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The EU's Digital Copyright Directive - where are we now?

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In 2016 the EU proposed the "[Directive on copyright in the Digital Single Market](#)" (the **Directive**). Since then, the Directive has been widely debated at EU level and has been the subject of intense campaigning and lobbying, with various interested parties writing numerous open letters to the EU Council's Working Party on Intellectual Property, the European Commission and the European Parliament, setting out their concerns about the proposals. Such campaigning has contributed to the slow progress of agreeing and finalising the wording of the Directive and even stalled negotiations shortly before final trilogue discussions were due to take place.

Despite these earlier attempts to hinder its progress, according to a [press release](#) from the European Parliament on 13 February, an agreement has now been reached on the wording of the Directive.

What is the Directive about and why has it been so difficult to agree?

The Directive was proposed in order to harmonise and modernise copyright laws across Europe. It seeks to ensure that content creators benefit from the online world in the same way that they do from the offline world and (in theory) to ensure that existing rights are better enforced, and existing obligations are better respected.

The most controversial sections of the Directive have always been articles 11 and 13.

Article 11

This requires news aggregator sites such as Google News or Bing News to pay publishers for using snippets of their articles. According to the press release, under the Directive these sites will be able to share hyperlinks to news articles together with "individual words or very short extracts" freely. In reality, many platforms regularly include more information than this and may therefore still be charged more often than not. Until we see the final wording of the Directive, there remains a lack of clarity around when charges may be imposed (and what such charges would be). Sites have been opposed to the proposals up until now and this is unlikely to change.

Article 13

Sometimes known as the "meme ban", this provides that platforms such as Twitter and YouTube which host user-generated content, will have to proactively search for and take down *any content* that infringes copyright. This is a move away from the current situation where it is generally left to copyright owners to enforce their rights (although platforms should remove infringing content once they are notified of it).

Although the latest news confirms that some uploaded material, such as memes (a typically humorous image, video or piece of text conveying a popular social idea that spreads rapidly between viewers via the internet) can be shared freely, previous concerns that Article 13 could result in sites removing considerable amounts of content including memes, which are usually based on copyrighted images, are unlikely to have gone away. Arguably memes should be covered by copyright's parody defence, however campaigners have been concerned that

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Article By

[Carlton Daniel](#)

[Squire Patton Boggs \(US\) LLP](#)

[Global Business IP and Technology Blog](#)

[Communications, Media & Internet](#)

[Global](#)

[Intellectual Property](#)

[European Union](#)

Article 13 would extend to cover such use, particularly if sites have to use automated methods to search for and remove content, as such automation will not be able to tell the difference between legitimate, and infringing, use of third party copyright.

Articles 11 and 13 are both included in the final wording of the Directive.

Where are we now?

Towards the end of 2018 the European Council, Parliament and Commission were in the midst of trilogue talks, where the final wording of the Directive is privately negotiated. Despite the numerous open letters the European Commission received, and trilogue negotiations being temporarily stalled while Germany and France reached a compromise position on some key provisions, we now have an agreement on the wording of the Directive.

The final wording has not yet been published but the press release includes assurances from [Alex Voss](#), EPP Germany, that the deal reached will correct a situation which “has allowed a few companies to earn huge sums of money without properly remunerating” creatives and journalists but that will maintain the internet as “a space for free expression”.

Interestingly, start-ups are set to be subject to lighter obligations. A start-up is a platform that has been active for less than three years, has an annual turnover of less than €10 million and fewer than 5 million unique monthly visitors to its website.

Next Steps

The next step is for the agreed wording of the Directive to be approved by European Council representatives and MEPs, with one source saying this is expected to be a mere [formality](#). No revisions to the final text are permitted at this stage meaning EU lawmakers have to vote on the text of the Directive, including articles 11 and 13, as it has been agreed.

The vote could take place in March or April, shortly before the European Parliamentary elections are due to take place. If the Directive is passed, it may be unpopular with voters and put current MEPs at risk of losing their seats. If the Directive is rejected, it will carry over into the next parliamentary session, to be dealt with by potentially a new set of MEPs with different views on the wording of the Directive, which would delay the Directive becoming law.

Once the wording of the Directive is released, it will be heavily scrutinised by all parties.

And what about Brexit?

Assuming the UK exits the EU on 29 March 2019, if the Directive is not passed before that time, then it will not apply to the UK. Even if it does come into effect, the UK will have up to 24 months to implement the necessary changes.

In the event of ‘no deal’, it will remain to be seen whether the UK government implements similar legislation of our own, or chooses to take a different approach – particularly in relation to the controversial articles 11 and 13. In the meantime, we await the outcome of the final vote by MEPs before speculating on what the UK’s approach will be.

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