

THE KEY DEVELOPMENTS IN THE DIRECTIVES ON COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET RECENTLY ADOPTED BY THE EUROPEAN PARLIAMENT

On 17 May, the Official Journal of the European Union issued two Directives on copyright and related rights: [Directive \(EU\) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC \(Text with EEA relevance\)](#) (“the **Directive**”) and [Directive \(EU\) 2019/789 of the European Parliament and of the Council of 17 April 2019 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 programmes, and amending Council Directive 93/83/EEC \(Text with EEA relevance\)](#) (“the **Second Directive**”). Once implemented in each Member State, regulations relating to intellectual property rights, especially in the online environment, will undergo major changes.

1. Measures to adapt exceptions and limitations to the digital and cross-border environment

After several years of preparation and a parliamentary procedure with numerous versions, which underwent substantial changes, on 6 June the **Directive** will enter into force. From this date, each Member State will have 24 months to implement it.

The **Directive** sets out the following limitations in order to adapt intellectual property rights to the digital and cross-border environment:

- Research organisations and cultural heritage institutions conducting scientific research can reproduce works and other protected subject matter and extract them from databases in order to carry out text and data mining (art. 3).
- Any operator can reproduce and extract works and other protected subject matter from databases in order to carry out text and data mining, although the rightholders will be able to exclude their works and other subject matter from the scope of the exception by expressly reserving their rights (art. 4).
- Works and other subject matter can be used in digital and cross-border teaching activities, for the sole purpose of illustration for teaching, providing the following requirements are met:
 - It is for non-commercial purposes;
 - It is carried out under the responsibility of an educational establishment, either on its premises or via a secure electronic system which only the educational establishment's pupils and teaching staff have access to;
 - an indication of the source, including the author's name where possible, of the work or other subject matter used is provided (art. 5).

- Cultural heritage institutions can reproduce works and other subject matter, which are permanently in their collections and make them available to the public, in any format or medium, provided it is for preservation purposes (art. 6).

2. Measures to improve licensing practices and ensure wider access to content

Measures have been introduced to ensure access to works and other subject matter, and therefore ensure access to cultural heritage, as well as to improve the licensing system. They include the following:

- The power for representative management organisations to grant non-exclusive licences to a cultural heritage institution for out-of-commerce works and other subject matter which are part of the institution's permanent collection (art. 8.1).
- Establishing a limitation to enable cultural heritage institutions, which make available out-of-commerce works and other subject matter within their permanent collection, provided that the name of the author is indicated and that they are made available on non-commercial websites.

However, the **Directive** obliges Member States to provide rightholders an easy and effective means of excluding their works and other subject matters from the aforementioned provision (art. 8.2).

The possibility of collective licensing with extended effect, by which, when a licence is granted for the exploitation of works and other subject matter, Member States can establish that it can be extended to rightholders who have not given the respective entity a management mandate.

With the aim of protecting the legitimate interests of rightholders, the Directive establishes certain safeguards, including the possibility for rightholders to exclude their works and other subject matter from the licensing mechanism with extended effect (art. 12).

- The obligation for Member States to facilitate the understanding of parties involved in negotiations to make available audiovisual works on video-on-demand services (art. 13).
- Ensuring that, after the expiry of the term of protection of a work of visual art, any material resulting from the reproduction of this work (for example, a photograph or scanned copy of it) will not be subject to copyright or related rights, unless the resulting material is original (art. 14).

3. Measures to achieve a well-functioning marketplace for copyright

The **Directive** also includes measures to achieve a well-functioning marketplace for copyright, mainly by:

- Providing publishers of press publications an exclusive right to reproduction and to make available in relation to online use of their press publications by information society service providers (art. 15).

- Giving authors who transfer their rights to a publisher the power to obtain part of the income obtained due to the application of any limitation or exception to the exclusive rights (art. 16).
- The use of protected content by online content-sharing service providers (art. 17).

With regard to the use of protected content by online content-sharing service providers, one of the most controversial points of the **Directive** and the point which underwent the most changes, it is worth noting that:

- Intermediary services, where content is provided by users, carry out acts of communication to the public when they grant access to works, or other subject matter uploaded by users, which are protected by intellectual property rights.
- Those responsible for the service must obtain authorisation from the rightholders in order to communicate to the public, or make available to the public, works or other subject matter.
- Directive 2000/31/EC (applicable when there is no "actual knowledge" of the infringement), which has been operational until now, does not apply to these services.
- In the absence of authorisation from the rightholders, service providers shall be liable for the unauthorised acts of communication to the public, unless they are able to demonstrate all of the following:
 - (i) That they have made best efforts to obtain an authorisation;
 - (ii) that they have made best efforts to ensure the unavailability of works and other subject matter which are protected by intellectual property rights for which the rightholders have provided the service providers with sufficient information; and
 - (iii) that they have acted expeditiously upon receiving a notification, by disabling access to such content, and that they have made best efforts to prevent future uploads.

These conditions mean that Internet service providers will need to establish internal protocols to guarantee the non-availability of works and other protected subject matter, ensuring that they can be removed as soon as they receive a notification and that service providers can detect and prevent further uploads of the same content.

On the other hand, the **Directive** obliges Member States to ensure:

- That authors and performers receive appropriate and proportionate remuneration for the exploitation of their works or other subject matter;
- that they obtain sufficient information from transferees regarding the exploitation of their works or other subject matter;
- that they have access to alternative dispute resolution procedures; and
- that they can revoke licences or the transfer of rights when the work or other protected subject matter is not being exploited.

4. Copyright and related rights applicable to certain online transmissions of broadcasting organisations

Noteworthy measures introduced by the **Second Directive** include:

- In relation to acts of making available works or other protected subject matter, provided that they are radio or television programmes which are news and current affairs programmes or own productions (excluding sport events), the "country of origin" principle will apply, and they will be deemed to occur solely in the Member State in which the broadcaster has its main establishment. (art. 3).
- Rightholders other than broadcasting organisations will only be able to exercise their right to grant or refuse authorisation for a retransmission through a collective management organisation (art. 4).
- A programme that is transmitted by direct injection of a broadcasting organisation to a signal distributor will be considered one single act of communication to the public, provided that the broadcasting organisation does not simultaneously transmit those signals directly to the public (art. 8).

This **Second Directive** is evidently more technical, and is less applicable to citizens and internet companies, but it has a huge impact on broadcasting organisations and the retransmission of content online.

Europe has spent years preparing itself for an increasingly digital and connected world, and these recent directives are an example of the mammoth task carried out by the EU legislator. But now the responsibility has been passed to Member States, who must adapt the directives to their internal regulations within a maximum period of 2 years.

This Briefing has been prepared by the Intellectual Property and Technology Law team.

The general information contained in this Legal Briefing does not constitute legal advice. This Briefing was prepared on 28 May 2019 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

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