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The DSM Directive: A Significant Change to the Regulation of Copyright Online

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Introduction

Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (the “DSM Directive”) entered into force on 7 June 2019. The more contentious parts of the Directive are targeted at addressing various perceived imbalances between creators, rightsholders and users of online content in the digital sphere, most notably the perceived “value gap” between the remuneration received by creators of content and the profits received by online platforms. Its scope is, however, more wide-ranging and the DSM Directive is perhaps better characterised as a diverse series of measures intended to enable copyright to function more effectively in the digital age.

The DSM Directive was the subject of significant debate, and fierce protest, prior to its approval by the Council for the European Union. The legislative process led to the removal or amendment of some of the more controversial elements of the Directive, including those relating to the so-called “meme ban”. The result is that many aspects of the Directive have been left as relatively high-level principles rather than prescriptive requirements, which will need to be expanded and developed during the national implementation phase and are likely to be the subject of litigation and CJEU referrals in the future.

National legislators have until 7 June 2021 in order to implement the DSM Directive, but enthusiasm for doing so varies significantly. France, which has publicly emphasised its backing for the reforms, became the first Member State to adopt aspects of the DSM Directive into national law within months of the Directive being passed. Poland (a vocal critic of the DSM Directive), on the other hand, has already sought an order annulling articles 17(4)(b) and 17(4)(c), challenging their proportionality and necessity. The theme of different Member States taking differing approaches to implementation is likely to continue as these high-level principles of the Directive are fleshed out during national implementation; there is significant scope for Member States to legislate for different implementations (undermining the original aim of creating a more harmonised Digital Single Market within the EU).

As for the UK, at the time of writing, there is continued uncertainty regarding the UK’s future relationship with the EU. If the UK leaves the EU prior to the end of the implementation period for the DSM Directive it will in effect have a choice as to whether or not to implement the Directive. Although there were early indications that the then government intended to implement the provisions of the Directive regardless (the UK having been a key proponent of some of the measures) there is little certainty at present as to what will happen, and it appears more likely that any implementation will be subject to, and contingent on, any deal that the UK is able to strike with the EU.

Articles 3 and 4 – The Text and Data Mining Exception (“TDM Exception”)

Text and data mining (“TDM”) is the process by which a large amount of data is analysed in order to extract knowledge and value. It is defined in article 2(2) of the DSM Directive as “*any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlation*”. TDM is an extremely important practice in numerous areas, perhaps none more so that in the context of the development of artificial intelligence. The DSM Directive creates two new exceptions to rights provided in Directive 96/9/EC (the “Database Directive”), Directive 2001/29/EC (the “Infosoc Directive”) and the DSM Directive in order to enable TDM.

Article 3 – For the Purposes of Scientific Research

Article 3 provides a mandatory exception for TDM carried out by “*research organisations and cultural heritage institutions*”. The definitions of such organisations and institutions make clear that they are conceived of as being not-for-profit entities, publicly accessible institutions or entities with a “*public service mission*”. The likely beneficiaries of this new mandatory exception include universities and public research institutions. While the exception will also apply to those organisations that are engaged in public-private partnership, clearly only the public partner should be able to benefit.

Entities that fall within the scope of this exception have the benefit of being able to perform TDM on information to which they have “*lawful access*”. Although lawful access is not defined in the DSM Directive, recital 14 does state that it should be understood as covering “*access to content based on an open access policy or through contractual arrangements*” and also covers information that is freely available online.

The scope of the right includes not only the storage and retention of data for the research itself, but also for the verification of results, which is particularly important in the field of scientific and academic publication.

Article 4 – General Exception for TDM

Article 4 introduces a narrower exception for TDM that is not limited to public institutions or entities. While this initially appears to be of greater utility for commercial entities, the exception is extremely limited. Article 4(3) provides that a rightholder can “*expressly reserve*” the right to use their copyrighted work provided that this is expressed in an “*appropriate manner*”, which may be by machine-readable means.

This express “opt out” provision may significantly reduce private companies’ ability to use data to enhance their AI or other operations. It appears likely that any organisations making their content available online will utilise this opt-out, as it provides them with leverage in order to further monetise their content by entering into licences.

While recital 8 outlines the importance of TDM in the development of technology and the support of innovation, in practice the extent to which TDM is permitted under the DSM Directive is not as broad as that in countries like the US and Japan.

