

Copyright in the digital environment: the DSM strategy and the challenges ahead

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1. Introduction

Internet has led to a radical transformation of the way music, audiovisual contents, news and literary works are produced, distributed and exploited. Content is often made available online directly by its producers, with no intermediation. New business models and players have emerged, and innovative services challenge the traditional income sources of individuals and undertakings in the content industry.

The spread of illegal contents that can be easily uploaded and thus accessed online raises further challenges for the protection of right-holders. Moreover, digital technologies allow easy cross border access to copyright-protected content in sectors traditionally based on territorial licensing.

At the same time, in the era of big data, access to text, data and databases is increasingly important in order to fully exploit the innovation potential of the automated computational analysis of information in all sectors, ranging from transport to energy, from security and environmental protection to health services.

Against this background, EU policy makers are discussing whether and how the digital transformation makes the current EU legal framework for copyright and related rights inadequate and in need of reform. Key internal market directives, such as the E-Commerce Directive (2000/31/EC), the Infosoc Directive (2001/29/EC) and the IPRs Enforcement Directive (2004/48/EC) are being reconsidered in this perspective. A related issue is whether it is more appropriate to intervene by means of legislation or, instead, through alternative measures, ranging from the use of European funds to the promotion of memoranda of understanding between stakeholders and the encouragement of self-regulation and co-regulation initiatives.

The debate on the proper boundaries of copyright and how to ensure adequate protection of right-holders in the Digital Single Market is characterised by strongly

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diverging visions and conflicting interests. Thus, identifying some shared views may provide a useful benchmark for policy making.

First of all, the ultimate goal of policy initiatives should be the establishment of a legal framework capable of fostering, by means of appropriate incentives to creation and investment, the supply and diffusion of contents and the dynamic development of all sectors involved. In all likelihood, such legal framework would also ensure the greatest benefits for content users.

A further non-controversial view is that, with reference to the use and dissemination of content in the digital context, it is necessary to balance several freedoms, rights and interests.

As highlighted by the case-law of the EU Court of Justice and national courts, often the task of finding the balance is fulfilled by judges, on the basis of the existing legislation, including the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Looking, for instance, at the case-law on the liability of internet service providers (ISPs) for infringements related to protected contents, the assessment may require taking into account, at the same time, the freedom of enterprise, property rights, the freedom of expression for those who provide content on Internet, the protection of personal data, the right of defence and the right of users to have access to the largest possible amount of information.¹ With reference to the fair compensation for private copying, the need to ensure right-holders' compensation has to be balanced with other interests, with a view not to impose disproportionate financial burdens on individuals who do not benefit from the private copying exception.² When dealing with territorial restrictions, in cases such as *Premier League/Murphy*,³ the point of view of consumers in the internal market has to be balanced against the need to ensure the economic viability of business models for the production and dissemination of contents. In all these areas, the proportionality principle plays a major role in the assessment by judges.

The modernization of the copyright legislative framework also requires taking into account several interests and looking at proportionality as a guiding principle.

¹ See, for instance, Court of Justice, judgment 29 January 2008, case C-275/06, *Promusicae*; judgment 24 November 2011, case C-70/10, *Scarlet v. Sabam*; judgment 16 February 2012, case C-360/10, *Sabam v. Netlog*; judgment 19 April 2012, case C-461/10, *Bonnier Audio*.

² See Court of Justice, judgment 9 June 2016, case C-470/14, on the Spanish system and judgment 22 September 2016, case C-110/15 on the Italian system.

³ Court of Justice, judgment 4 October 2011, joined cases C-403/08 and C-429/08.

From a political perspective, there is a clear demand by EU citizens for an easy online access to a wide variety of contents, also cross-border. In time of disaffection and mistrust for the EU project, meeting such demand, i.e. “solving the market supply failure of lawful digital content”,⁴ would help strengthen EU citizens’ sense of belonging to an integrated single market entailing real benefits for consumers.

A number of factors which may be viewed as access barriers to online content have been identified, ranging from transaction costs to territorial restrictions, windowing, content exclusivity and technology specific licensing agreements. From a public policy perspective, it remains to be seen whether public intervention with respect to these features may improve the way in which markets operate to the benefit of consumers.

Indeed, initiatives aimed at facilitating access to protected content face a crucial constraint: they should not jeopardize the economic viability of the business models for the production and dissemination of contents. As largely acknowledged by all stakeholders, demand for digital content services is ultimately driven by demand for the content offered.⁵

In this regard, the extreme views whereby in a borderless digital world the very idea of protection of copyright and related rights is obsolete, although maybe intellectually appealing, are of little practical use.

