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THE EUROPEAN UNION'S COPYRIGHT POLICY IN THE DIGITAL AGE: AN ANALYSIS OF NEW MEDIA AND THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

Abstract

The media play a pivotal role in fostering connections among individuals and facilitating interaction within communities and society at large. They serve as platforms for sharing collective experiences and, through communication processes, contribute to the creation of a sense of belonging to a unified societal structure. The advent of the internet, coupled with the rapid technological revolution, has significantly transformed the media landscape, leading to the emergence and proliferation of new media. These new media encompass digital technologies that enable interactive and networked communication, marking a departure from the one-way communication model characteristic of traditional media such as television, radio, and print. The platforms associated with new media include, but are not limited to, social media, blogs, podcasts, online video sharing platforms, virtual reality environments, and mobile applications.

The rise of new media has, however, created a need for substantial adjustments to the existing legal frameworks, particularly concerning copyright regulations. At the European Union level, this shift has been addressed through reforms aimed at balancing the rights of content creators with the evolving demands and expectations of consumers in the digital age. One of the most significant legislative responses to this challenge is the Directive on Copyright in the Digital Single Market, adopted in 2019. This directive represents a comprehensive effort to update copyright regulations in light of the new media environment, ensuring both the protection of intellectual property and fair access for consumers.

This paper explores the European Union's approach to copyright policy, with an emphasis on the key legislative instruments and reforms introduced to regulate new media. Special attention is given to the Directive on Copyright in the Digital Single Market, analyzing its implications for content creation and dissemination in the digital realm. Furthermore, the paper examines the potential impact of the directive on freedom of expression, particularly through its new rules on content regulation, and evaluates the position of the European Court of Justice on this issue.

Keywords: new media, copyright and related rights, EU legislation, freedom of expression.

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I. Introduction

The advent of the internet in the 1990s began to introduce changes in people's lifestyles, while the technological revolution marked significant transformations. One of the key roles of the media in society is its responsibility to serve the public interest. As part of this responsibility, one of the most important areas is informing the public, that is, the functioning of a "public sphere" in which the media holds a central place. Media plays a crucial role in connecting people with other members of the community and society. It enables them to share common experiences and, through the process of intercommunication, fosters a sense of belonging to a unified society.

The emergence of the internet in the 1990s and its dynamic development in the first two decades of the 21st century drastically altered the structure of the media system. The public communication sphere gradually expanded to include the internet, serving as an additional or complementary part of public communication. Gradually, with the increase in various communication devices accessing the internet and the reduction in connection costs, the internet began to occupy a central place in everyday communication, including political communication among citizens.

On the other hand, there arose the question of establishing a robust policy framework that protects intellectual property rights, while simultaneously promoting innovation and providing public access to knowledge and culture. In other words, states were put to the "test" of balancing the interests of creators, distributors, consumers, and policymakers in the digital era. This issue was of great interest for regulation by the European Union, which led to the adoption of the Directive on Copyright in the Digital Single Market in 2019. The Union's history prior to the adoption of this directive records other significant legislative steps for copyright protection, ensuring the protection necessary to encourage creativity and stimulate investments in the sector. The goal is to promote cultural diversity and better access for consumers and businesses to digital content and services across Europe.

Copyright encompasses a series of rights granted to authors, performers, producers, and broadcasters, primarily:

- Economic rights, which allow rights holders to control how their work and other protected materials are used and to receive payment for that usage. These rights generally authorize or prohibit copying, distribution, and public communication and are harmonized across the EU.
- Moral rights, which include the right to claim authorship of the work and the right to object to any derogatory actions related to the work, are not harmonized across the EU.

The Copyright and Information Society Directive (InfoSoc) from 2001 was a fundamental step in harmonizing copyright laws across the EU and adapting them to the digital environment (Hugenholtz, 2000). However, with the rise of social media, streaming platforms, and user-generated content, there was an increasing need for further modernization of these regulations.

In response to these developments, the EU adopted the Directive on Copyright in the Digital Single Market (DSM Directive) in 2019.

II. The evolution of the media landscape and its impact on EU copyright legislation

The emergence of the internet, the introduction of the World Wide Web, and digital technologies have inevitably influenced every aspect of life. They have changed the culture of communication between people, impacted education, shifted the discourse on freedom of expression, transformed the economy, the workforce, and more. Digitization has radically transformed the media space over the past decades, leading to discussions on digital democracy, polarization, digital rights, digital space, and digital culture. The introduction of the World Wide Web in the 1990s, followed by the development of Web 2.0 technologies in the early 2000s, enabled dynamic, user-generated content and fostered participatory cultures (O'Reilly, 2005). The shift from analog to digital technology in the late 20th century marked a turning point, enabling new forms of media production and consumption (Jenkins, 2006). The introduction of Web 2.0 technologies further revolutionized the digital landscape, allowing user-generated content, social networking, and collaborative projects (O'Reilly, 2005).