Article 15 and Article 17

Articles 15 and 17, which provide for a new press publishers’ right in respect of online publications and new obligations on online platforms regarding the exploitation of copyrighted works, were the subject of extensive and at times intemperate debate during the DSM Directive’s legislative phase. Supporters claim that the provisions address long overdue imbalances between tech platforms and rightsholders, while critics complain that the provisions are a curb on freedom of expression. Some critics are also concerned about the erosion of the limitations on intermediary liability that have hereto been relied on by many online service providers.

Articles 15 – The Press Publishers’ Right

The DSM Directive provides a new right for press publishers relating to the online use of their press publications. The origin of the measure lies in EU concern about the continuing decline in the revenues earned by press publishers, responsibility for which is often attributed to the rise of new online services and news aggregators, the latter being said to cause leading press publishers to lose control of their content and being unable to monetise it as a result. This issue is addressed in recital 54 in the preamble to the DSM Directive, which specifically calls out “*problems in licensing the online use*” of publications as making it “*more difficult for [press publishers] to recoup their investment*”. The recital also explains the underlying policy reasons for supporting press publishers in this way, stating that: “*A free and pluralist press is essential to ensure quality journalism and citizens’ access to information*” which “*provides a fundamental contribution to public debate and the proper functioning of a democratic society*”.

Article 15(1) provides press publishers with the right, by reference to articles 2 and 3 of the Infosoc Directive, to authorise the online use by information society services of their reproduction and making available to the public rights. The new right does not apply to private or non-commercial uses. Importantly, the definition of press publication, contained in article 2(4) of the DSM Directive, encompasses not only literary works but other accompanying works such as videos and pictures.

The press publishers’ right is established separately and in addition to the existing copyright protection afforded to literary works created by journalists and leaves that protection unaffected (article 15(2)). In effect it is a new “neighbouring right” provided to press publishers solely for the purposes of licensing (or enforcing against) online news services. Under article 15(4) of the DSM Directive, the right lasts for two years from the date of publication and shall not apply retrospectively. The right will only benefit those press publishers established in an EU Member State.

Article 15 compels Member States to provide for authors whose works are incorporated into a press publication to receive an “*appropriate share*” of the revenues that press publishers receive for use of their press publications. There is, however, no guidance on how an “*appropriate share*” of revenues should be calculated, or how such share is to be collected or distributed.

There are two significant limitations on the new right.

First, it does not protect publishers in respect of acts of hyper-linking (i.e. the mere posting of a hyperlink to a new[s] article without any text taken from the article). The exclusion of hyperlinks

from the scope of the Directive can be read as an attempt to address criticism that was voiced during the legislative process that the provisions amounts to a “link tax”.

Second, the reuse of “very short extracts” from a press publication is also carved out of the new protection. This concept is, however, not defined in the DSM Directive, which is likely to create significant uncertainty. Recital 58 states that the term must not be interpreted in such a way as to affect the effectiveness of the provision, although this adds little to the understanding of what a “very short extract” is. The existing standard of originality for European copyright law, which states that a short extract of 11 words is capable of benefitting from copyright protection if it is the author’s own intellectual creation, could have provided some guidance, as could the “substantial part” test for infringement. However, as the DSM Directive does not refer to either existing standard at all, it appears that the definition for the purposes of this Directive will be different.

Article 17 – Platform Liability

Article 17 was arguably the most contentious provision of the DSM Directive. The provision has been designed to narrow the so-called “value gap”, whereby copyrighted content is exploited on the internet for free or for low remuneration, particularly on platforms that provide access to user-uploaded content. Indeed, recital 61 outlines the perceived legal uncertainty as to whether such online services engage in copyright-relevant acts.

The DSM Directive attempts to draw a line under this uncertainty in article 17(1) by stating that “online content-sharing service provider platforms” (“OCSSPPs”) perform an “act of communication to the public” or an “act of making available to the public” by giving the public access to copyrighted works. Such content-sharing services are obliged to “obtain an authorisation” for such use from the relevant rightholder.

The main obligation, to “*obtain an authorisation*” from a rightholder, may occur in the form of a licensing agreement, although the DSM Directive appears to allow scope for other forms of authorisation with the inclusion of the phrase “for instance” (article 17(1)). Where there is no licensing agreement or authorisation, OCSSPPs may avoid liability where they comply with each of the following three conditions (article 17(4)):

- that they have made “best efforts” to obtain such authorisation;
- that, in its absence, they have made best efforts in accordance with high industry standards to make specific works unavailable where provided with sufficient information from the rightholder (so-called “upload filters”); and
- that they act expeditiously to remove content when notified by the rightholder.

