



## Developments in Copyright

As 2018 moved into 2019, progress on the EU Directive on Copyright in the Digital Single Market (“EU Copyright Directive”) was looking shaky to say the least - a highly controversial IP bill; unprecedented lobbying and international media attention; celebrities such as Sir Paul McCartney and Lady Gaga campaigning in Brussels; and even death threats against politicians! The trilogue negotiations between the European Commission, European Parliament and the EU Council, each of which appeared to have a different view of the appropriate text, were dragging on and it looked like the negotiations were at stalemate or heading off the rails completely ... And then, rather suddenly and surprisingly speedily (presumably so as to keep ahead of the May 2019 European parliamentary elections), a ‘final’ version of the text was agreed and presented to European Parliament in February, and approved by the Parliament in March and then by the European Council in April. The EU Copyright Directive (EU 2019/790) came into force on 7 June 2019 and hence must be implemented by Member States by 7 June 2021.

The main points of controversy surround a new press publishers’ right to seek remuneration from platforms for re-posting their content, known as the ‘link tax’ by its detractors; and the so-called fix of the ‘value gap’, which imposes obligations for online platforms to filter user-uploaded content for copyright infringing material. Many argue that in practice this will require that online platforms monitor anything being uploaded so as to be able to delete any items which might present a legal risk, and that this will amount to censorship. A full discussion of both of these issues could take many pages. It suffices here to say that the IP Federation has stayed completely away from commenting on these particular aspects of the EU Copyright Directive.

One aspect of the of the EU Copyright Directive which was welcomed by the IP Federation was in relation to a mandatory exception for Text and Data Mining (“TDM”) for commercial as well as non-commercial purposes. To introduce the context of the IP Federation comments here, it is necessary to backtrack to a time when the EU trilogue talks seemed to be stalling. On 30 January 2019, the UK IPO announced a call for evidence - in connection with its own post-implementation review of the UK copyright changes made in 2014 - to which the IP Federation responded.

The IP Federation response considered the impact of the UK copyright exception for text and data mining an essential technique used in machine learning, and highlighted the vital need to extend the current exception for TDM to enable commercial use by commercial entities.

Machine learning, which forms the backbone of Artificial Intelligence (“AI”), relies on aggregating both raw and structured data and content into a machine-readable form and analysing this information - at hyper scale - to identify insights, patterns and relationships, which can be used for a myriad of valuable purposes, such as augmenting how we make critical decisions. The ability to unlock benefits from AI, for example in innovative projects benefitting the public, should exist for all entities - large, medium or small, public or private, commercial or non-commercial - and for all purposes.

We pointed to the independent report “Growing the Artificial Intelligence Industry in the UK”, which included the recommendation that, in order to support TDM as a standard and essential tool, the UK should move towards establishing that the right to read (i.e. where an entity *already has* lawful access) is also the right to mine data. The report also recommends that the Government should assess the value that could be added to the UK economy by making data available for AI through TDM, including by commercial businesses.

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Further, the Government's Industrial Strategy and AI Sector Deal recognised the critical role of AI to the UK and the necessary partnerships between government, academia and business that need to occur if the UK is to be able to compete in the fast-moving field of AI.

If the UK is to keep pace with the rest of the world, the IP Federation's members believe it is absolutely necessary that the CDPA be amended to expressly allow for the reproduction of lawfully accessed works to facilitate TDM, for commercial or non-commercial purposes, by commercial and non-commercial entities. This can be implemented with sufficient protections for content owners to ensure that copies made for AI purposes do not disrupt their existing commercial markets and are treated securely to protect their legitimate copyright expectations.

In the midst of the ongoing Brexit negotiations, it is unclear what the stance of the UK Government is with respect to the EU Copyright Directive. If the Government decides not to transpose the EU Copyright Directive into UK law, it will avoid having to transpose the controversial provisions mentioned earlier. However, the IP Federation would urge the Government to at least implement a copyright exception for text and data mining activities for both commercial and non-commercial purposes, and by commercial and non-commercial entities, so as to avoid a hampering effect on AI development and commercialisation in the UK.

Belinda Gascoyne, 8 October 2019