

Max Planck Institute Director Reto Hilty: Europe Might Miss Chance For Real Copyright Law Modernization

by Monika Ermert

With the final vote over Europe's [new copyright directive](#) being expected during the Parliament's [March 26th session in Strasbourg](#), two decades of the copyright wars seem to culminate in another hot battle. Thousands of citizens have taken to the streets during recent weeks warning that the intended changes to liability fundamentally change how citizens can use social media platforms in the future. Article 13 will make providers liable for any copyright violation, pushing them to automatically filter content uploaded by their users. Article 11, the so-called snippet law or link tax, has been pushed for by large publishers in order to compel Google and the likes to share their revenues. Amidst the ongoing fight, [Reto Hilty](#), Director of the Max Planck Institute for Innovation and Competition (MPI) in Munich, took a cool, analytic look into the two most debated provisions and concludes that the reform—even after a number of amendments – misses on what it originally set out to achieve: adapting copyright to digital times. [Note: this interview by IP-Watch writer Monika Ermert first appeared in German in [heise online, here](#).]

Intellectual Property Watch: You and your colleagues at the MPI for Innovation and Competition last year strongly recommended against adopting Article 13 in its original form, because you found fundamental rights violated and provisions contradictory to current EU law, namely the eCommerce Directive. Is the amended version expected to be put to the European Parliament's vote on 26 March ready for adoption?

RETO HILTY (HILTY): Not really. Some obligations for providers covered by the draft legislation have been watered down. The provisions also will not be applied to new market entrants who do not reach a certain revenue threshold. In addition, member states are called on to ensure that users can exercise rights granted to them through copyright limitations and exceptions, for example the right to parody. Nevertheless, essential problems remain. Providers who will not be able to license certain content will be obliged to make that content unavailable on their site. Another problem is that amendments introduced to allow for compromises have added complexity.

Q: The amended version intends to be more precise about who which providers will be subject to the legislation. Collaborative software developers or non-commercial online encyclopaedias will be exempted. Are the provisions clear enough here?

HILTY: It is certainly reasonable to exempt for example platforms like Wikipedia. However, exemptions necessarily result in questions about where to draw the line. Legal uncertainty is to some extent inevitable. You may say that a provision that is not 100 percent precise can allow for some flexibility during implementation. This might be a good thing given that future business models are unknown to us today. A sufficiently open legal norm might survive when new developments in the market warrant interpretation of legislation. This prevents that legislation has to come up with fine-tuning all the time.

Q: So this is a positive change in the draft?

HILTY: It depends on how you look at it. The price tags for more flexibility are usually extensive referral proceedings at the European Court of Justice. That is what we saw after adoption of the 2001 InfoSoc Directive. Two decades later national courts still refer essential questions to the ECJ to determine the implications of the EU law. It would have been nice to prevent this by passing a directive that adds clarity and consistency to the existing EU copyright regime. Sadly, that is not what we will get. On the contrary, the new directive creates a variety of new questions.

Q: In the MPI statement from last year you criticized inconsistencies between the draft new directive and the EU eCommerce directive. Has this been resolved by the approach to declare so called "online content sharing providers" liable for content posted by their users?

HILTY: It is quite common in European legislation that regulatory subject matters overlap. If contradictions arise as a result, this is problematic. If they are eliminated by clarification, this is positive in principle. The proposed amendment now tries to establish a kind of exclusion for the basic exemption from liability according to the E-Commerce Directive. Such a special regulation is not only possible, but ultimately unavoidable if the proposed Article 13 is to take effect. Another question is whether such a special provision is desirable from a legal policy point of view and makes sense from a factual point of view.

Q: One major point raised by opponents of article 13 is that exemptions for start-up companies would not extend to small companies, once they are in the market for more than three years. Are small platforms discriminated against?

That's probably not quite true. Although it is right that the privilege for start-ups is limited to three years, it is precisely this "hard" limit that serves legal certainty. In addition, however, the relevant provision provides for several criteria to determine whether a provider has fulfilled its obligations. In this respect, consideration shall be given to the nature of the service, the audience and size, as well as the type of works posted by users (currently Article 13(4a)(a)).

We will see what that helps. The national legislatures have enormous room for interpretation by implementing this directive. In any case, they hardly can simply copy and paste this provision; instead, they need to make more precise specifications for legal practice. However, the European Court of Justice will have to judge whether such provisions comply with EU law. One may criticize the proposed provision in this respect, but its purpose is precisely to avoid overburdening smaller providers with these new obligations.