Hence, although the primary obligation under article 17 is to enter into a licence with the relevant rightholder, an alternative (but onerous) course to avoid liability is available.

The measures required in order to comply with these “*best efforts*” obligations must be proportionate to the size of the service, the type of works concerned and the availability of “suitable and effective” means, as well as their cost (article 17(5)). Further, article 17(6) provides that new market entrants with a turnover of less than 10 million euros a year are only required to make best efforts to obtain authorisation, unless they have more than five million subscribers, in which case they also have to show best efforts to prevent further uploads of notified works.

The final text of the article is less inflammatory from a user perspective than earlier drafts, having removed references to “*effective content recognition technologies*” as well as including provisions to combat protests against the so-called “meme ban” (article 17(7)). However, the final text of the DSM Directive has left several questions open.

The definition of an OCSSPP states that it encompasses platforms which “*organise*” and “*promote*” content, without specifying how these concepts are to be interpreted. Furthermore, the organ-

ised content should consist of “a large amount of copyright-protected works”, although what qualifies as a “large” amount of works will be subject to differing interpretation at the national level.

There is, further, a tension between the provisions of article 17 and the existing defences provided for under the E-Commerce Directive. The DSM Directive explicitly states that the hosting defence provided for in article 14 of the E-Commerce Directive is not applicable for OCSSPPs in relation to the communication to the public right. It is, further, unclear how the monitoring obligations contained within the DSM Directive interact with the prohibition against general monitoring contained in article 15 of the E-Commerce Directive, save that they would appear on their face to be incompatible.

Chapter Three

Chapter Three of the DSM Directive contains a number of new rights and mechanisms designed to ensure that authors and performers receive “fair” remuneration for the exploitation of their works. While Chapter Three received far less attention than other parts of the DSM Directive during the legislative process, its potential impact on relations between the creators and exploiter of copyright works is great.

The overall purpose of Chapter Three is to address the perceived “imbalance” between those who create and those who exploit copyright works. Recital 72 outlines this rationale, highlighting the fact that “authors and performer tend to be in a weaker contractual position when they grant a licence or transfer of their rights” and, therefore, require protection “to be able to fully benefit from the rights harmonised under Union law”. Further, recital 73 states that authors’ and performers’ remuneration should be “appropriate and proportionate to the actual or potential economic value of the licensed or transferred work”.

There are, however, a number of open questions relating to Chapter Three, with perhaps the biggest one being how they will apply to works that are made under an employment contract. Typically, the transfer of rights in these situations will occur by an operation of law, either vesting initial ownership of copyright in the company (e.g. UK, US and Japan) or by other means (e.g. Germany, which enables employers to assume exclusive rights for works created in the fulfilment of an employment relationship). If works created by employees do fall within the scope of the DSM Directive, then the practical implications will be very significant.

The transparency and remuneration provisions of Chapter Three will apply to all copyright works, except for computer programs within the meaning of article 2 of Directive 2009/24/EC.

Article 18 – Appropriate and Proportionate Remuneration

Article 18 sets out the overarching requirement for Member States to ensure that authors and performers receive “appropriate and proportionate remuneration” when they licence or transfer their exclusive exploitation rights. The provision does provide Member States with some freedom, with article 18(2) outlining that they “shall be free to use different mechanism” including taking account of contractual freedom and the “fair balance of rights and interests”.

Article 19 – Transparency Obligations

Article 19(1) of the DSM Directive requires a contracting party receiving rights in protected works to provide up-to-date, relevant and comprehensive information to authors and performers on the exploitation of their works and performances. This includes information regarding the modes of exploitation, revenues generated, and the resulting remuneration. This information has to be provided on a regular basis, and at least once a year. These trans-

parency obligations are designed to facilitate use of the article 20 “bestseller” right.

Whilst the primary obligation to provide information falls on the direct contracting party by virtue of article 19(2), the obligations also extend to sub-licensees, if they are the party(ies) with the relevant information. This could have an impact on the relationship between the first contracting parties who take initial transfer or licence of copyright, and those transferees or licensees who they contract with.

