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The New Takedown Obligations in the EU for Online Content-Sharing Service Providers

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The European Union is adopting a new Copyright law named the “European Directive on Copyright in the Digital Single Market” (renamed “Article 17” in the most recent draft of the legislation and hereinafter referred to as “the Directive”) requires online content-sharing service providers (YouTube, Twitter, Facebook, etc.) to take more responsibility for copyrighted material shared illegally on their platforms. See Chapter 2, Certain Uses of Protected Content by Online Services, Article 17.

Under the Directive, online content-sharing service providers that host user-generated content such as images, videos, audio, text, etc. are responsible for taking down the content if it infringes another party’s copyright. The Directive further states online content-sharing service providers shall be liable for the posting of this content UNLESS they can demonstrate that they have: “(a) made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; (c) and in any event acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).”

There are several exemptions to the Directive. Most notably, new online content-sharing service providers that have been available to the EU public for less than three years and which have an annual turnover below EUR 10 million need only comply with point (a) above. Nevertheless, upon receiving a sufficiently substantiated notice, they must act expeditiously to disable access to the notified content or to remove the content from their websites.

European Parliament passed the controversial law in March. The European Council – the political body composed of government ministers from each of the 28 European Union member states – voted to adopt the Directive into EU law in April, and it came into force on June 7, 2019. Recently, the Polish government filed a complaint against the Directive with the Court of Justice of the European Union. Unless the Polish court case changes anything, EU member states will have until June 7, 2021 to enact their own laws to implement the Directive.

There is likely to be significant legal uncertainty with the Directive in the years to come. There is also the possibility of diverging application of the Directive between the UK and the remainder of the EU, depending on what happens to Brexit. The Directive will impact how internet companies operate in Europe, although the two-year implementation window provides some time to prepare.

Michael Best's team of intellectual property lawyers advise clients on a broad range of copyright protection and enforcement strategies. If you are curious about how the Directive will impact your business in the EU, feel free to reach out to a Michael Best attorney, including the authors listed below.

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