

Kluwer Copyright Blog

“Towards a modern, more European copyright framework”, “Beautiful” moves and “bold” inspirations in EU digital copyright law

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On December 9th 2015 the Commission revealed its [plans for the modernisation of copyright law](#). The target is to adapt copyright law to technological challenges and to make it more European, digital friendly and functional in an EU digital single market. The Commission’s strategy focuses on the three key areas which have been identified by its [Digital Single Market Communication](#) of 6th May 2015 (namely content portability across borders, copyright exceptions and enforcement), while some additional areas of reform are also pinpointed: digitisation and circulation of out-of-commerce works; better allocation of resources generated by online forms of content distribution; and fair remuneration for authors and performers.

A step by step approach based on a series of targeted interventions is openly favoured in the context of a short term copyright reform schedule. At the same time, the long term vision of EU copyright codification is not abandoned, but is rather vaguely shifted to the future. So, the communication appears as an amalgam of “beautiful” specific digital single market driven copyright reforms accompanied by the “bold” fantasy of an EU unified copyright law.

The most concrete step has been taken in respect of the question of content portability, where a legislative proposal on cross-border portability has been adopted. The approach taken by the Commission is based naturally and primarily on market priorities and consumer expectations. In this respect, the proposal for a regulation on the cross-border portability of online content services provides the opportunity for subscribers to access those services when they temporarily move to a member state other than their state of residence. It is noteworthy that this possibility is constructed as a kind of non-waivable consumer right, since it is established that any contradictory contractual provisions shall be unenforceable. Nonetheless, further clarification is necessary. For example, how is “temporarily” defined?

The content providers’ obligation to use effective means in order to verify that the online content service is provided only to subscribers who are temporarily in another Member state is subject to the principle of proportionality. That has a double meaning. First, the proposal would oblige service providers that offer services free of charge to provide for cross-border portability where they do not verify the subscriber’s Member State of residence, as such a requirement would involve a major change to the way they deliver their services and could involve disproportionate costs. Secondly, in respect of content providers who already verify the subscriber’s state of

residence, the technical and organisational measures shall not exceed what is necessary for the determination of the Member State where the subscriber is accessing the service. Consequently, an appropriate measure is the sampling of IP address instead of constant monitoring of location. Similarly, where authentication of a subscriber is sufficient in order to deliver the service provided, identification of the subscriber should not be required. In any case, the Regulation leaves the service providers with the freedom to implement the appropriate measures and, as a result, the latter will bear the responsibility of selecting those verification measures which effectively respect the privacy of the subscribers.

In the field of copyright exceptions and limitations, the emphasis is put on exceptions for the purposes of research and education, text and data mining and libraries. Furthermore, legislative initiatives have been announced which will implement the Marrakesh Treaty, while it is notable that to the Commission's action list are added the assessment of possible reforms enabling the preservation of digital content by cultural institutions and the so-called 'panorama exception'. Nonetheless, it is not clear what the scope and form of the relevant exceptions will be. For example, the relationship between the scientific research exception and uses for text and data mining needs to be analysed. Will it be one single broad exception covering both or is a separate exception for text and data mining needed? Should it cover both non-commercial and commercial purposes (on this subject, see the recent Blogpoll [here](#))? In any case, previous experience shows that those exceptions should be mandatory and properly guaranteed against TPMs, otherwise any reform will be meaningless.

In respect of the Commission's newly voiced concerns for achieving a well-functioning market place for copyright, a "sharing the value" approach for the commercial reuse or retransmission of protected content by online platforms and news aggregators was announced. At the same time, the Commission underlined the fact that the definition of the rights of "communication to the public" and of "making available" has proved to be contentious and that it is necessary to examine whether action is needed in order to clarify these concepts for the sake of content distributors and ordinary Internet users. This is not surprising, given the linking saga which has flourished in both national and CJEU case law. Nonetheless, what is rather surprising is that the Commission has decided to open the highly contentious issue of an ancillary right for publishers for the reuse of content by online news aggregators. In its [press release](#), the Commission seems to provide comfort for the opponents of a "link or snippet tax". Nonetheless, it is not clear whose and what activities will be targeted by a future reform. Who is considered to be a news aggregator? The use of how much of a copyright protected work could be justified as a "snippet" and how would such an evaluation interact with the quotation exception? Furthermore, a "sharing the value" approach also implies that appropriate safeguards for the fair remuneration of authors and performers are established. In this respect, mechanisms such as the regulation of certain contractual practices or unwaivable remuneration rights shall be assessed. This seems to open the door for EU harmonisation of the issue of copyright contracts, which has to date been primarily a matter of national competence.

Lastly, a broad reform is also announced in the field of enforcement. The role of intermediaries in the fight against copyright infringement will be somehow "upgraded" in the so-called "follow the money" approach for commercial scale infringements. Nonetheless, it will be challenging to define what a "commercial scale" infringement is, whilst it will not always be easy for advertisers or payment processors to determine whether a website is infringing copyright or not.

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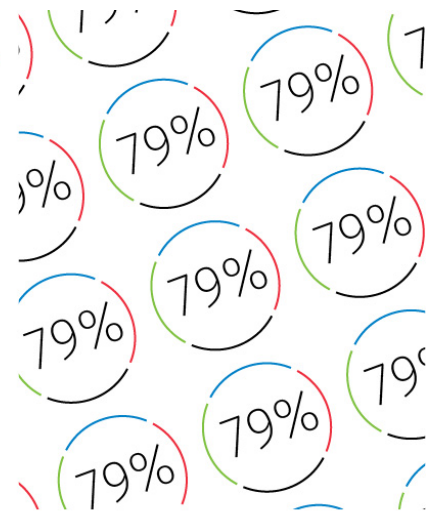
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