Significantly, the exploitation of existing content created before the Directive is fully in force will also apparently be caught by the effects of this provision, meaning that organisations exploiting back catalogue works will become responsible for reporting to authors and performers who contributed to the works. This may not be easy to comply with in practice given the potential difficulty of identifying and locating those covered by the new right.

Different copyright-exploiting businesses are likely to be affected to differing degrees. Record labels, for example, will be used to accounting to featured artists and may therefore be familiar with reporting requirements of this kind in a broad sense, but even they will not be suited to providing such information to performers that they have typically contracted on a buy-out basis. The overall effect therefore will be a significant increase in the administrative, and therefore financial, burden of exploiting such works.

There are some significant open-ended issues within the provisions. Article 19(3) permits Member States to limit the scope of the transparency obligation in situations where compliance would be disproportionate in view of the revenues generated; the provision also states that the obligation can be limited to the types and level of information that can “reasonably be expected”. However, neither the proportionality threshold nor the types of information to be provided have been defined within the DSM Directive, leaving open the question of how Member States will interpret these elements during the implementation phase.

Article 20 – The “Bestseller” Right

Article 20 offers authors and performers the right to claim additional, appropriate and fair remuneration, beyond what was originally agreed by the author or performer in the original contract. This right can be enforced against the original contracting party, or against third parties to whom rights to exploit the author’s works have subsequently been assigned or licensed. The mechanism is designed to operate where authors and performers originally agreed remuneration that was disproportionately low when compared to the revenues later generated by the work or in question. The right covers every type of payment, including lump sum payments, which are common in creative industries (particularly for early-stage authors and performers).

While the concept of a “bestseller” right is familiar to certain civil law jurisdictions (the Dutch Copyright Act, for example, already contains such a clause), it is something of an alien concept to common law jurisdictions such as the UK.

The potential implications of the new right are significant, and create new risks for copyright-exploiting organisations such as publishers or film production companies. As a result of their coming into force, payments that have been contractually agreed may need to change during the course of exploitation of a work, in order to rebalance remuneration that would be considered disproportionately low with the benefit of hindsight.

As this right can be enforced against third parties to whom rights have subsequently been granted, it will be important to consider the allocation of risk between the first corporate owner of a work and the party to which it subsequently grants rights.

One crucial question that will need to be answered is how to address what level of remuneration is “disproportionately” low. This will require an assessment not only of the compensation actually

agreed in any relevant contract between a creator and exploiter of copyright, but also to look at the source of revenue that could be considered a relevant exploitation. Recital 78 refers to merchandise revenue as being potentially applicable, for example, but deciding whether or not it is a relevant revenue stream is likely to be subject to dispute. Some guidance may be provided by countries that already have a similar right on their statute books. German law has a mechanism for additional remuneration to cover situations where the original remuneration is “*conspicuously disproportionate*”. The court assesses what would have been reasonable remuneration with the benefit of hindsight; where the actual remuneration is less than half of this amount it will always be considered “disproportionately” low.

Article 23 – Common Provisions and Other Overarching Issues

Article 23 provides that any contractual provisions targeted at preventing compliance with the requirements of the Chapter Three provisions shall be unenforceable. Additionally, recital 81 makes clear that choice of non-EU law for intra-EU contracts should not deprive authors and performer of those rights where all other elements relevant to a situation are located within an EU Member State. However, what is not clear is whether a jurisdiction clause agreeing a non-EU court could prevent these protections, as the contract would not be regulated by EU private international law.



Phil Sherrell heads Bird & Bird's international Media, Entertainment and Sport sector, a 130-strong team of sector-focused lawyers spread across our offices and practice areas. His day job is as a litigator, handling complex intellectual property and media law disputes, often with a digital aspect.

Cases of particular note include:

- *Mattel v Zynga* (obtaining a Court of Appeal victory for Mattel in relation to the iconic Scrabble brand);
- *Warner Music & Sony Music v Tuneln* (UK test case on liability for linking to copyright-protected content);
- *Metropolitan International v Google* (one of the leading cases on search engine liability for defamatory content); and
- *Meltwater v the Newspaper Licensing Agency* (the Copyright Tribunal dispute which set the model for the licensing of online news content).

Phil also sits on the Copyright and Technology Working Group of the British Copyright Council and regularly appears in the media on copyright and other media law issues.

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