Moreover, European policy-makers face mounting demands for a legal framework capable of ensuring that the development of the digital market is accompanied by a fair remuneration of all figures along the value chain (from authors to performers, from the content industry to Internet Service Providers). In the words of the European Commission, we should look for ‘a fairer and sustainable marketplace for creators and the press’. In this area, the main challenge is how to support the viability of business models without unduly interfering in the distribution of income, which would entail the risk of stiffening and distorting the evolution of markets.

EU policy makers must find the way to respond to these political demands. In view of the above-mentioned constraints and the huge variety of interests involved, the task

⁴ Ericsson, *Solving the market supply failure of lawful digital content*, CEPS Task Force on Copyright in the EU DSM, 2012.

⁵ See Commission Staff Working Document accompanying the Commission Final Report on the E-Commerce Sector Inquiry, SWD(2017)154 final.

of modernizing copyright and related rights in the Digital Single Market turns out to be extremely complicated.

2. Copyright in the DSM Strategy

2.1 The micro-strategy for DSM Copyright

Between 2010 and 2012 the European Commission proposed a first set of measures for the modernization of copyright in the digital context. Difficulties in reconciling the different stances, however, led to a stop for a couple of years. The only relevant measure adopted in this period is Directive 2014/26/EU, aimed at increasing the efficiency of the collective management of copyright and related rights and at facilitating the multi-territorial licensing of rights for music works for online use in the internal market.

The Juncker Commission decided to try again: it proposed, within the broader Digital Single Market Strategy of May 2015, a micro-strategy for the DSM Copyright aimed at overcoming the block of conflicting interests.⁶

Looking at the copyright modernization strategy in historical perspective helps to understand why it is composed of carefully targeted proposals and why measures entailing costs for a category of stakeholders are usually accompanied by complementary measures entailing benefits in compensation. The micro-strategy also contemplates a wide use of non legislative instruments.

For instance, the Commission envisages a combination of use of European funds and regulatory duties (i.e. a 20% minimum share of European contents for on-demand service providers) in support of European audiovisual productions.⁷ At the same time, video on-demand service providers will benefit from complementary proposals aimed at streamlining their access to protected content.⁸

⁶ See Commission Communication, *Towards a modern, more European copyright framework*, COM(2015) 626 final, and Commission Communication, *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market*, COM(2016) 592 final.

⁷ Proposal of a Directive on audiovisual media services, COM(2016) 287 final, 25 May 2016.

⁸ Proposal of a Directive on copyright in the Digital Single Market, COM(2016) 593 final, 14 September 2016.

This paragraph provides an overview of the main features of the EU strategy for copyright in the digital context. It considers, in turn, the general measures aimed at facilitating access to the European cultural heritage and the new harmonized exceptions, the measures designed specifically to promote cross border access to protected content and the ones intended to achieve a fair remuneration of stakeholders along the value chain.

2.2 Access to the European cultural heritage and the new exceptions

Starting from the least controversial issues, for nearly a decade the Commission has been trying to exploit the opportunities provided by digitalization to improve the accessibility of European cultural heritage.

For works in public domain, which are no longer protected by copyright, since 2008 a non-profit online platform (Europeana), based on cooperation among European cultural institutions, provides free online access to the works of their collections which have been digitized.

The following step concerned orphan works, whose right holders are no longer traceable by means of reasonable efforts to get a license. For those works that, following a specific procedure, are deemed to be orphan works, Directive 2012/28/EU has introduced a specific harmonized exception at the EU level for copying and dissemination, although the exception applies only to a subset of institutions (e.g. libraries) and works (e.g. single photos are not included), and only for cultural and educational purposes. The establishment, at the EUIPO, of a freely accessible database of all works considered orphan works in the EU can be viewed as a first step towards a system of registration for copyright.⁹ Whether the set of works covered by the exception should be expanded and whether the system should allow also commercial exploitation of works are still open issues.

Since 2011 the Commission is also trying to promote large scale digitization of works whose right-holders are identifiable but which are out-of-commerce, with the aim of easing access by citizens without disrupting the system of rights. The approach followed by the Commission consists in establishing a framework aimed at facilitating voluntary licensing agreements in favour of cultural institutions for the digitization and

⁹ In the European debate, more advanced projects including the commercial exploitation of orphan works, based on the authorization of an independent body, have also been considered. See for instance *HM Government Policy Statement: consultation on modernising copyright*, July 2012.

dissemination of out-of-commerce works (books, magazines, films). The proposal is based on an opt-out mechanism; collective management societies are given a key role in reducing transaction costs and coordinating the system.

