

## European Commission Adopts New EU Copyright Rules

***The Commission's proposals aim to reform EU Copyright laws as part of its package of proposals towards an EU Digital Single Market.***

On 14 September 2016 the European Commission (the Commission) adopted new proposals for telecoms and copyright reform as part of the Commission's Digital Single Market (DSM) Strategy with the stated aim of stimulating increased cross-border commerce within the EU and modernizing the European legislative frameworks which govern content and communications within the single market in the digital age. This package of measures also complements other initiatives such as the Directorate-General for Competition's sectoral inquiry.<sup>1</sup>

### Background – DSM Strategy

In May 2015, the Commission formally announced its DSM Strategy, with the aim to reform the EU single market for the digital age by focussing on better online access to digital goods and services, creating an environment for the growth of digital services and networks, and ensuring that the European economic zone takes advantage of the opportunities for increased digitalization. The Commission sees the modernization of EU copyright rules as a key element of achieving the DSM Strategy.

As part of this initiative, the Commission has undertaken several public consultations and has made a number of previous announcements about developing legislation in areas such as online content portability (see our previous *Client Alert* on this issue [here](#)). These latest proposals, which were signposted in President Juncker's State of the Union 2016 address, will be of particular interest to companies active in the digital space in Europe, including broadcasters and licensors of content, and to rights holders.

### The Proposals

This *Client Alert* focuses on the copyright proposals. For an analysis of the telecoms proposals, please see our separate *Client Alert* (forthcoming). See also our previous *Client Alerts* on the DSM: [European Commission Unveils New Digital Single Market Proposals](#) (25 May 2016) and [European Commission Announces a Digital Single Market Strategy for Europe](#) (6 May 2016).

The Commission released proposals for a *Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programs* (the Regulation)<sup>2</sup> and a *Directive on Copyright in the Digital Single Market* (the Directive).<sup>3</sup> These proposals include in particular:

## **A cross-border clearance mechanism for digital broadcasting by broadcasters and retransmission of broadcasts online**

As an addition to the Commission's proposals on portability, the Regulation proposes a legal mechanism to break down territorial borders for certain aspects of television and radio services in Europe. Currently, broadcasters transmit programs on their services which they have licensed from others or produced themselves, but programs will inevitably contain content which is protected by copyright and needs to be cleared for use. On the whole, broadcasters in a Member State will clear rights to transmit within the borders of that Member State on their services and on catch-up services.

The Commission's stated aim is to improve access to this programming for consumers across the EU by providing a legal mechanism in the Regulation to extend the "country of origin" principle enshrined in the Satellite and Cable Directive (Directive 98/83/EEC). That principle allows broadcasters to clear rights for satellite broadcasting in one Member State only, allowing them to make their satellite transmissions available in other member states but does not apply to those broadcasters clearing rights for their online services. The Regulation proposes to extend this principle to specific online services including simultaneous online transmissions of a broadcast, "catch up" television services and associated ancillary services such as "the making of" programs. It only applies to broadcasts and does not apply to video-on-demand (VoD) services.

The mechanism also extends this principle to operators of retransmission services. The Satellite and Cable Directive provides for a system of mandatory collective management for retransmissions by cable of television and radio broadcasts from other Member States. The Regulation proposes to extend this to other closed electronic communication networks, such as internet protocol television (IPTV).

Although these proposals do not prohibit geo-blocking per se, they are a further deliberate incursion into limitations on territorial licensing which is of course in line with the Commission's stated aims for the DSM. The Commission is attempting to address growing demand for access to broadcasts from members of linguistic minorities of the Union as well as from persons who live in a Member State other than their Member State of origin.

## **Measures to achieve a well-functioning marketplace for copyright**

- *Rights in publications:* The Directive introduces a "related right" (a right which is related to a copyright but which does not reward the original act of creation, rather rewarding the performance of the work or the effort of pulling together a production), for media organizations to cover digital uses of press publications. Part of the rationale for this is a concern that publishers to which rights have been transferred or licensed by an author should have a right to claim a share in the compensation for digital uses, given the investment they are making in distribution. This right is being referred to as the "Link Tax," as publishers will be entitled to charge fees when small amounts of texts are used in hyperlinks.
- *Use of copyright-protected content by information society services storing and giving access to large amounts of works and other subject-matter uploaded by their users:* The Directive requires online user-uploaded content platforms to take measures to ensure the protection of user-uploaded works, for example by implementing content recognition software. The Directive reinforces the position of rights holders to negotiate and be remunerated when online services exploit their content. These proposals will push the onus for monitoring compliance upon the service provider rather than the users, with a carve out for small and medium enterprises (SMEs), meaning that these measures will disproportionately impact the larger players. This is the Commission's attempt to address rights holders' concerns as to the "value gap" between the ease with which popular content (particularly

music) is accessed online and the arguably meagre profit that rights holders reap from it. However, this approach will come at a cost for both new and established platforms which host this type of content.