Traditional media forms, such as print, radio, and television, have been complemented and in some cases, replaced by new media platforms leveraging the internet, mobile devices, and social networks. New media encompasses various forms of digital communication, including social media, blogs, podcasts, online videos, and virtual and augmented reality. These platforms have redefined the way content is created, distributed, and consumed.

The rise of social media platforms like YouTube, Facebook, and Twitter, followed by the development of mobile applications like Instagram, Snapchat, and TikTok, introduced new forms of visual storytelling and short video content, catering to younger audiences and reshaping media consumption habits for millions of people (Leaver, Highfield, & Abidin, 2020).

Unlike traditional media, which typically has a set location, editor-in-chief, and publisher, online media allows content creators to remain anonymous and, if they choose, to hide their digital traces. Anonymity and pseudonyms are considered beneficial and legitimate in repressive regimes. The challenges posed by social networks and Web 2.0 for the information industry and journalists are greater than ever. Barriers to entry have lowered, as anyone with a computer, iPhone, or other devices can now be a publisher.

In the European Union, copyright law plays a significant role in regulating the use and distribution of creative works. However, the rise of new media including social media platforms, streaming services, and user-generated content sites poses significant challenges to traditional copyright frameworks.

All these changes in the media world have also transformed the culture of communication, introducing new practices. As the media landscape evolved, so did the methods of creating, distributing, and consuming content. This presented a challenge for lawmakers to adapt copyright legal rules to this new reality. The

European Union has sought to establish a balance by creating a policy framework that protects intellectual property rights, encourages innovation and new creations, and ensures free access to information, thereby promoting digital democracy.

EU copyright legislation includes 13 directives and two regulations that harmonize basic rights for authors, performers, producers, and broadcasters. By establishing consistent standards, EU copyright law reduces national differences and ensures the level of protection necessary to foster creativity and investment in creative works. These harmonized standards also promote cultural diversity and provide consumers and businesses with better access to digital content and services across Europe.

2.1. Development of EU copyright and related rights legislation in relation with new media

EU activities have contributed to better harmonization in the protection of rights holders, reduction of costs, and an increase in options for content users, particularly by establishing a European regulatory framework for copyright and related rights, promoting dialogues on copyright and related issues, and taking a leading role in international negotiations and discussions on copyright. Digital technologies have significantly changed the copyright landscape, with 33 sectors of the EU economy considered highly intensive in terms of copyright, encompassing over 7 million jobs, or 3% of EU employment (eur-lex).

EU initiatives and its robust legislative framework have led to greater protection for rights holders, reduced transaction costs, and increased options for content users, especially through:

- a comprehensive European regulatory framework for copyright and related rights.
- promotion of inclusive and dynamic dialogues among stakeholders on copyright and related issues, aiming to gather diverse perspectives, experiences, and contributions from all interested parties.
- taking a leading role in international negotiations and discussions on copyright and related issues.

How does the EU define copyright and related rights?

Copyright and related rights are legal protections granted to creators and those involved in the production and distribution of creative works. These rights can be categorized as follows:

- **Economic Rights:** These rights allow rights holders to control the use of their works and other protected materials and to receive compensation for their use. Economic rights typically include the exclusive rights to permit or prohibit reproduction, distribution, and public communication of works. At the EU level, economic rights and their protection periods are harmonized.

- **Moral Rights:** These rights include the right to be recognized as the author of the work and the right to oppose derogatory treatments of the work. Unlike economic rights, moral rights are not harmonized across the EU.

Copyright is central to supporting the development of creative industries, as it pertains to original intellectual creations in literature, science, and the arts. Related rights, on the other hand, refer to the rights of performing artists over their performances, as well as the rights of phonogram and film producers, broadcasting organizations, and publishers over their phonograms, videograms, printed works, broadcasts, or other editions. Copyright and related rights provide legal protection to authors and performers for their works, as well as the opportunity for fair compensation. In the digital era, these rights take on new significance, as new media enable the rapid and widespread sharing of original content and creations. The protection of copyright and related rights must keep pace with the rapid development of new media. If a balance is not achieved between fast technological advancements and the simultaneous “modernization” of the EU’s legal framework, there is a risk of undermining the rights of creators and opening the digital space to manipulations and the exploitation of original works for unethical and unlawful purposes. This could lead to the infringement of other rights and the emergence of negative side effects that may impact society by undermining democratic values, the integrity of the digital space, public trust, and the rule of law.

