

# Copyright holders one step closer to better protection in digital market

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The European Parliament and EU Council have recently passed a new directive which aims to update copyright law for the digital era. Importantly, it introduces two controversial measures, commonly referred to as the “upload filter” and the “link tax”. These measures provide copyright holders with extra instruments to monetise their work and bridge the “value gap”.

The directive substantially improves the legal position of right holders in the digital market. For their part, information society service providers such as Facebook and YouTube will now have to put systems in place to filter copyright-protected content and to actively conclude licence agreements with right holders and publishers.

Member states must implement the directive by April 2021.

## Development

The directive – also known as the EU Copyright Directive – aims to update copyright rules for the 21st century. Most copyright rules pre-date the internet, and are not well-suited to deal with today’s issues. This directive aims to improve protection for copyright holders by creating instruments to monetise their work used by information society service providers (ISPs), and to consequently stimulate the creative industry. It also aims to safeguard the use of copyright protected works for private and scientific or educational purposes.

ISPs, governmental and non-governmental authorities and other stakeholders heavily criticised the draft directive. The initial proposal included a universal obligation for ISPs to conclude licensing agreements with relevant right-holders of the works that were user-uploaded to their platforms. ISPs were to take appropriate and proportionate measures to ensure protection of the works, which could include filtering software, popularly referred to as “upload filters”. The draft directive also included an obligation for ISPs to remunerate publishers for the digital use of press publications, commonly referred to as the “link tax”. This was heavily criticised because it was anticipated that ISPs would not be able to share news effectively, and because the exceptions were notoriously vague.

The Committee’s draft directive was rejected by the European Parliament and then substantially revised. The amendments included the exclusion in Article 17 (formerly Article 13) of small ISPs with a turnover below EUR 10 million and offered those platforms a softer regime, in which they are required to act expeditiously upon complaints of copyright infringement. Article 15 (formerly Article 11) was also amended to exclude “individual words” of news articles being reproduced by ISPs. Although hyperlinks were already subject to an exception in the directive, they may still be protected by copyright law under existing

European jurisprudence. The European Parliament approved the revised directive on 26 March 2019, followed by final approval of the Council on 15 April 2019. Member States have two years to implement the directive in national law.

## Article 17: “upload filter”

ISPs perform an act of communication to the public when they provide access to user-uploaded copyright-protected works. As such, Article 17 now provides that ISPs can be held liable for copyright infringement by way of user-uploaded content. They must therefore conclude licencing agreements with copyright holders as ISPs often profit from copyright-protected works through viewership and ads for which they do not pay licence fees. Article 17 provides that copyright holders will now be compensated through these ISP licencing agreements.

Article 17 provides a “safe-harbour” exception. An ISP is not liable for copyright infringement if it can demonstrate that it:

- used best efforts to obtain an authorisation from the copyright holder;
- used best efforts to ensure the unavailability of the protected content;
- acted expeditiously to remove the flagged content; and
- used best efforts to prevent future uploads.

The unavailability requirement of this “safe-harbour” effectively obligates ISPs to put a content-filter in place. This “upload filter” has been heavily critiqued as it may have the potential to slow down the user experience of the ISPs platform, and may be costly to introduce. Some experts deem that filtering technology is not sufficiently equipped to understand the nuances of what is, and what is not allowed under copyright law, and may potentially limit freedom of speech. The UN Special Rapporteur has expressed [concerns](#) in this regard.

## Article 15: “link tax”

ISPs often share snippets of news stories through which they attract viewership and ad revenue, but over which they fail to give credit to the press publishers who originally provided the news. Article 15 now provides press publishers established in a member state with a neighbouring right to their publications. Therefore, ISPs must now obtain the prior permission from press publishers to share their publications, through which the press publishers can generate income.

Article 15 is critiqued because it is still unclear when linking is subject to prior permission. Individual words and “very short snippets” are allowed, but yet not defined. Similarly, hyperlinks are allowed, but may still amount to copyright infringement under current EU case law. Furthermore, press publishers may choose to opt out of this neighbouring right, in which case their articles may be more attractive for search engines to display, and as such, they will receive more viewership. Economists therefore doubt whether Article 15 will yield its intended result.

## Other provisions

The directive also contains an exception for text and data-mining methods used for scientific and educational purposes by research institutions. The preservation exception has been extended to

include research institutions and public service broadcasting organisations, thus expanding the digital actions which educational and scientific institutions may undertake with regards to copyright-protected works.

### Experts



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