



# LEGAL ISSUES



Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>  
**Jack Montgomery** (Western Kentucky University) <jack.montgomery@wku.edu>

## Legally Speaking — European Union Promises Big Changes in Copyright Law

by **Bill Hannay** (Partner, Schiff Hardin LLP, Chicago, IL) <whannay@schiffhardin.com>

### Controversy Continues over New EU Directive, But it Does Create Safe Harbors for Librarians

On March 26, 2019, the EU's Parliament adopted a new "Directive on Copyright for the Digital Single Market." The leadership of the EU claims that the directive will modernize and improve copyright rules on a market-wide basis, but the voting was anything but unanimous. It passed 60% to 40% (or 348 in favor, 274 against). Five countries refused to approve the directive: Italy, Finland, Sweden, Luxembourg and the Netherlands, and three other countries (Belgium, Estonia and Slovenia) abstained. See generally <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>.

The EU leadership claims that the new law will have three major benefits: (1) it will ensure better choice and access to content online and across borders; (2) it will improve copyright rules for research, education and cultural heritage purposes; and (3) it will achieve a well-functioning marketplace for copyright.

The Council of the European Union (a separate body consisting of government ministers from each EU country) officially approved the directive in April, and it went "into force" on June 7th, 2019. However, it will not be fully operative until the completion of the "transposition" phase in which each EU member state is given time to enact its own internal laws to implement the directive. (The member states will have until June 7th, 2021 to do so.)

It will be a bit complicated if the dissenting states continue to oppose the directive. If a member state fails to pass the required national legislation (or if the national legislation does not adequately comply with the requirements of the directive), the EU's executive branch (called the European Commission) may initiate legal action against the member state in the European Court of Justice.

According to the EU's website, Europe "needs modern copyright rules fit for the digital age" and the new Directive on Copyright "will make sure consumers and creators can make the most of the digital world." Moreover,



the Directive "will help European copyright industries to flourish in a Digital Single Market and European authors to reach new audiences, while making European works widely accessible to European citizens, also across borders." The Directive's aim is to "ensure a good balance between copyright and relevant public policy objectives such as education, research, innovation and the needs of persons with disabilities."

The five countries that voted against the new directive expressed strong but polite disagreement with the leadership, issuing their own Joint Statement commenting as follows:

We believe that the Directive in its current form is a step back for the Digital Single Market rather than a step forward.

Most notably we regret that the Directive does not strike the right balance between the protection of right holders and the interests of EU citizens and companies. It therefore risks to hinder innovation rather than promote it and to have a negative impact the competitiveness of the European Digital Single Market.

Furthermore, we feel that the Directive lacks legal clarity, will lead to legal uncertainty for many stakeholders concerned and may encroach upon EU citizens' rights.<sup>1</sup>

Poland has even gone so far as to bring suit against the European Parliament over the Directive. The country's Deputy Foreign Minister is quoted as saying: "This system may result in adopting regulations that are analogous to preventive censorship, which is forbidden not only in the Polish constitution but also in the EU treaties."<sup>2</sup>

The chief problems with the Directive are contained in Articles 11 and 13 in the original draft (now re-numbered Articles 15 and 17). Article 11 establishes a so-called "link tax," which will allow publishers to charge platforms such as Google to "link" to publications and display news stories. Article 13 will impose liability

on any platforms for displaying content that infringes on someone's copyright.

The big platforms — such as Facebook, Google, YouTube, Wikipedia, and others — and their customers fear that the Directive will significantly deform and destroy the way the sites currently function. While the Directive says that content platforms cannot be liable for what they're hosting, that exemption is entirely dependent upon the sites' efforts to remove anything that infringes on someone else's copyrighted works, like books, magazine articles, music or pirated movies. Sites can only be safe if they proactively ensure that copyrighted content is not making its way onto the site. The platforms (and everyday users) are of the view that this is a fool's errand. There is no effective way to detect and prevent millions of users from uploading a copyrighted photo, sound clip, video scene, or other potentially protected work. Platforms would have to install and implement some sort of mass filter, which doesn't currently exist and would, as one commentator noted, "be ripe for abuse by copyright trolls and would make millions of mistakes."

For those of you worried about the impact of this new law on the viral creative process known as "memes," the EU says to stop worrying. Certain tweaks to Article 13 of the law were made earlier this year in order — theoretically — to make memes safe "for purposes of quotation, criticism, review, caricature, parody and pastiche."

As is often the case with large-scale law reform projects, there are good things accompanying the new Directive as well as the seeming censorship of the previously free-wheeling Internet. Of greatest relevance to libraries and research institutions, the new Directive will allow libraries and other cultural heritage institutions, like archives or museums, to make copies of EU cultural heritage protected by copyright and related rights to preserve it, using modern digital techniques.

