BABY, ONE MORE TIME?: THE UK AND THE EU COPYRIGHT DIRECTIVE

What seems like a lifetime ago back in January 2020, the UK government announced that it had **no plans** to implement the EU's **Copyright Directive** (2019/790) into national law. In the UK, the EU Copyright Directive, like the **Unified Patent Court project**, was a casualty of Brexit (on the latter, see Lens posts **here** and **here**). So it was with great intrigue that the suitability or otherwise of the EU Copyright Directive ended up as a **term of reference** in a Digital, Culture, Media and Sport Committee (DCMSC) consultation on the economics of music streaming in the UK (see Lens post **here** on initial terms of reference). To put it mildly, the hearing sessions were combative, with one MP describing one boss of a major record label as "**living in cloud cuckoo land**".

The recently released report on the **"Economics of Music Streaming"** created further intrigue for copyright lawyers. Despite saying at least four times in its report (at [142] and [178] of the main report and at [16] and [23] of the conclusions and recommendations) that the government "has repeatedly told us" no EU Copyright Directive, the DCMSC went on to make a number of key recommendations that look very similar to those in the EU Copyright Directive. The reasoning provided is ensuring that the UK keeps pace with the changes made by the EU Copyright Directive. So the question is: despite suggesting that the UK will control its own copyright destiny in a post-Brexit world, are we going to end up with a UK-ish version of the EU Copyright Directive anyway?

In this post, we briefly look at three DCMSC recommendations which suggest that a version of the EU Copyright Directive might be on the way to the UK.

Key provisions of the EU Copyright Directive and DCMSC's recommendations

1. *Potential liability for online platform operators for copyright-infringing content uploaded by their users (Article 17)*

The road towards Article 17 has been paved with controversy. It provides, among other things, that online platforms operators may be liable for unauthorised acts of communication to the public and making available to the public of copyright works. This is unless they can demonstrate that they used "best efforts" to obtain authorisation from the right holders for works uploaded by users (i.e. a licence) and used "best efforts" to remove works for which right holders have not consented but provided "the relevant and necessary information". They must also act "expeditiously" to remove or disable access to such infringing content and prevent their future uploads.

Article 17 also states that, where an online platform operator performs an act of communication to the public, or an act of making available to the public, the safe harbour from liability under the **E-Commerce Directive** (2000/31/EC) does not apply to it. This is a departure from the recent case of ***Peterson v Google LLC and Elsevier Inc v Cyando AG***, where the CJEU held that, under the old law applicable at the time, online platform operators can rely on the safe harbour, provided that their conduct is merely technical, automatic and passive (see Lens post **here**).

The DCMSC's report observed (at [171]) that the safe harbour gives online platform operators that host user-generated content (UGC) a competitive advantage over other services. This undermines the music industry's leverage in licensing negotiations by providing UGC-hosting services with broad limitations of liability. This has, in turn, contributed to a suppression in the value of the digital music market. The DCMSC stated (at [177]) that Article 17 is a solution to the safe harbour but that it was not a "silver bullet".

Whilst the DCMSC does not explicitly recommend the adoption of Article 17, it recommended (at [178]) that "[as] a priority, the Government should introduce robust and legally enforceable obligations to normalise licensing arrangements for UGC-hosting services, to address the market distortions and the music streaming 'value gap'. It must ensure that these obligations are proportionate so as to apply to the dominant players like YouTube but does not discourage new entrants to the market."

2. *Right to transparency for artists on licensing deals (Article 19)*

Article 19 gives authors or performers a right to receive up-to-date information, on a regular basis (and at least once a year), from those to whom they have licensed or transferred exploitation rights in their works. The information must cover modes of exploitation, all revenues generated and remuneration due.

The DCMSC stated (at [142]) that artists in the UK should not be in a worse position than they would have been had the UK remained in the EU. They accept the need for

transparency and that artists should have "sight of the terms of deals where their works are licensed, on request and subject to non-disclosure". Consequently, the DCMSC recommended that there should be notification requirements for relevant parties to provide clear information and guidance to artists about the terms and structures of every deal where artists' works are licensed, sold or otherwise made available, and the means and methods by which monies that are being distributed to them are calculated, reported and transferred.

3. *Right to contract readjustment (Article 20)*

The report observed that a contract readjustment between a record label and an artist may address the inherent advantage major record labels have in being able to leverage the risk of not recouping the advances made to artists in exchange for poor royalty terms and other costs being subject to recoupment. The DCMSC stated that the EU Copyright Directive gives (and countries such as Germany and the Netherlands already give) artists a right to contract readjustment. Under Article 20, unless there is an applicable collective bargaining agreement providing for a comparable mechanism, artists can ask for additional appropriate remuneration from the party they entered into a contract for the exploitation of their rights. This right applies if the remuneration previously agreed is disproportionately low compared to the revenue and benefits derived from exploitation.

The DCMSC recommends (at [123]) that the Government introduce a right to contract readjustment "where an artist's royalties are disproportionately low compared to the success of their music" noting that this would particularly benefit performers on outdated legacy contracts.

One more time?

The DCMSC's firm recommendation (at [41]) is that "music streaming needs a compete reset". Is it also saying that copyright generally, and digital copyright in particular, needs a "complete reset" to be similar to the EU Copyright Directive? This would seem to be the case, given the underlying tone of the DCMSC report and its recommendations.

Such a message would also be consistent with the recent decision in ***TuneIn v Warner Music*** where the Court of Appeal were, in effect, invited by TuneIn to disregard years of EU copyright case law and start again post-Brexit. Sir Geoffrey Vos (who was in agreement with the other Lord Justices) declined to do so instead saying that (at [198]) "it would be undesirable for one nation to depart from the CJEU's approach without an exceptionally good reason." (See Lens post **here**).

Not surprisingly, the DCMSC report has generally been well-received by the music industry. For example, Horace Trubridge, General Secretary of the Musicians' Union made a **statement** that "it's time to make the most of this rare, cross-party consensus, bring British copyright law up to date, show Global Britain leading the fight to protect the intellectual property of artists and creators, and to make the UK the best place to be a musician."

For now, we wait for the UK Government to **give us sign** … EU Copyright Directive one more time?

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