- *Fair remuneration in contracts of authors and performers:* The Directive proposes a mechanism for increasing the transparency to rights holders of the exploitation of their works, with an alternative dispute resolution procedure to allow authors and performers to “rebalance” contracts in the event that they find their contractually agreed remuneration disproportionately low compared to the revenues generated therefrom. This attempts to address a concern that authors and performers often have a weak bargaining position when licensing their rights online.

### **Measures to improve licensing practices and ensure wider access to content**

- *Out-of-commerce works:* The Directive requires Member States to implement legal mechanisms with cross-border effect, to facilitate easier licensing of “out-of-commerce” works (which are works that are not available to the public through customary channels of commerce and cannot be reasonably expected to become available) by cultural institutions. The collections of cultural institutions (e.g. libraries and museums) contain a large number of out-of-commerce works, but mass digitization of these works by cultural institutions is often financially unfeasible. This proposal is therefore an attempt to aid cultural institutions in making these works which have significant cultural and educational value available to the public.
- *Access and availability of audiovisual works on VoD platforms:* The Directive requires Member States to set up a negotiation mechanism, so parties wishing to conclude an agreement for making audiovisual works available on VoD platforms can rely on the assistance of an impartial body with relevant experience for assistance with negotiating licensing rights. With this proposal, the Commission seeks to increase the availability of European works on VoD platforms — notably films. The Commission notes that films made in the EU are significantly less widely distributed by VoD than films made in the US (47% to 87% between 2005 and 2014), thought to be due to European films typically being produced by smaller production companies.<sup>4</sup> Each Member State will be required to nominate and/or set up its own impartial and professional body that will assist parties in negotiating and achieving agreements.

### **Measures to adapt exceptions and limitations to the digital and cross-border environment**

- *Text and data mining:* The Directive allows research organizations to conduct text and data mining for scientific research purposes (and we note that these purposes can be commercial in addition to non-commercial, provided that the research is carried out by a research organization), allowing for increased efficiency.
- *Use of works in digital and cross-border teaching activities:* The Directive introduces an exception to allow for the digital use of works and other subject matter for teaching purposes, to improve the cross-border provision of distance learning.
- *Preservation of cultural heritage:* The Directive permits cultural heritage institutions to make copies of works that are permanently in their collections for the sole purpose of preserving such works, which offers new legal certainty for the use of digital technologies to preserve such works.

## **Facilitation of access to published works for persons who are blind, visually impaired, or otherwise print disabled**

Also announced on 14 September 2016 were proposals for an additional directive and regulation to implement the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled.<sup>5</sup> The Directive introduces a new mandatory exception allowing people who are blind or otherwise print disabled to access books and other content in formats that are accessible to them, including across borders; and the regulation governs the exchanges of accessible format copies between the EU and third countries that are parties to the Marrakesh Treaty.

## **Next Steps**

The European Parliament and the Council of the Member States will now discuss these legislative proposals under the so-called co-decision procedure. These discussions can be politically sensitive and involve a few iterations between the Parliament and the Council. Once an agreement is reached on common texts, the two EU legislators will jointly adopt them. While the regulations will be directly applicable and enforceable in all Member States, directives will need to be implemented and transposed into national legal acts. It is therefore unlikely that these proposals will become binding in Member States sooner than 2019/2020. In relation to the implications of “Brexit,” please see our *Client Alert* “[The UK has voted to leave the EU: What now?](#)” (24 June 2016). Until we have more certainty about what Brexit is likely to look like, we suggest that companies continue to move forward as if the new regime will apply to the United Kingdom.

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## Endnotes

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<sup>1</sup> See the [Commission Staff Working Document – Preliminary Report on the e-Commerce Sector Inquiry, published 15 September 2016, SWD \(2016\) 312](#).

<sup>2</sup> [“Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions”](#) – COM (2016) 594, 14 September 2016.

<sup>3</sup> [“Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market”](#) – COM (2016) 593, 14 September 2016.

<sup>4</sup> Note that there have been various EU competition law investigations of the arrangements for distribution of films made in the US. See for instance [case AT. 40023 and press release of 23 July 2015](#) that linked this investigation with the Digital Market Strategy.

<sup>5</sup> [“Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled”](#) – COM (2016) 595, 14 September 2016; and [“Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society”](#) – COM (2016) 596, 14 September 2016.