Looking at all these initiatives, when digitization is used to ensure access to non-exploited works, the obstacles related to the moral and economic protection of right-holders are less prominent, although with obvious differences between works in public domain, orphan works and out-of-commerce works. Nonetheless, in all three areas substantial financial resources are needed for large scale digitization and dissemination of works with concrete benefits for users. It remains to be seen how these resources should be found, in the public sector and/or engaging the private sector.

For the audiovisual sector, as early as 2012 there was a clear demand for improving discoverability and online availability of European works, including films which have not been released in cinemas or for which, in a Member State, there is not a national distributor; how to proceed, taking into due account the rights of all the persons involved, remained an open issue. In the copyright package of September 2016, the European Commission first of all pushes for a universal system for the identification of audiovisual works entailing, with the help of technology, the interoperability of current standards, as a starting point for the integration of existing databases.¹⁰ In addition, it proposes to simplify the licensing process for the making available of works on video-on-demand platforms. Member States are required to establish independent bodies with the task of facilitating the negotiation of rights. The logical framework, thus, includes catalogues, licensing hubs and licensing mechanisms.

Complementary initiatives aimed at facilitating access to works by European citizens include the making available of funds for subtitling and dubbing, as well as the promotion of search tools for content recommendation.

The goal to promote access to contents is pursued also by means of the new harmonized exceptions contemplated by the Copyright Directive, which will apply throughout the EU. They cover:

- the digital use of works and other subject-matters for the purpose of illustration for teaching activities, also cross border;
- copies for the preservation of the European cultural heritage by cultural institutions, also for non-orphan works.

¹⁰ Commission communication of 14 September 2016, COM(2016) 592 final.

- reproductions and extractions made by research organisations in order to carry out text and data mining of works and other subject matter (including databases) to which they have lawful access for the purposes of scientific research.

The exception for text and data mining, which does not provide for compensation for right-holders, is particularly important to spur research carried out with the assistance of digital technology and will apply also when research organizations engage into public-private partnerships.¹¹

2.3 Cross border access to contents

Since Internet by definition operates across national borders, there is a potential tension between the traditional approach to copyright, based on protection at the national level, and the easiness of cross border access to creative contents provided by digital technologies.

Both technical measures and licensing agreements for the online distribution of digital content are used to preserve the territorial dimension. In order to understand these commercial practices from an economic viewpoint, it must be kept in mind that within the EU there are significant differences in demand for the various contents, for reasons ranging from language to cultural diversity, from different levels of income to digital divide etc. In this context, it is often rational for right holders and content service providers to adopt a non-uniform commercial strategy, differentiated across Member States or groups of Member States, in order to remunerate their investments. The issue is especially sensitive in the audiovisual sector, for films, TV series and sport events.

Therefore, territorial restrictions do not depend only on the national scope of copyright: territorial licenses might remain even if a unitary protection of copyright at the EU level, i.e. a single copyright title were reached in the future.¹² On the other

¹¹ For the purposes of the Copyright Directive, research organisations are defined as universities, research institutes or any other organisation the primary goal of which is to conduct scientific research, also jointly with the provision of educational services, on a non for profit basis or by reinvesting all the profits in its scientific research or pursuant to a public interest mission recognised by a Member State, in such a way that access to the results cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon such organisation.

¹² *Copyright in the EU Digital Single Market, Report of the Ceps Digital Forum (2013).*

hand, the current territoriality of rights does not prevent the granting of multi-territorial licenses.

Thus, with respect to territorial restrictions, the European legislator on the one hand should ensure easy access to content in an internal market perspective and, on the other, should not unduly limit commercial practices e.g. by imposing a duty to grant pan-European licenses. Up to now, European legislation in this area has gone only as far as to promote multi-territorial licensing of rights for the online use of music works, with no top-down obligations.¹³

Within the DSM Strategy, the issue of territorial restrictions is addressed both from the point of view of competition policy and from an internal market perspective.

As for competition policy, the Commission has carried out a Sector Inquiry into e-commerce with the aim, inter alia, of understanding whether the current licensing practices for digital content in the EU raise competition concerns.¹⁴ The focus is both on geographic restrictions and on other features such as the duration of exclusivity clauses, automatic renewal, bundling of rights, restrictions on the technologies which can be used by service providers to provide content and by users to obtain access thereto. In principle, these restrictions may represent barriers to entry for online distributors of digital content.

