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The Digital Single Market and Implications for Book Publishers

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What is the Digital Single market and what is it trying to achieve?

The European Commission's proposals to develop a Digital Single Market in Europe have given rise to some well-publicised concerns in the audio-visual sector. Whilst portability and a ban on geo-blocking may not cause the same level of concern for publishers, where the majority of digital content is downloaded rather than streamed, that doesn't mean that the industry can ignore what is happening.

The European Commission has made various proposals on copyright reform as part of its Digital Single Market strategy, which are summarised below insofar as they impact the publishing sector (leaving aside, for now, the question of whether or not the UK will still be subject to the jurisdiction of the EU after June's referendum).

Both the Commission and the European Court of Justice have been grappling with the impact of digitization on the creative industries and the exploitation of content. In May 2015, the Commission published its long-awaited Digital Single Market strategy document. The strategy is an aggregation of a number of different policy areas the aim of which is to create the right environment for e-commerce and digital business to flourish in Europe and to try to replicate to some extent the advantage that US start-ups have in terms of the scale of their home market.

Underpinning the Commission's strategy are three key pillars which relate to:

1. removing the differences between the online and offline worlds when it comes to the movement of products and services throughout Europe;
2. working to ensure that Europe has high speed broadband networks and a competitive telecoms regulatory environment; and
3. enabling investment in technologies that will help to create the environment that Europe needs for a strong digital economy, such as cloud computing, as well as encouraging research and innovation in the sector and, importantly, developing digital skills.

Under these three pillars are a whole host of specific actions and initiatives including:

- making cross border e-commerce in relation to physical goods easier. This involves addressing things like the costs of cross border parcel delivery and the administrative burden that arises from having to deal with different VAT regimes (an issue that is very keenly felt in the book publishing industry due to the differences in VAT treatment for physical and electronic books);
- bolstering consumer protection and confidence in cross border e-commerce;
- creating incentives for investment in high speed networks and better cooperation between member states on the management of radio spectrum; and
- privacy and cyber security – both very hot topics at the moment for all industries.





What specific proposals has the Commission put forward?

In December last year the Commission published a further Communication detailing some specific steps that it is taking in respect of copyright and its vision for the future - the creation of what the Commission calls "a modern, more European copyright law". This is not about unified copyright law across Europe at this stage but that is part of the Commission's vision. At this stage though the Commission's proposals are limited to four main areas:

1. Harmonisation of copyright exceptions;
2. Clarifying the role that intermediaries play in relation to copyright protected content;
3. Modernising enforcement; and
4. Portability and cross border access to digital content such as videos, games and e-books

1. Harmonisation of copyright exceptions

Where a specific exception exists in legislation the consent of the copyright owner is not required for the use of copyright work. Under the current regime, whilst there is a list of copyright exceptions contained in European law, these are largely optional for member states. This means that the exceptions that have been implemented differ from member state to member state.

It is not the Commission's intention to open up the whole list of exceptions or to make all of them mandatory but to look at specific exceptions that could be changed to create more scope for innovation. There had been a fear that the Commission would try and introduce a US-style fair use exception, but this has not manifested. Instead it is particularly focused on the exceptions relating to education, research and access to knowledge, notably a text and data mining exception for scientific research purposes.

The (relevant parts of the) communication from the Commission in December relating to text and data mining state refer to an exception that would allow public interest research organizations to carry out text and data mining of content they use for scientific research purposes.

The publishing industry has generally been resistant to proposals to harmonise copyright exceptions – the danger being that any expansion of the scope of the

copyright exceptions will inevitably lead to authors and creators losing out. This proposal around text and data mining has given particular cause for concern on the basis that it is not clear who the "public interest research organisation" are that would benefit from this or why the current commercial licensing models that exist are not adequate to address this.

Although it has stated that its next step will be to publish legislation to implement the WIPO Marrakesh Treaty (by introducing an exception in relation to special formats of print material to benefit those with print disabilities) we are waiting to see the detail on this.

2. Clarifying the role that intermediaries play in relation to copyright content

Online intermediaries such as search engines, social networks and app stores are also under the spotlight. In December 2015 the Commission launched a consultation looking at the role that these types of organisations play in the online ecosystem.

Some argue that many online platforms that claim to merely host third party material are not simply intermediaries and have in fact built very successful businesses on the back of providing curation, search and discoverability functionality.

The Commission believes that there is uncertainty about what online acts should and should not be captured by the definitions of "communication to the public" and "making available". The basic principle is that these acts of exploitation should be subject to authorisation from the copyright owner and appropriate remuneration but exactly what is captured by this has become an area for debate. Certainly organisations such as the PRS – which controls the right to authorise public performance of musical works – believe that the activities of online intermediaries fall within the scope of "exploitation".

The Commission is also keen to look at the process for take down of illegal or infringing content as this can be ineffective and burdensome.

3. Modernising Enforcement

The Commission has also committed to looking at ways of modernising enforcement which suggests further support in the fight against piracy which will of course be welcomed by rights-holders across the media landscape. Although the pirating of e-books is not as prolific as with other copyright works it is clearly still a concern. The Commission has committed to working on a European framework to “follow-the-money” and cut the financial flows to businesses which make money out of pirated content. Again we are still waiting for the details, which are expected later this year.

4. Portability and cross border access

This is the area where there has been the most concrete action so far by the Commission, which published a draft regulation on the portability of digital content before Christmas. This legislation will enable consumers to take digital content they have lawfully paid for or subscribed to with them when they travel within the EU and is expected to come into force in 2017. The timing is not accidental as this will coincide with the end of roaming charges, which makes sense but also highlights the political agenda behind some of these proposals, i.e. demonstrating to European citizens what the EU is doing for them in the hope of stemming the rise of anti-Europe sentiment in some member states (we will see in June if that has worked in the UK!).

The Commission has been very vocal about the need for consumers to be able to access online services wherever they are within Europe. A user's ability to do this is often limited due to the territorial nature of copyright and the complications and costs involved in clearing rights on a pan-European basis, not to mention the fact that territorial licensing is fundamental to the business model for producing a lot of creative content.

The film and TV industry has worked hard to educate the Commission on the way in which its content is developed, produced and financed, demonstrating that removing the ability for producers in Europe to license rights on a territory by territory basis is likely to lead to a loss of cultural diversity because of the pressure this would put on financing models – which is precisely the opposite of what the Commission is hoping to achieve.

There is widespread scepticism about the extent to which there is a real market failure here that justifies legislative intervention. However, a limited ability for consumers to take digital content on holiday with them is seen as the lesser of two evils when compared with the prospect of full cross border access.

Portability of services is clearly less of an issue for the publishing industry as e-books are usually downloaded onto a device rather than streamed. Plus the portability regulation (as currently drafted) applies only to services to which users “subscribe”. However the industry still needs to take note because:

- subscription models do exist for e-books and as these have proven successful for TV content, movies and music there is a reason to believe that they will have a place in the e-book market as well;
- any devaluation of audio-visual rights might indirectly impact the book publishing market as pressure on the margins of TV and movie studios could lead to a decrease in the value paid for book options; and
- the Commission has specifically stated that “restrictions for [e-books] in the future cannot be excluded.”

And of course the Commission has looked specifically at e-books over the years with the previous Vice-President Neelie Kroes taking a particular interest in this market and the principle that there should be no barriers for consumers to acquire e-books across territorial borders, platforms and devices.

Finally, as mentioned above, the portability proposal is just the start. The Commission has made it clear that its vision for the future involves the gradual erosion of obstacles to cross border access to copyright content and the European wide circulation of copyright works. We will wait to see how that unfolds.

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