IMRO/Law Society Annual Lecture on Copyright Law

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"Article 17 of the Digital Single Market Directive, complex and challenging in equal measure"

Directive 2019/790 on copyright and related rights in the Digital Single Market (the Directive) brings about the biggest changes to the EU copyright regime in about 20 years. The objective of the Directive is to further harmonise and modernise the EU's copyright framework. The Directive makes specific reference to "rapid technological developments" transforming the way works are created, produced, distributed and exploited. Recital (2) of the Directive refers to how a harmonised legal framework for copyright and related rights contributes to the proper functioning of the internal market and the stimulation of innovation, creativity, investment and production of new content.

Article 17 of the Directive is arguably the most contested and debated provision in the Directive. One of the objectives of Article 17 is to remedy the so-called 'value gap' – the perceived gap between the value that online sharing service providers derive from protected works and subject matter and the revenue they distribute to rightholders. Article 17 imposes a new liability regime on online service providers, such as YouTube, Meta and TikTok, in relation to copyright-protected works uploaded to their platforms by individual users. A key part of this new liability regime is the legal obligation imposed on service providers to obtain authorisation from rightholders in relation to any protected works uploaded by users to their platforms. Where no authorisation is obtained, a service provider shall be liable for unauthorised acts of communication to the public, including making available to the public.

Article 17 (4) contains exemptions from liability, provided a service provider complies with three cumulative conditions. Unfortunately, some of the terms used in these conditions are quite open-ended, for example, "best efforts", "high industry standards of professional diligence" and acting "expeditiously". It is likely that some or all of these terms will be challenged in court, whether at domestic court level or, indeed, at CJEU level.

The complexity of Article 17 is captured well in Advocate General Øe's Opinion in Case C-401/19, Poland v European Parliament and the Council of the EU (i.e. the Polish challenge to Article 17). At paragraph 44 of his Opinion (dated 15 July, 2021), citing the submission by the EU institutions and the French Government, the Advocate General refers to the various provisions of Article 17 as constituting "a complex liability regime which reflects the balance sought by the EU legislature between the rights and interests of sharing service providers, the users of their services and rightholders". Undoubtedly, this triangle of interests is a complex one, involving a difficult balancing act for transposing governments.

On 12 November, 2021, Ireland transposed Article 17 (along with other mandatory provisions of the Directive) into law by way of the EU (Copyright and Related Rights in the Digital Single Market) Regulations 2021.

Another important document in the context of the implementation of Article 17 into domestic law is the European Commission Guidance on Article 17, dated 4 June, 2021. This much delayed communication is non-binding in nature and has been described by some commentators as more of a hindrance than a help! The concept of a "manifestly infringing

upload", used in the Guidance, is a good example of where very differing viewpoints will arise!

We are still awaiting the CJEU ruling in the Polish challenge to Article 17. This judgment may be delivered in late-April. It will be interesting to see if the EU's senior court follows the Advocate General's advice and dismisses Poland's challenge.

At this year's IMRO/Law Society Annual Copyright Lecture, the aim is to try and pull these various "threads" together, to illuminate the complexities of Article 17 and critically assess the practical operations of this important provision.