The Directive will also make it easier for cultural heritage institutions to conclude licenses with collecting societies, which cover all the out-of-print (or out-of-commerce) works in their collections. This should significantly facilitate the use of works that are no longer commercially available, while ensuring that

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the rights of copyright-holders are fully safeguarded. This will make it possible for cultural heritage institutions to digitize and make available their collections of out-of-commerce works for the benefit of European culture and of all citizens.

The mechanics of this process will be aided by an exception included in the Directive that will apply in specific cases when no collective management organization exists that can license the use of out-of-commerce works to cultural heritage institutions.

Moreover, the Directive addresses the situation in which a work of art is no longer protected by copyright, i.e., falls into what the legal terminology calls “public domain.” In such cases, anyone should be free to make, use and share copies of that work, be it a photo, an old painting or a statue. However, this is not currently always the case, because some Member States provide copyright protection to copies of those works of art. The new Directive will make sure that all users are able to disseminate online — with full legal certainty — copies of works of art that are in the public domain. For instance, anybody will be able to copy, use and share online photos of paintings, sculptures and works of art in the public domain available on the web and reuse them, including for commercial purposes or to upload them in Wikipedia.

In addition to these defenses or exceptions to copyright violations, the Directive deals across the board with a number of other copyright exceptions. Currently, many of these exceptions to copyright law are currently “optional” and do not necessarily apply across borders. Also, some of them need to be re-assessed in light of today’s technological realities. Therefore, the Directive on Copyright seeks to modernize copyright rules and make key exceptions and limitations applicable throughout the EU, especially those in the areas of teaching, research, and (as noted above) preservation of cultural heritage.

Text and data mining (“TDM”) is an automated process which allows information to be gathered through the high speed machine reading of massive amounts of data and texts. The new rules will allow researchers to apply this technology on large numbers of scientific journals that their research organizations have subscribed to, with no need to ask for authorization for text and data mining purposes.

The new teaching exception will cover digital uses of copyright-protected content for the purpose of illustration for teaching. For example, the exception will ensure that educational establishments (such as colleges, universities, and schools) can make available teaching material or online courses to distance students in other Member States through a secure electronic environment, e.g., a university’s intranet or a school’s virtual learning environment.

But neither the “bad” aspects of the new Directive nor the good ones will be implemented in the near future, until EU member states enact their own “transposition” laws implementing the directive and until the lawsuits challenging the Directive make their way through the courts.

In the meantime, you can still dream a little meme with me and publish it on the Internet without worrying about copyright violations. Oh, hey, I forgot, the EU leadership says that memes will still be protected even under the new Directive. So, naught to worry. 🌱

*William M. Hannay is a partner in the Chicago-based law firm, Schiff Hardin LLP, and is a frequent contributor to Against the Grain and a regular speaker at the Charleston Conference. He can be reached at <whannay@schiffhardin.com>.*

### Endnotes

1. <https://www.permanentrepresentations.nl/binaries/nlatio/documents/policy-notes/2019/02/20joint-statement-regarding-the-copyright-directive/II-39+Declaration+NL+ea+on+Copyright+DSM.pdf>
2. <https://www.reuters.com/article/us-eu-copyright-poland/poland-files-complaint-with-eus-top-court-over-copyright-rule-change-idUSKCN1SU0T9>

## Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura\_gasaway@unc.edu> [www.unc.edu/~unclng/gasaway.htm](http://www.unc.edu/~unclng/gasaway.htm)



**QUESTION:** *A publisher asks about blockchain and whether it could be used to reduce uncertainty about who authored a work and the date it was produced.*

**ANSWER:** Blockchain is the technology behind cryptocurrency such as Bitcoin. It is an open ledger of information that can be used to record and track transactions, which are exchanged and verified on a peer-to-peer network. The significance of distributed ledger technology is that it ensures the integrity of the ledger by crowdsourcing oversight and thus removes the need for a central authority.

There may be an opportunity to use blockchain to solve the determination of authorship and production date if it is built on the sustainability of copyright registration information. Some have argued that use of blockchain could actually reduce the number of people needed to maintain archives. Blockchain may actually have more application for trademark and patent law, because of the greater flexibility in copyright law. For example, registration is not required to claim rights in a copyrighted work as opposed to a patent. In order sue for copyright infringement; however, one must register the copyright, so registration is still very important.

An updated blockchain secured and distributed may provide assistance in recording rights that are created in original works of authorship. It has the potential to reduce costs by speeding up registration processes and for clearing rights. Some even argue that it may have the potential to replace the current copyright system currently in use at the U.S. Copyright Office. At present, blockchain’s use in copyright is merely in the discussion stage. Proponents say that as the technology becomes mainstream, developers will have to collaborate to develop standards and interoperability protocols. The European Union Intellectual Property Office and the U.S. Congress currently are looking into the capabilities of blockchain.

