

### KEY UPDATES TO COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET INTRODUCED BY ROYAL DECREE-LAW 24/2021 OF 2 NOVEMBER 21

On 3 November, [Royal Decree-law 24/2021 of 2 November](#) (hereinafter, "**Royal Decree-law**") was published in the Official State Gazette ("BOE"), adopting the text transposed into Spanish law, including, **Directive (EU) 2019/789** of the European Parliament and the Council, of 17 April 2019 establishing rules on the exercise of copyright and related rights applicable to certain online transmissions by broadcasting organisations and to retransmissions of radio and television programmes; and **Directive (EU) 2019/790** of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the digital single market. To learn more about both directives, we recommend reading the [legal briefing](#) we prepared in 2019 following their publication.

Both directives are transposed as a matter of urgency, through the Royal Decree-law instrument, and outside the deadline provided for in Directives 2019/790 and 2019/789, which ended on 7 June 2021. The Explanatory Memorandum states that the legislature has attempted (i) to maintain the texts of the directives, and (ii) to make as few amendments as possible to the current intellectual property legislation in the interests of brevity.

The most relevant aspects of the Royal Decree-law are as follows:

#### 1. **New related rights for press publishers and other rightholders.**

The Royal Decree-law amends Article 32.2 of the Spanish Copyright Act ("**SCA**") to eliminate the equitable compensation recognised in the earlier version of the legislation in favour of publishers or other right holders for the making available of texts or non-significant fragments of content, published in periodical publications or on periodically updated websites, for the purposes of information, the creation of public opinion or entertainment.

In addition to the elimination of such equitable compensation, following the provisions of Article 15 of Directive 2019/790, a new related right (Article 129 *bis* of the SCA) has been introduced for the benefit of publishers of press publications and news agencies for certain uses of any text, image, photographic work or photograph (for example, through *snippets*) that are the subject of this right, for information society services. Therefore, although the subject matter of the new related right is *press publications*, in respect of which Article 129.1 *bis* of the SCA grants exclusive rights of reproduction and making available to the public,

Article 129.2 *bis* of the SCA refers to the use of works and services contained in such *publications*, such as texts or images, which, under the new Article 32.2 of the SCA, must be the subject of autonomous intellectual property rights.

However, the essential purpose of Article 32.2 of the SCA, which is provided in the section on exceptions on exclusive rights, is to establish that search engines will not have to request authorisation to reproduce isolated words and to provide links to *press publications*. This is a new exception on exclusive intellectual property rights in respect of press publications. The exception for certain uses and providers is also included in Article 129.6 *bis* of the IPL. This mainly concerns private uses, hyperlinks, minor uses or uses in blogs and informative websites. There is no apparent justification for including the aforementioned exception in the rule regarding the rest of the unique circumstances.

Unlike the previous exception provided for in Article 32.2 of the SCA, the legislature does not establish any formalities concerning the management of this new related or connected right, but rather authorises right holders to negotiate the granting of authorisations in accordance with the principles of contractual good faith, due diligence, transparency and respect for the rules of free competition, while excluding the abuse of a dominant position in the negotiation. Thus, publishers and right holders can choose to manage this right either individually or through a collective management company.

As a new feature regarding Directive 2019/790, the Royal Decree-law establishes certain rules in relation to the granting of these authorisations by press publishers to information society services, in particular:

- (i) Editorial independence must be respected.
- (ii) The information society service provider shall provide detailed and sufficient information on the main parameters governing the rating of content and the relative importance of those parameters, under [Regulation \(EU\) 2019/1150](#).
- (iii) No other contracts or services may be linked to this agreement.
- (iv) The First Section of the Intellectual Property Commission shall be authorised to hear disputes relating to this agreement.

Regarding the time frame of this right, it is established for a period of two years from 1 January of the year following the date of the press publication. It is also stated that the rights granted to publishers and agencies do not apply to press publications first published before 6 June 2019.

