to digital goods and services across Europe; (2) creating the right conditions and a level playing field for digital networks and innovative services to flourish; and (3) maximising the growth potential of the digital economy.

As far as copyright law is concerned, the EU digital single market initiative has rapidly emerged as a new battlefield of clashing copyright visions, since it has been seen as an opportunity for various stakeholders and lobbies to raise their voices either in support of safeguarding or reversing the EU copyright law status quo. Indeed, right holders hope that the Commission’s plans will avoid disturbing the equilibrium in the digital cultural industry, which might be impoverished if the level of copyright protection is degraded. On the contrary, consumers and digital rights defenders consider the EU Digital single market to be a golden opportunity to make copyright law more flexible and user friendly.

The Commission’s recent communication is quite instructive, but certainly does not announce the apocalypse that was predicted. This is not a surprise. On the contrary, it can be explained by the way EU copyright legislation has been constructed to date, mainly through small steps which closely follow the realistic and necessary path of compromises.

The proposed package includes certain measures aimed at reducing or neutralising the negative effects of disparities in national copyright law on the establishment of a unified digital market of contents in Europe. Indeed, as stated “*The Commission will make legislative proposals before the end of 2015 to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU, including through further harmonisation measures. The proposals will include: (i) portability of legally acquired content, (ii) ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector, (iii) greater legal certainty for the cross-border use of content for specific purposes (e.g. research, education, text and data mining, etc.) through harmonised exceptions,(iv) clarifying the rules on the activities of intermediaries in relation to copyright-protected content and, in 2016, (v) modernising enforcement of intellectual property rights, focusing on commercial-scale infringements (the ‘follow the money’ approach) as well as its cross-border applicability*”.

The Commission’s plans focus on three key areas of copyright law which will ultimately be subject to the reform: territoriality, exceptions and enforcement.

Territoriality

Territoriality has often been denounced as the main obstacle to the establishment of a unified digital market in Europe. Indeed, the principle of territoriality is *ab initio* the antithesis of the concept of unification, since territoriality is by definition linked with the notion of barriers, of “physical lines” having a separating, structuring or even an identifying function. Territorial borders demarcate spaces within which different laws apply. The edifice of copyright law has been built on this model.

Especially in the field of copyright law, where economic and cultural objectives coincide, the principle of territoriality appears to have an ambiguous role. On the one hand, territoriality is deemed to guarantee national cultural sovereignties, by safeguarding national visions of copyright law which often represent a certain historical, philosophical, social and economic background. What kind of works shall be protected? Who can be an author? How broad are the liberties recognised for the benefit of the public? On the other hand, if culture is seen as a liberating and integrating power with an inherent vocation to be communicated, the principle of territoriality appears ill-fitting.

In the digital economy, the territoriality of copyright law appears more outdated than ever, since it poses significant impediments to legitimate EU consumer expectations. As highlighted in the Commission’s communication “*The aim is to improve people’s access to cultural content online – thereby nurturing cultural diversity – while opening new opportunities for creators and the content industry. In particular, the Commission wants to ensure that users who buy films, music or articles at home can also enjoy them while travelling across Europe*”.

Even though this has been primarily seen as a call to abolish territoriality, it appears that the Commission has finally opted for a more moderate approach. This approach is principally based on a classic recipe, consisting of the minimalist method of acting via specific interventions in specific subject areas of copyright law. So, it appears that the maximalist approach of replacing national copyright laws by a European Copyright Code, as recently proposed by the European Copyright Society in a letter to the European Commission’s digital commissioner Günther Oettinger, won’t be part of the current reform. This will somehow “legitimate” the Court of Justice’s activist course in constructing EU digital copyright law brick by brick, on a case by case basis in highly contentious issues, such as digital exhaustion or the making available right.