**QUESTION:** *A high school librarian asks whether it is permissible to use a student’s picture from a previous presentation.*

**ANSWER:** To answer this question requires further analysis of the question. By picture, does the librarian mean photograph of the student or a photograph that the student used in a presentation? I will assume that the presentation is for a course that meets the requirements of section 110(1) of the *Copyright*

*Act* (in a nonprofit educational institution, in a classroom, with students and teachers present at the same place as a part of instruction).

If it is a photograph of the student who delivered the first presentation, then answer is easy. It is the photographer rather than the student who owns the copyright, absent a transfer of rights. Because of privacy concerns, however, the student should be asked about using his or her image in a later presentation unless the school has students and parents agree to a blanket permission to use their photographs.

Assuming that the second presentation is also for a class, reusing another type of photograph from the first student’s presentation is also covered by section 110(1) that allows the use of photographs in a nonprofit educational institution, in a classroom etc., as a part of instruction. If the first presentation contained original photographs taken by the student, it would be polite to seek permission to reuse the photo. Regardless of who took the photograph, if the presentation is posted on the web, permission to use it should be obtained unless the image is in the public domain.

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**QUESTION:** *Audible announced that it would create the Audible Captions program to transcribe a book's audio in order to create a text to run along with the audio. A reading teacher asks why publishers are objecting to this since the purpose is to help children "who are not reading to engage through listening."*

**ANSWER:** The Association of American Publishers (AAP) filed suit against Audible on August 23, 2019, to halt Audible's plan to implement the Audible Captions program. Although it did not join the suit, the Authors Guild later issued a letter supporting the AAP suit.

Publishers claim that their contracts with Audible are limited to voice recording and playback. They believe that including captions violates their rights of reproduction, distribution and display. Audible posits that it is too soon to file suit since the program had not yet been introduced to the public. Despite this, on August 28 Audible stipulated to the court that it would not introduce the Audible Captions program to the works from a group of major publishers until the copyright and licensing issues raised in the suit are resolved. It will go forward with the program for Audible and Amazon original works and for works in the public domain, however.

**QUESTION:** *A children's librarian asks about the recent copyright litigation involving the song "Baby Shark."*

**ANSWER:** The "Baby Shark" song is quite popular with toddlers but is very irritating to others of us. It became popular based on a 2016 posting on YouTube that has millions of views. The origins of the song itself are somewhat unclear, but a musician, **Johnny Only**, sued **Pinkfong** in South Korea this summer claiming copyright infringement of his "Baby Shark" song that he published on YouTube in 2011.

There is an argument that the tune was a campfire folk song in the United States for many years before "Baby Shark." **SmartStudy**, the company behind the **Pinkfong** brand, claims that the tune is in the public domain. In order to succeed in the suit, **Johnny Only** will have to prove that the second song is substantially to "Baby Shark" and that he created the work that is not in the public domain. The issue will be decided in South Korean courts, so it bears watching.

**QUESTION:** *A publisher asks when the modernization of the U.S. Copyright Office will be completed.*

**ANSWER:** That is an excellent question. Recently, **Thom Tillis**, a U.S. Senator from North Carolina who is chair of the Senate Judiciary's Intellectual Property Subcommittee, wrote to the Copyright Office questioning the slow progress of modernizing the public recodation and registration system and implementing a new Copyright Enterprise System. It is slated to be completed in 2023, which **Senator Tillis** said was too long.

**Senator Tillis** says that information technology experts indicate that the modernized

registration system could be implemented in 8-12 weeks. A new system would speed the registration process from the current 1-7 months for electronically submitted claims and 1-18 months for claims received via email. The times are longer for both if correspondence is required. A new system would provide "real-time data and what needs to be tweaked within weeks, not months or years."

According to Register of Copyrights, **Karyn Temple**, the Copyright Office has dedicated 25 employees to reduce the average pendency times by 40% within the last two years and to eliminate the backlog of workable claims. The Office believes that long-term planning for IT and other infrastructure upgrades could be improved if Congress gave the Copyright Office authority to use unobligated fee balances from previous budget cycles.

This is a crucial issue for both copyright industries and for users of copyrighted works. Copyright is extremely important not only to copyright producers but also to society. According to **Senator Tillis**, copyright industries contribute \$1.3 trillion to the U.S. gross domestic product and represent almost 7% of the entire economy. These industries employ about 5.7 million American workers with average salaries of almost \$100,000 annually.

The **Tillis** letter may be found at: <https://www.tillis.senate.gov/2019/7/senator-tillis-it-s-time-for-congress-to-modernize-the-united-states-copyright-office>. 🌻