The purpose of the Sector Inquiry was reaching a better understanding of the existing business practices, of their reasons and their impact on the market, so as to provide the basis for a proper application of competition rules by the European Commission and national competition authorities. In particular, in order to ascertain whether contractual clauses have an actual or potential negative impact on the competitive variables such as price, quality, variety and innovation, to the detriment of consumers it is necessary to consider the counterfactual scenario, i.e. considering how the market would work in the absence of the contested restrictions. Traditionally, with reference to vertical agreements between suppliers and distributors in the physical world, restrictions to passive sales, i.e. distributors meeting unsolicited requests, are considered incompatible with EU competition rules. In transposing the approach to content provision in the digital context, some caution is needed, since the ease of switching from the single user's online fruition to the generalized diffusion of the

¹³ Directive 2014/26/EU.

¹⁴ The Final Report on the E-commerce Sector Inquiry was published in May 2017. See COM(2017)229 final.

content in the web may easily undermine the sustainability of business models for producers and distributors of contents.

The Final Report of the e-commerce Sector Inquiry confirms that licensing agreements between right-holders and digital content providers are often based on exclusivity and usually contain technological, temporal and territorial restrictions. In particular, online rights are to a large extent licensed on a national basis or for the territory of a limited number of member States which share a common language. This is especially prevalent in relation to content types that may contain premium products, such as sport (60%), films (60%) and fiction TV (56%). In parallel, digital content providers often use geoblocking measures, especially for TV series (74%), films (66%) and sport events (63%).¹⁵

The Commission acknowledges that these licensing practices “reflect the desire of right holders to exploit fully the rights they hold, and the need for digital content providers to remain competitive by offering attractive content that meets consumer demand and reflects cultural diversity within the European Union”; contractual restrictions in licensing agreements are therefore not the exception but the norm in the digital content market.

In its policy conclusions, the Commission does not claim that territorial licenses are always anticompetitive: it states that they may raise concerns of anticompetitive foreclosure for new online business models and services and new or small players, but the assessment of licensing practices under the EU competition rules has to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and the characteristics of the relevant product and geographic markets. Thus, whether licensing agreements restrict competition needs to be assessed on a case by case basis.¹⁶

As for internal market legislation, a study of 2014, published under the auspices of the European Commission, on the economic analysis of territorial restrictions for copyright in the EU has shown that, compared to the current situation, a general ban on territorial restrictions would not necessarily result in an improvement of consumer

¹⁵ COM(2017) 229 final, paragraphs 19-22; 58-59; 65-66.

¹⁶ Ibidem, paragraphs 71-72.

welfare.¹⁷ The European Parliament, in its resolution of 19 January 2016 “Towards a Digital Single Market”, has acknowledged that the indiscriminate promotion of pan-European licenses could paradoxically result in a reduction of contents available to users.

Thus, both the audiovisual sector and more generally protected contents are excluded from the scope of application of the proposal of Regulation on geo-blocking, which imposes a duty of non-discrimination for services accessible online.¹⁸

As to cross border access to content, within the DSM Strategy the Commission proposes only specific, well targeted measures which, although entailing a weakening of the territorial nature of copyright, in principle should not have significant side effects. In particular, these measures include:

- the acknowledgement of the right of consumers to have access to content services which they have lawfully acquired in their Member State of residence, when temporarily travelling in another Member State (Regulation 2017/1128/EU on cross-border portability of online content services);
- a simplified clearance of rights for the provision of some online services strictly ancillary to broadcasts (simultaneous online transmission, catch up services), based on the extension of the country of origin principle, already used for cable and satellite transmissions, to the provision of these online services (so-called Sat-Cab Regulation).¹⁹ This proposal is meeting strong opposition by content providers and commercial broadcasters, who argue that it might jeopardize the sustainability of strategies based on territorial licensing, in particular for sport events, TV series and movies, and that it is hardly compatible with the territorial nature of copyright in the EU.

Summing up, from both the competition policy and the internal market perspective, current EU initiatives aimed at promoting easier cross border access to online contents take into account that territorial restrictions in the current licensing practices may have

¹⁷ CRA(2014), *Study on the Economic Analysis of the Territoriality of the Making Available Right in the EU*, prepared for the DG Internal Market, http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf.

¹⁸ COM(2016)289 final.

¹⁹ Proposal of Regulation on certain online transmissions of broadcasting organisations and retransmission of television and radio programmes, COM(2016) 594 final.

economic justifications which should not be overlooked and, thus, remain narrowly circumscribed.

At the same time, it is clear that the lack of availability of legal contents, at the national level or cross-border, may end up favouring piracy. Therefore, it is in the interest of right holders and digital content providers to broaden the chances for users to legally enjoy online contents, also by means of innovative solutions. Spotify and Netflix are success stories in this area.