This necessitates that the EU legal framework ensures transparency, fair conditions for content usage, and the protection of the interests of all stakeholders. Through the harmonization of national legislations and the introduction of common standards, the European Union aims to establish a stable and fair environment for the development of cultural and creative industries, as well as for innovation in the digital landscape.

By providing a clear legal framework for copyright and related rights, the European Union strives to foster creative development, preserve cultural heritage, and ensure fair and equal access to cultural content for all its citizens. EU copyright law balances the exclusive rights of rights holders with exceptions that allow the use of protected content under specific conditions. The EU has established a comprehensive list of exceptions through various copyright directives. These exceptions allow for the use of protected materials without authorization from rights holders in certain cases. The enforcement of procedures and legal remedies against copyright infringements is partially harmonized at the EU level. EU copyright legislation is based on several core principles aimed at harmonizing copyright protection across member states while promoting the internal market. The main objectives are to protect the rights of authors and creators, promote the dissemination of culture and knowledge, and harmonize copyright protection throughout the EU. Copyright legislation grants creators exclusive rights to their works, allowing them to control the use and distribution of their creations. This protection encourages creativity and innovation by ensuring that creators can enjoy the benefits of their efforts (Hugenholtz, 2000). By safeguarding creators’ rights, copyright law also facilitates the dissemination of cultural and intellectual goods. The EU strives to balance the protection of intellectual property with the public interest in access to knowledge and culture (Derclaye, 2008). Given the cross-border nature of digital content and services, the EU seeks to harmonize copyright laws among member states to reduce barriers within the internal market and ensure fairness for creators and consumers (Geiger, 2010).

2.2. Key legislative steps - copyright and new media

The EU's approach to copyright law has significantly evolved over the past two decades to address the challenges posed by digital technologies and new media. Early efforts to harmonize copyright laws across member states focused on adapting existing regulations to the digital environment. The Copyright Directive (2001/29/EC), also known as the InfoSoc Directive, was a crucial step in this process, aiming to align national laws with the demands of the information society (Hugenholtz, 2000). This directive introduced key rights, such as the right to communicate to the public and the right to reproduction, while also establishing exceptions and limitations for specific uses, such as education and research.

As the digital landscape continued to evolve, the need for further reforms became apparent. The proliferation of user-generated content, social media, and online streaming services highlighted gaps in the existing framework, particularly regarding fair compensation for creators and the responsibilities of digital platforms. In response, the EU introduced the Directive on Copyright in the Digital Single Market (DSM Directive) in 2019. This directive represents a significant update to EU copyright policy, addressing new challenges posed by digital technologies and online platforms.

The DSM Directive includes several provisions designed to modernize EU copyright law for the digital era. Key aspects of the directive relevant to adapting to the “new reality” are highlighted in Articles 3, 4, 15, and 17. By introducing new rights for press publishers and imposing stricter responsibilities on content-sharing platforms, the directive aims to ensure that creators receive fair compensation for the use of their works. This directive seeks to improve legal certainty, strengthen copyright protection, and promote innovation and access to knowledge.

Article 15 of the DSM Directive introduces a new right for press publishers, giving them the exclusive authority to allow or prohibit the online use of their content by digital platforms, such as news aggregators and social media. This provision aims to ensure that publishers receive fair compensation for the use of their journalistic content. The right applies to the digital use of press publications for two years from the date of publication and does not cover individual words or very short excerpts. The introduction of Article 15 was met with mixed reactions. Supporters argue that it provides much-needed support for the struggling journalism industry, allowing publishers to negotiate better terms with digital platforms (Rosati, 2019). However, critics claim it may restrict access to information and stifle the free flow of news online, especially if platforms decide to limit the use of short news snippets to avoid licensing fees (Quintais, 2019).

Article 17 is one of the most controversial aspects of the DSM Directive. It places direct responsibility on content-sharing platforms for copyright-infringing content uploaded by their users. To avoid liability, platforms must demonstrate that they have made best efforts in obtaining authorization from rights holders, prevent unauthorized works from being available, and promptly remove infringing content upon receiving notice. The implementation of Article 17 has sparked significant debate regarding its potential impact on freedom of expression and the feasibility of implementing effective content filters. Opponents argue that requiring platforms to filter content could lead to over-blocking, suppressing lawful content and endangering freedom of speech (Frosio, 2020). Supporters, on the other hand, argue

that it is necessary to protect creators' rights and ensure they receive fair compensation for the online use of their works (Senftleben, 2020).