## 2. Use of protected content by providers of online content sharing services.

Article 73 of the Royal Decree-law transposes Article 17 of Directive 2019/790, establishing that providers of online content sharing services (such as social networks, video sharing platforms, etc.) communicate to the public with the authorisation of the respective right holders, under the provisions of Article 20 of the SCA.

Thus, in the event that providers of online content sharing services do not have such authorisation, they will be liable for the unauthorised acts of communication to the public, they cannot benefit from the exemption from liability provided by Directive 2000/31/EC and, in the absence of authorisation, they will avoid liability only if they demonstrate that (i) they have used their best efforts to obtain such authorisation; (ii) they have used their best efforts to ensure the unavailability of such works and other subject matter; and (iii) they have acted expeditiously upon receipt of a notification, disabling access to such content, and have used their best efforts to prevent its future uploading.

These conditions will also require these service providers to establish internal protocols to ensure that protected works and performances are not available, that they are removed immediately -as soon as they receive a notification-, and that they can detect and prevent new uploads of the same content.

Furthermore, the Royal Decree-law establishes that, when right holders request that access to specific works or subject-matter be denied, they must provide reasons for such a request, and the objections submitted will be processed within a period not exceeding 10 working days (Directive 2019/790 stated that they will be processed without undue delay), and the decisions to disable content will be examined by humans, without the use of robots or other similar means.

## 3. Incorporating new exceptions on intellectual property rights in the digital and cross-border environment.

Among the aims of Directive 2019/790 is the improvement of online accessibility to works and other subject matter protected by intellectual property rights, mainly for educational or scientific purposes, for which the catalogue of exceptions on the exclusive rights of the owners of the protected works and other subject matter is extended, so that they can be used without their authorisation in certain circumstances, specifically the following:

- (i) **Exception on text and data mining** -for scientific and commercial use- (Article 67 of the Royal Decree-law), under which the authorisation of the holder of the intellectual property rights is not required for the reproduction of works and other legitimately accessible subject matter, when they are used for this activity (mining). This provision does not apply in cases where right holders have expressly restricted the use of works to machine-readable or other suitable means.

Article 67.2 of the Royal Decree-law provides that the reproductions and extractions obtained may be stored for as long as necessary to achieve the objectives of this mining.

- (ii) **Exception on digital and cross-border educational and scientific research activities**, established in Article 68 of the Royal Decree-law. It will not be necessary to obtain authorisation from the holders of intellectual property rights for the reproduction, distribution and public communication by digital means of works and performances, provided that: (i) they are carried out by teaching staff in official educational institutions, taught in centres that are part of the Spanish education system and by the staff of universities and research bodies; (ii) they are carried out in a secure electronic environment; (iii) the source is provided, including the author's name if such information is available.

In this respect, it should be noted that the use of works and other subject matter in educational activities was already regulated by Articles 32.3, 32.4 and 32.5 of the SCA and that the transposition carried out relates to the need to establish that such use must be carried out in a secure electronic environment, namely the national territory of Spain, even if the recipients are not in Spain.

- (iii) **Exception on the conservation of cultural heritage**, included in Article 69 of the Royal Decree-law and which complements Article 37 of the SCA, relating to acts of reproduction, lending and consultation of works using specialised terminals in certain establishments, from which citizens may benefit through the institutions responsible for cultural heritage, such as museums, libraries, sound libraries, film libraries, newspaper libraries or archives in public ownership or which are part of cultural or scientific institutions.
- (iv) **Exception on pastiche**, both in the digital and analogue environment, under which it will not be necessary to have the authorisation of the author or right holder to transform a disclosed work and its combination with others, provided that such action does not entail the risk of confusion with the original works or performances, or cause damage to them or their author.

This exception was not among those described in Directive 2019/790, but in Directive 2001/29 (Article 5.3.k) when regulating parody, which was already included in the Spanish legal system in Article 39 of the SCA. Therefore, this seems to be a clarification by the legislature to expressly allow the creation of pastiches through other people's works, in accordance with what was stated by the Court of Justice of the European Union in case C-476/17<sup>1</sup>.

