

THE EUROPEAN UNION'S NEW COPYRIGHT LAWS MAY SPELL DOOMSDAY FOR ONLINE PLATFORMS

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The European Union Directive on Copyright in the Single Market is an EU directive designed to limit how copyrighted content is shared on online platforms. On 15 April 2019 the European Council, a body comprising government ministers from each of the 28 EU member states, voted to adopt this directive into European law. The individual member states now have two years in which to incorporate this new rule, known as Article 13, into their own national laws.

WHY IS THE DIRECTIVE CONTROVERSIAL?

Article 13 refers to online sharing content services that disseminate user-generated content for public consumption. Such platforms, principally sites like YouTube, Facebook, Instagram, SoundCloud and Dailymotion, are now required to use their “best efforts” to ensure that any users must have a licence to use copyrighted material and also remove any pirated uploads.

Unlike previously, these businesses will now be held accountable for anything posted or uploaded to their platforms that infringes copyright violations. This is a radical change for companies that may be home to thousands upon thousands of uploads every day. Colloquially known as ‘the meme ban’, Article 13 effectively boils down to a battle between rights holders and technology companies. Anyone browsing YouTube would be aware that clear instances of copyright infringement have long been removed from the site, but this legislation goes much further.

A wildly successful form of current YouTube content comprises videos of YouTubers playing popular games. It may seem incongruous to non-gamers that people are interested in just watching others play online, but for those who enjoy the spectacle, it's akin to following a favourite sports team in action. It seems such content, though, would be inadmissible in a post Article 13 world, as the YouTubers would not have licences to the gaming content being played – no matter how happy the copyright holder feels about having their game reviewed and viewed and, therefore, amplified and promoted across the globe. Fan videos, review sites and mash-ups would also be liable for removal.

IMPACT

Many small publishers and content providers are very concerned about their future obligations. “Article 13 brings into doubt all our marketing strategies, particularly in relation to those markets in the EU,” says Blair Purvis, CEO of local publisher, Prahran Publishing. “Any challenge to the validity of our copyright, whether founded or unfounded, could negate all our advertising spend. We are, in essence, guilty until proven innocent.”

Joel Smith, Herbert Smith Freehills partner and head of Intellectual Property in the UK, says it's too soon to know what the full ramifications of the legislation will be. He notes that even though the directive came into force on 2 June of this year, the two-year period before it's transposed into national law means there is plenty of time to debate the directive and work out the details. There will also be challenges, he says, citing the Polish Government, which on 23 May announced it was bringing a court case against the section to the EU's Court of Justice.

TOO SOON TO KNOW

The most sensible approach believes Joel is to ‘wait and see’, while emphasising that despite the negative reaction in the media, the legislation has laudable aims. “Critics fear the directive will cause the death of the internet as we know it,” he says. “The important thing as it stands is it's not intended to affect the ordinary user of content-sharing websites. It's really aimed at the large platforms – YouTube, Facebook, Spotify – requiring them to remunerate the artists and journalists who produce the content.”

Article 13 is simply an attempt to protect content owners and take the onus off them when they feel they have been treated less than fairly, says Joel. Copyright owners have always been able to complain if they found their material being disseminated illegally, but now the platforms will be required to self-monitor. “The copyright owners now say, ‘You've got the technology to automate the filtering, to implement blocking. You don't need us to individually send you an email saying, ‘Can you take down this particular piece of music or blog or whatever it is’,” adds Joel.

GLOBAL REACH

Although the directive is a European one, the worldwide reach of the internet and its content sharing sites means it's important that those in the legal profession are aware of any developments. “Given that many of these global platforms fit neatly into the EU, I wouldn't be surprised if whatever they do, they decide to do on a broader basis,” says Joel. If so, this may well have a direct impact on people in countries like Australia.

Herbert Smith Freehills senior associate and intellectual property litigator, Aaron Hayward agrees that the legislation is likely to have wider ramifications. “Strictly it only applies to the EU, but in all likelihood you’d expect given the size of the European market that, if global platforms have to adopt certain practices to comply with European law, they are likely to roll that out on a broader basis.” He also agrees with a ‘wait and see’ policy, noting, “It’s hard to see what will happen until there is an actual implementation of legislation, which is the trick with European directives. Usually, they sound aspirational and airy fairy, but the actual implementation can be a bit more sedate.”

STILL UNDER THREAT?

And what about those YouTubers filming their own game play? Despite the practice driving people to actually purchase and play the underlying games, it is distinctly possible that the game creators will welcome the legislation. “If the showing of people playing an online game is something the game company owns the rights to... they may say ‘we’re entitled to some kind of remuneration’,” says Joel.

“They would say to the platforms ‘you need to get a licence for us’, but the hope is that a pragmatic solution will be found so that people can continue to view the things they want to view.” Aaron reiterates that the main difference is likely to be a case of the major organisations now needing to be proactive about protecting copyright, rather than reactive. “There are already requirements that file sharing and music sharing sites like YouTube, Facebook and so on need to comply with under Australian copyright law and they were introduced as a result of the US/Australia free trade agreement in the early 2000s.

“I expect, through a mix of the actual requirements that the European jurisdictions will implement, combined with approaches that are already being taken by some of the bigger players to comply with their existing obligations, in practice it may be that the actual things they end up doing are not that dissimilar to what they already do.”

FINALLY

In an intriguing move, the EU recently renumbered the provision in the final directive. Perhaps to avoid the negative connotations of the number 13 or merely to circumvent some of the angry feedback and make those seeking where it sits in the law work harder, it’s now called Article 17... which, it could be argued, doesn’t have quite the same Doomsday feel about it.

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