Effects of Article 11

Q: Let's take a quick look at Article 11, the "snippet law". Is that something that is overly burdensome for smaller companies?

HILTY: That is a completely different question. The planned neighboring right for press publishers aims at ensuring that news services shall only be allowed to use shortest text parts from articles – so-called snippets – if they pay for them. The provision must be criticized as ignorant of the actual context. It is certainly true that such news services do not work without news, and it is of course the

press publishers who invest in this content. But it's too simplistic to not figure in that press publishers substantially benefit from traffic created by the platforms. Whether they can really earn something with such occasional visitors depends on their business models and in particular on how they place their advertisements.

Some press publishers may not want such occasional visitors, but then they have the possibility to prevent linking by simple technical means. The vast majority of press publishers, however, do not want to prevent this. Instead, they want to get a share of the revenue of the news services. For large platforms like Google, these revenues certainly are considerably higher than the ones a normal press publisher can make. For smaller, specialized, possibly local, providers, however, that might not be the case. That leads to a paradoxical effect that a giant like Google could afford the remuneration, but can use its dominant market position to avoid any paying.

Q: Snippet legislation passed in several countries illustrate that implementation did not result in positive effects for publishers...

HILTY: Correct. Google just stopped its news service in Spain after the passing of a mandatory remuneration of publishers. In Germany, where a neighboring right for press publishers "merely" was introduced to allow the parties to negotiate licenses, practically all press publishers caved in and granted free licenses to Google to avoid losing the traffic.

Q: The proponents of the directive argue that the EU-wide implementation will bring Google to its knees, do you agree?

HILTY: Indeed, the proponents argue the EU market would be too big to lose for Google. My expectation is rather that Google will neither need pay, nor withdraw from that market. Article 11 also "only" prohibits the reproduction and make available to the public for the purpose of pushing for licensing like in Germany. But Google's market position quite possibly is big enough to compel the publishers to give them a free license. Publishers will see it as the only way to prevent losing valuable traffic. Smaller providers in contrast lack that kind of market power. In addition, the pressure from the streets may quickly grow as soon as people in the EU cannot reach their favorite content with the ease and speed they got accustomed to over years thanks to the big players. Smaller providers, in contrast, certainly will have much more difficulties to mobilize the masses in such a way.

Illegal Content

Q: Back to Article 13. Can smaller providers really carry the burden to license for content posted by users on the one hand, yet still face the risk to becoming liable?

HILTY: I do not think that the size of the company is what matters when it comes to resolving the contradictions that remain in Article 13. One core contradiction is that on one hand license fees are to be generated, whereas on the other hand not licensed content shall be made inaccessible. While this may look sensible on first glance, these goals are hard to reconcile. First, to negotiate licenses will only be possible for content where the rights owner can be identified without too much effort. For commercial movies or music for example, this may be the case.

But those rights owners might opt to not grant licenses to any other platform in order to avoid cannibalizing their regular, commercial online service. If the provider therefore can't get a license, but infringing content is nevertheless uploaded, Article 13 obliges him to block such content. For a specific, commercially available work, it might be relatively easy and automatable to check whether or not it is covered by a license. This does not necessarily depend on the company size of a provider. However, this obligation of the provider amounts to precisely that kind of general monitoring which is not only not to become a duty under paragraph 7 of Article 13 of the new directive, but also not to be imposed on a provider under Article 15 of the e-commerce directive.

For user-generated content, in contrast, decisions about potential copyright violations are much more complicated. If the respective content is based on a copyright protected work that has been adopted by a user, the rights owner has to agree before such content legally can be uploaded to a social network. In practice, such an agreement will hardly ever be given. Such content consequently is illegal and the provider is obliged to block it, as long as there is no statutory exception that allows its publication, for example the right to parody works. The newly inserted paragraph 5 of article 13 now focusses at such legally permitted uses. It aims at preventing such permitted uses from being undermined by the provider's obligation to block illegal content.

Q: Is this a workable solution to prevent violations of freedom of expression rights?

HILTY: I doubt it. It is very hard to imagine how this could prevent at least temporary restrictions. Even without a general monitoring obligation a provider will have to take action in the light of its far-reaching obligations under paragraph 4 at the latest when a right holder claims an infringement. In case of doubt, it will block a content first. If the uploading user defends his position, a dispute resolution or, if necessary, a court mechanism shall apply. This mechanism shall make sure that a content uploaded legally shall not remain blocked. Legal proceedings might take several years, though, because highly complex questions have to be answered here. For example, do memes, which combine protected pictures with short, catchy texts, constitute a quote, a caricature or a parody or are they just the manifestation of free expression (not permitted, however, due to a lack of a general exception)? It is impossible for any provider to judge this, no matter how big he is.