Despite the existence in the SCA of a specific section on exceptions on the exclusive rights of right holders, these new exceptions are part of it but form an independent section within the Royal Decree-Law itself.

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<sup>1</sup>Judgment of the Court (Grand Chamber) of 29 July 2019. Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben.

## 4. Broadcasters' online transmissions and retransmissions of radio and television programmes

Regarding the measures introduced by the Royal Decree-law, which transposes Directive 2019/789 into Spanish law, we highlight the following aspects:

- (i) For acts of making available protected works or other subject matter, provided that they are informative, current affairs and own-produced radio or television programmes (excluding sporting events and the protected works or other subject matter included therein), the "**country of origin**"<sup>2</sup> principle will apply, with such uses being deemed to be produced solely in the Member State in which the broadcasting organisation has its principal place of business.
- (ii) Right holders who are not broadcasters shall exercise their rights to grant or refuse authorisation for retransmission exclusively through a collecting society<sup>3</sup>.
- (iii) There shall only be a single act of communication to the public where there is a transmission of programmes by a direct feed<sup>4</sup> from a retransmission organisation to a signal distributor, provided that the broadcasting organisation does not simultaneously transmit such signals directly to the public<sup>5</sup>.

## 5. Amendment of the SCA

The Royal Decree-law introduces the following amendments to the SCA:

- (i) Regarding communication to the public, the concept of retransmission established in Article 20.1.f), which affects online transmissions of radio or television programmes intended for reception by the public, is expanded.
- (ii) The review action for inequitable compensation established in Article 47 is expanded, establishing a more protective regime for authors.
- (iii) The right of revocation is established when an author has granted an authorisation or assigned his rights over a work on an exclusive basis, authorising him to terminate such assignment if the work is not being used by the assignee. Through this concession, the position of authors is strengthened.
- (iv) A new paragraph is introduced in Article 194, through which the material scope of action of the mediation and/or arbitration functions of the First Section of the Intellectual Property Commission of the Ministry of Culture and Sport is expanded.

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<sup>2</sup> Provided for in Art. 3 of Directive 2019/789, and transposed by Art. 76 of the Royal Decree-law.

<sup>3</sup> Art. 4 of Directive 2019/789, and transposed by Art. 77 of Royal Decree-law.

<sup>4</sup> A technical process whereby a broadcasting organisation transmits its programme-carrying signals to a non-broadcasting organisation in such a way that the programme-carrying signals are not accessible to the public during such transmission.

<sup>5</sup> Art. 8 of Directive 2019/789, and transposed by Art. 79 of Royal Decree-law.

## 6. Entry into force and validation

The amendments introduced by the Royal Decree-law that have been analysed in this briefing came into force on 4 November 2021. In accordance with the provisions of Article 86.2 of the Spanish Constitution, the text of this legislation shall be submitted to debate and vote by the Congress of Deputies within thirty days following its enactment, at which time the Congress shall decide on its validation or repeal.

## 7. Table of equivalences

Directive 2019/790	Directive 2019/789	Royal Decree-law
Art. 1	Art. 1	Art. 65
Art. 2	Art. 2	Art. 66
Art. 3		Art. 67
	Art. 3	Art. 76
	Art. 4	Art. 77
Art. 5		Art. 68
	Art. 5	Art. 78
Art. 6		Art. 69
Art. 8		Art. 71
	Art. 8	Art. 79
Art. 14		Art. 72
Art. 17		Art. 73
Art. 18		Art. 74
Art. 19		Art. 75

This Legal Briefing was prepared by Andy Ramos Gil de la Haza and Alicia Maddio, Counsel and Associate of the Intellectual Property, Industrial Property and Technology practice; and Isabel Iglesias, Knowledge Advisor.

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 11 November 2021 and Pérez-Llorca makes no commitment to update or revise its contents.

For more information,  
please contact:

**Andy Ramos Gil de la Haza**  
Intellectual Property, Industrial Property and Technology Counsel  
[aramos@perezllorca.com](mailto:aramos@perezllorca.com)  
T: +34 91 423 20 72