Moreover, it is not entirely clear how the principle of territoriality in copyright law will become more compatible with EU consumers’ expectations. The Commission announced more broadly that legislative proposals will be made in the first half of 2016 to end unjustified geo-blocking and that action could include targeted change to the e-Commerce framework and the framework set out by Article 20 of the Services Directive. The latter imposes a requirement that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, although providers are allowed to retain differences where these can be justified by objective criteria. Nonetheless, Article 2 provides that audio-visual broadcast services do not fall within the scope of the Services Directive but it seems this might change. The Commission also plans to review the satellite and cable directive to assess the need to enlarge its scope to cover broadcasters’ online transmissions and the need to tackle further measures to ensure enhanced cross-border access to broadcasters’ services in Europe. The satellite and cable directive establishes that rights for a satellite broadcast must be cleared in the country of origin between the broadcasting organisation and the right holders, but in Internet transmissions the country of reception rule has been applied.

Exceptions

Here too, a restrained approach has been favoured. The Commission’s plans are far removed from proposals advocating for a European “fair use” clause, for unified mandatory copyright law exceptions or “user rights”, as they include only two categories of exception: exceptions permitting more freedom for private use by consumers who have legally acquired content or have legally purchased online services; and exceptions for the purposes of research and education, such as text and data mining. So, exceptions for information purposes, quotation and parody or for archiving purposes are not for the moment part of the Commission’s direct plans.

Since the exact content and scope of the reforms to those copyright exceptions is not yet known, no-one’s victory or defeat can be announced. Nonetheless, the decision to touch on the tough issue of exceptions undoubtedly has noteworthy symbolic value, since it is a clear sign that the evolution of EU copyright law does not necessarily follow the copyright expansion dogma, which has been fiercely criticised by various stakeholders.

Enforcement

A more substantial reform, with broader impact, is announced in the field of copyright enforcement, although its exact method of implementation has only been vaguely pronounced. Nonetheless, it is clear that the role of intermediaries in the fight against copyright infringement will be somehow “upgraded”. This requires a restructuring of the intermediaries’ safe harbour that was established by the E-Commerce Directive in 2000. The asylum of intermediaries, which has been based on the prototype of a completely passive and neutral role of these key players in the information society, has undoubtedly contributed to shaping the Internet in its present liberal form (see here), but it has often been denounced for inconsistencies, paradoxes and injustices. Experience since 2000 has shown that hosting providers face divergent due diligence duties in national jurisdictions, while the absence of common notice and take down procedures and unregulated private ordering in copyright enforcement has led to discrimination and disparities in respect of the conditions of removal of presumed illegal or harmful content. So, the conditions for establishing a pan European standard of due care of intermediaries or unified notification procedures seem to have matured. Moreover, it seems responsibilities in tackling online copyright infringement shall also be extended to other categories of intermediaries, such as advertising networks and payment processors, in the context of the so-called “follow the money” approach for commercial scale infringements. The rationale is that by cutting the source of revenue for pirate sites, the opportunity for website owners to profit from such sites is significantly reduced and as a result such sites become commercially unviable (see here). Nonetheless, here too some clarifications are necessary. The concept of “commercial scale” infringements has not been defined so far and -given the hot debates on its scope when ACTA was discussed- it will not be an easy task to delimit its exact content. Furthermore, it is not always easy for advertisers to decide whether a website is infringing copyright or not.

Conclusion

The steps proposed by the Commission undoubtedly contribute to the development of EU copyright law. A reform of the principle of territoriality, more exceptions, and a new approach to intermediaries’ liability are necessary. It was also almost impossible to expect a sudden revolution in the EU institutions’ approach, after so much time applying the ‘impressionist method’ (small, thin, yet visible touches in specific areas of the law) to Copyright law as to many other fields (see for example, the downgrade of the proposed Regulation on online contracts in Europe, which will apply only to the sale of goods). While impressionism itself was a revolution and created some of the most wonderful works of art, in contrast, in copyright law an expert scholar would probably be disappointed by this patchwork of small, thin touches. Let’s hope that the whole picture will be contemplated one day!