In the future, the number of platforms will increase, along with the volume of content. Effective protection of individuals in cyberspace will be a priority, but it should not compromise freedom of expression. Filtering and blocking content on the internet, particularly on social networks, will be a great challenge.

Article 17 - Use of Protected Content by Online Content-Sharing Service Providers - is the first article in Chapter 2, which addresses specific uses of protected content by online services. In practice, service providers or online content-sharing service providers host copyrighted works or other protected content on their platforms, uploaded by users. To share such content, providers must obtain permission from copyright holders, in accordance with Article 3, paragraphs (1) and (2) of Directive 2001/29/EC. This article specifies that member states should grant authors the exclusive right to authorize or prohibit any communication of their works to the public by wire or wireless means, including making works available to the public in a way that allows access at a time and place individually chosen by each member of the public. Member states must ensure an exclusive right to approve or prohibit making the following available to the public by wire or wireless means, accessible by the public at a time and place of their choosing:

(a) for performers, the fixation of their performances; (b) for phonogram producers, their phonograms; (c) for producers of the first fixations of films, the originals and copies of their films; (d) for broadcasting organizations, the fixation of their broadcasts, whether transmitted by wire or wireless means, including by cable or satellite. It means that it is essential for content-sharing service providers such as YouTube to obtain authorization from the author. If the service provider fails to obtain permission, it is directly liable for unauthorized acts of communication to the public, meaning the provider has made copyrighted works available to the public without authorization. However, service providers can be exempted from liability, with the burden of proof on them. They must demonstrate that:

- they made best efforts to obtain authorization,
- they made best efforts, in line with high industry standards of professional diligence, to ensure the unavailability of certain works and other protected content for which rights holders provided relevant and necessary information,
- they acted promptly, upon receiving a sufficiently substantiated notice from rights holders, to disable access to or remove the reported works or other content from their websites and made best efforts to prevent their future uploads.

When determining if the service provider has fulfilled their obligations, the following elements, among others, are considered:

(a) The type, audience, and size of the service, as well as the type of works or other content uploaded by users of the service; (b) The availability and cost of appropriate and effective means for the service providers.

For new service providers, whose services have been publicly available in the EU for less than three years and have an annual turnover below 10 million euros, liability is limited only to demonstrating that they made best efforts to obtain authorization and acted quickly upon receiving a sufficiently substantiated notice

to disable access to or remove the reported works or other content from their websites.

When the average number of unique monthly visitors for such service providers exceeds 5 million, calculated based on the previous calendar year, they must also demonstrate that they made best efforts to prevent further uploads of the reported works and other content for which rights holders provided relevant and necessary information. Member states should require online content-sharing service providers to provide rights holders, upon request, with appropriate information regarding the functioning of their practices and, when licensing agreements are concluded between service providers and rights holders, information on the use of content covered by the agreements. Member states should also require online content-sharing service providers to establish an effective and expeditious complaint and dispute resolution mechanism accessible to users of their services in cases of disputes regarding the disabling of access to or removal of works or other content uploaded by them. When rights holders request the disabling of access to their specific works or other content or the removal of such works or content, they must justify the reasons for their requests. Complaints should be processed without undue delay, and decisions to disable access to or remove uploaded content should be subject to human review. Member states should also provide access to out-of-court dispute resolution mechanisms. These mechanisms should allow disputes to be resolved impartially and should not deprive users of legal protection under national law or interfere with users' rights to effective judicial remedies. Specifically, member states should ensure that users have access to a court or other competent authority to determine the applicability of an exception or limitation to copyright and related rights. Online content-sharing service providers should inform their users in their terms and conditions that they may use works and other content under exceptions or limitations to copyright and related rights provided by Union law.