Q: Some of the opponents warn that platforms like YouTube, Twitter, Instagram will vanish. Do you agree?

HILTY: The platforms can continue to operate, as long as there are some licenses granted. But the content available might be considerably reduced.

Q: The MPI in its statement last year urged to ease licensing. Has this recommendation been addressed in the new text?

HILTY: No. The basic system remains unchanged. Either rights owners grant contractual licenses, or uploaded content remains illegal and has to be blocked. The idea of facilitating licensing goes a different way. It is inspired by current legislation that grants statutory permissions for certain types of uses. Rights owners cannot prohibit such uses, but they are entitled to remuneration, which is collected by collecting societies, instead of the rights owners themselves. The prime example for this concept was the permission of private copying in Germany in 1965 as a reaction to newly emerging reproduction technologies (such as tapes). The core advantage of the approach is to avoid

criminalizing users. Today, however, it is no longer just a question of allowing passive uses, such as private copying, for which a prohibition is hardly enforceable. It is now a matter of ensuring that copyright does not hamper user creativity that bases on pre-existing works. This is the case, however, when the distribution of their creations via social networks is not permitted.

Such action is a social reality today, and copyright law cannot ignore this if it is not to increasingly lose acceptance. To rely on blocking of such content instead is just as unrealistic as preventing private copying. As there is little chance that rights owners will grant licenses for such creative use, the legislature has to step in. Similarly to the regulation of the private copy, copyright legislation can replace the consent of the right holder based on a statutory permission. This permission can be subject to various conditions, for example uploading only for non-commercial purposes or the condition that the exploitation of the underlying work by the right holder is not unduly impaired. Above all, the condition may be that copyright owners have to be remunerated. Instead of making the creative user pay himself, however, the provider should be the point of payment. He is anyway the one asked for payment, albeit according to the current draft of Article 13 directly to the rights owner and not to a collecting society. In one way or the other, providers will allocate these costs from the users of their platforms.

Q: You touched on the attempt to avoid a general monitoring inconsistent with the eCommerce Directive. According to the draft text, takedowns cannot be automatized, but shall be checked by a person. How would that look like?

In fact, an obligation for general monitoring is not formally laid down, but only obligations of conduct are imposed on providers falling under Article 13. They especially have to take action if they are notified of infringements. It is question, however, whether they are going to take the risk of infringing such obligations, or whether they are going to install an automated filter system for safety's sake – even if they are not formally obliged to do so. It is precisely the requirement in case a user objects to a performed takedown, according to which the review of the takedown has to take place by a human, that insinuates the assumption of those who have come up with this mechanism that automatic systems, presumably based on AI, would filter out content not covered by licenses in the end.

Q: What is your impression of the legislative process so far? Would more time help to make the draft better from a legal point of view?

HILTY: The very controversial debate illustrates how politicized copyright law has become and how much it revolves around different lobby groups who push to have their positions asserted in the future directive. More time would not change much in that regard. When it comes to the legal aspects, every single problem is on the table. How effective the new provisions will be remains to be seen. On the whole, one may wonder whether it would be a great loss if the entire directive were to fail, which still seems possible if the compromise worked out in the trialogue were to be rejected by the EU Parliament.

I think a rejection of the current draft would provide a new chance. One has to acknowledge that the originally declared goal of the directive was to modernize copyright to make it fit for the EU digital single market. But the goal got very much lost on the way. The prime motive now seems to be – as

articles 13 and 11 illustrate – to satisfy the interests of certain copyright industries. Hardly any account is taken of the fact that copyright has become an obstacle to many new and promising business models. It tends to be overlooked that some of the proposed provisions make it much easier for right holders to escape innovation competition on the supplier side.

This is also where the bigger picture has to be seen. An outdated copyright law is ultimately to the detriment of consumers in Europe, who are deprived of offers that are naturally available in other regions of the world. But also the European economy is threatened with damage if we stick to an outdated copyright system. Europe's ambitions to keep up with the global pace in artificial intelligence or even to take a lead role there appear to be unrealistic if we are not prepared to re-consider much more fundamentally the functions of copyright in the digital world. A new attempt towards a forward-looking copyright directive after the elections in May this year would provide us with the opportunity to do so. If the now negotiated version of the directive enters into force instead, it will take years before we can take new – and compared to what the current draft can achieve perhaps much more important – steps towards the modernization of copyright.

Q: Professor Hilty, thank you.