2.4 Fair remuneration along the value chain

As for the political demand for a fairer and more sustainable marketplace in terms of remuneration of the different players along the value chain, in the Commission's strategy three main lines of action can be identified.

The first line of action consists in ensuring a more effective remuneration of right-owners by reinforcing the measures against infringements of rights. To this aim, the Commission encourages self-regulatory initiatives involving, through the follow-the-money approach, providers of online advertising, payment and shipping services in the prevention of infringements on a commercial scale. Under the same perspective, Article 13 of the draft Copyright Directive establishes new obligations on online service providers that store and provide to the public access to large amounts of content uploaded by users, so as to ensure that right-holders are informed of the use of their works and enjoy the concrete possibility to enforce their rights on protected contents by means of authorization or removal. Pursuant to the proposal, service providers should take measures to ensure the functioning of agreements concluded with right-holders to this aim, and those measures, including the use of effective content recognition technologies, should be appropriate and proportionate. It remains controversial how the proposal interacts with Articles 14 and 15 of the E-Commerce directive, which clearly circumscribe the liability of (passive) host service providers and exclude any general filtering obligation.

The second line of action entails the acknowledgement at the EU level of a new related right for press publishers, in case of digital use of their publications. This proposal, which is contained in Article 11 of the draft Copyright Directive and is hotly debated, does not go into the details of the remuneration model but aims at strengthening the bargaining position of publishers with respect to the use of their content by online service providers.

The third line of action consists in imposing transparency obligations on the counterparties of authors and performers on earnings generated by their work. In particular, Article 14 of the draft Copyright Directive establishes that authors and performers should receive on a regular basis sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due. Even in this case, the proposal merely defines a framework, without interfering with contractual balance. The system requires effective identification of works and efficient monitoring and reporting activities by all entities along the value chain. The provisions of Directive 2014/26/EU aimed at increasing the transparency and enhancing the efficiency of collecting societies contribute to the establishment of such framework.

3. The challenges ahead

This overview shows that the difficulty of reconciling opposite interests and the constraints which must be taken into account to avoid undesirable consequences for the various figures along the value chain (from right-holders to users of content) result in a piecemeal, incremental reform of copyright in the Digital Single Market. Basically, the DSM Strategy will lead to a targeted widening of exceptions and the establishment of a more transparent framework aimed at reducing transaction costs and facilitating the clearance of rights.

Those who envisaged a broader, systematic modernization of copyright at the EU level remain disappointed. On the other hand, at present more ambitious proposals would in all likelihood face a significant risk of political setback.

The Commission's Communication "Towards a more modern, more European copyright framework" of December 2015 contained also a long-term vision: it contemplated a wider reform aimed at overcoming the national scope of copyright in order to achieve a unitary protection at the EU level, which could match with a European jurisdiction.²⁰ As already argued in paragraph 2.2, such system would still be compatible with territorial restrictions in the licensing and use of the rights; the main constraint on such commercial strategies would result from the application of EU competition rules.

²⁰ COM(2015)626 final.

The Commission is aware that the full harmonization of copyright in the EU, in the form of a single copyright code and a single copyright title, would entail substantial changes in the way copyright rules work today and a radical reorganization of the system, which would require an in-depth impact assessment.

In the meantime, in order to ensure an effective and more uniform application of copyright legislation in the Digital Single Market, it seems appropriate that the Commission commits to further promote convergence of national laws, including as regards enforcement, and to proactively adapt the legislative framework – including harmonized exceptions – to the evolution of markets and consumer behaviour.

Parallel developments in the areas of online music, orphan works and European audiovisual works suggest that, in the future, standardized systems for the identification of works and interoperable online public registers will play a crucial role for copyright protection in different areas. Importantly, these tools may significantly reduce transaction costs and thus improve the operation of the market.

Some proposals also suggest that the digital transformation should be accompanied by a broader modernization of copyright entailing the shift to a generalized duty to license, or “compensatory liability regime”,²¹ for the online use of protected works. This approach remains highly controversial. It would entail a radical overhaul of the incentives for producers and distributors of content and it is doubtful that the result would be welfare-enhancing, also in terms of availability of content for online users. Taking both the moral and the economic dimension of copyright into account, it seems preferable that any new system based on an enhanced online transparency of protected works still contemplates, together with an enhanced licensing system, the possibility for right-holders to exclude third parties from the use of their works.

²¹See, for instance, Gustavo Ghidini (2006), *Intellectual Property and Competition Law. The Innovation Nexus*, Edward Elgar Publishing, and the literature cited therein.