Questions have also arisen about whether Article 17 aligns with the Charter of Fundamental Rights of the European Union. Poland filed a legal challenge before the Court of Justice of the European Union (CJEU), arguing that Article 17 violates the right to freedom of expression and information. Poland contended that, in practice, to fulfill their best-efforts obligations, service providers would need to implement preventive monitoring of all content their users wish to upload, using automated recognition and filtering tools. According to Poland, this creates a risk that lawful content may be automatically blocked by algorithms even before it is available online. On April 26, 2022, the Court dismissed Poland's lawsuit to annul Article 17 entirely. Regarding the concept of freedom of expression, the following aspects are important:

Freedom of expression is a civilizational achievement and a constitutional category that provides fundamental guarantees for an open and pluralistic society. However, it is often misused and interpreted too broadly. Freedom of expression is a fundamental human right, guaranteeing individuals and groups the right to hold opinions, express them, and seek and receive information in any form (orally, in writing, through the media, including both traditional and new online media, etc.). This definition reveals that freedom of expression is treated as a dual right: the right to express, accept, or transmit opinions and the right to seek and receive information in any form. Freedom of expression is not an absolute human right and may be

subject to certain restrictions. However, it is essential to emphasize that this right is neither superior nor primary over other rights. When evaluating whether a state's restriction on freedom of expression is legitimate, the Court applies the criteria set out in Article 10, paragraph (2) of the European Convention on Human Rights and Fundamental Freedoms, which must all be satisfied cumulatively: it must be prescribed by law, serve a legitimate aim, and be necessary in a democratic society.

In the context of freedom of expression and the digital society, automated recognition and filtering tools implemented by service providers are essential. The use of these tools can restrict the right to freedom of expression and information. Such restrictions must be justified and balanced with the competing right to intellectual property, with minimum safeguards in place to prevent abuse.

When interpreting this article legally, one can observe a dilemma regarding the term "best efforts", meaning the obligation of service providers to prove they made "best efforts" to obtain authorization from the author. The question arises as to what is meant by "best efforts" and where the threshold or tolerance level is for actions that qualify as "best efforts". If the legislature does not clarify which activities constitute best efforts, this could lead to legal uncertainty and varying applications of this provision across different EU member states.

Member states had until June 7, 2021, to implement the DSM Directive into their national legislation. The European Commission referred Bulgaria, Denmark, Finland, Latvia, Poland, and Portugal to the Court of Justice of the EU for failing to report the full transposition of measures related to copyright and related rights in the Digital Single Market (Directive (EU) 2019/790). Regarding the more specific EU Directive on copyright and related rights applicable to certain online transmissions (EU Directive 2019/789), the Commission referred Bulgaria, Finland, Latvia, Poland, and Portugal to the Court of Justice for failing to inform the Commission of the complete transposition of EU rules.

III. Conclusion

The EU's legal framework for copyright and related rights is relatively advanced and aims to maintain a balance with the rapid development of new media. However, during the implementation of legal provisions, regardless of the specific document, several recurring challenges arise. First, there is a need to harmonize the national legislation of member states to ensure effective rights protection while also providing legal certainty for digital platforms. For example, Article 15 of the DSM Directive was implemented with modifications in some countries, such as Germany, whereas France immediately transposed the directive and imposed strict obligations on digital platforms. The European Union must take greater care in monitoring the degree of alignment of national legislation, possibly by introducing assessment measures in this area to ensure consistency in implementation and legal certainty for all actors in the digital space. For instance, Google in France stopped displaying previews of articles from French media unless publishers explicitly agreed to allow their content to be used for free, which is not the case in some other countries.

Article 17 of the DSM Directive mandates the recognition and blocking of copyrighted content but does not provide detailed guidelines on how this should be

done without restricting freedom of expression or leading to excessive censorship. Automatic recognition tools and algorithms pose this risk. Therefore, the EU needs to develop a guideline that will be applicable to all platforms and will protect not only copyright but also the right to freedom of expression. One of the key challenges in protecting copyright in the digital era is the lack of user awareness regarding what constitutes copyright protection and what their rights and obligations are. As a result, this issue should perhaps no longer be left to the discretion of individual states through optional educational campaigns but should instead be a mandatory rule for educating citizens about their rights and responsibilities. A higher percentage of educated groups will reduce the space for manipulation in the digital world.

Continuity is crucial. The EU must regularly assess the legal framework and its alignment with societal developments and be more flexible in adopting new regulations. The internet is no longer just a phenomenon to be discussed; artificial intelligence is now taking center stage and requires urgent intervention from the Union. Soft law and policy documents on this topic are vital in providing guidance for policy development and supporting states with aspirations to join the EU. A unified approach to the implementation of rules is key to ensuring proper enforcement and timely intervention if a particular provision causes more problems than solutions in societal functioning. Authors' rights are significant, but they are not more important than the rights of platforms. Maintaining a balance is particularly crucial.

Given that new media continue to evolve at an accelerated pace, the need for adaptable and dynamic legal solutions is becoming increasingly evident. The European Union must continue to revise and refine copyright law, ensuring that intellectual property protection keeps pace with digital realities while safeguarding innovation, freedom of expression, and the public interest.

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