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Give Us Your Huddled Masses, But Not Your Copyright Law

By **Bill Donahue**

Law360 (April 18, 2019, 3:45 PM EDT) -- Sweeping copyright changes finalized by the European Union this week are a stark departure from the way U.S. law has long governed the internet, but don't expect similar legislation stateside anytime soon.

The so-called copyright directive, a raft of amendments adopted last month by the European Parliament over fierce opposition from American tech giants and free speech advocates, won final approval from the European Council on Monday, sending it to the bloc's member states to be put into law.

Most notably, the law's Article 17 — formerly titled Article 13 — would impose liability on sites like YouTube when users upload copyright-infringing material, requiring those services to proactively remove it. Critics say that will require automatic filters that censor content.

If that sounds different from the U.S. system of "notice and takedown," that's because it is — an almost philosophical reversal on who should be in charge of the Herculean effort that goes into policing copyright infringement on the internet.

"It is fundamentally different than the notice and takedown regime," said J. Alexander Lawrence, an attorney with Morrison & Foerster LLP. "The EU is flipping the burden."

The Digital Millennium Copyright Act, passed by Congress in 1998, created a system of so-called safe harbors for web services that host user-generated content, shielding them from lawsuits if they quickly took down infringing materials when notified by copyright owners of specific violations.

The idea behind that system was that it would be untenable to impose traditional schemes of indirect copyright liability on sites that let millions of users freely post content, since it would result in either draconian self-censorship or crippling legal damages.

"Under the DMCA, with user-generated content, there is generally no obligation for websites to police what users put up in the first instance," Lawrence said. "It is incumbent on the copyright owner to do the policing."

For internet companies, the DMCA is a sacred text. The Internet Association, which represents Google, Facebook and every other major web company, wrote in a 2016 white paper that the

safe harbor had been “instrumental and indispensable” in the rise of social media and the rest of today’s interactive internet.

Under the EU's existing copyright directive, passed a few years after the passage of the DMCA, web hosts are shielded by a similar safe harbor. So long as they attempt “expeditiously to remove or disable access” after being notified, they cannot be sued over content uploaded by users.

Article 17 would flip the script. The law would require big web companies to instead make their “best efforts” to “avoid the availability” of copyrighted works that have been identified by rights owners. The final version doesn't make any mention of automated filters or content-blocking — a point of fierce criticism ahead of the directive’s passage — but it will certainly require new proactive measures by sites.

“Unlike the DMCA, which generally treats internet platforms as passive intermediaries, the directive makes such platforms shoulder the initial burden of preventing and policing copyright infringement,” said Sy Damle, a partner at Latham & Watkins LLP and the former general counsel for the U.S. Copyright Office.

For some American copyright experts, the passage of such a huge change in Europe’s internet copyright policy has raised the specter of similar overhaul in the U.S.

After all, it would be something of an understatement to say that the country’s biggest copyright owners merely dislike the DMCA’s system of notice and takedown.

For Hollywood’s movie studios and music companies, the DMCA places an outsized burden on copyright owners by requiring a separate notice for every infringing upload, and they say it does little to stop an infringer from reuploading content that’s been taken down. The big entertainment companies have long referred to the system as an expensive game of whack-a-mole.

But efforts to change it have gained little traction.

Companies like Viacom spent years unsuccessfully litigating in favor of interpretations of the DMCA that would have required websites like YouTube to take a more active role in policing unauthorized content. A 2011 bill called the Stop Online Piracy Act, or SOPA, would have weakened the safe harbor, but that legislation was dramatically defeated after a huge backlash on the internet.

For Silicon Valley, the SOPA affair was something of a public-policy coming of age, demonstrating that the American technology industry had built up the political power to bring down legislative changes that would have created serious new burdens for web companies.

Eight years later, that opposition hasn’t softened. Google, Facebook and other tech companies just spent the last two years fighting to block Article 17 in the EU. Though they came up short in Brussels — where U.S. tech companies have faced headwinds for years — experts think it would be a whole different fight in Washington, D.C.

“Some might say the EU directive was, in part, a protectionist measure targeted at U.S. tech companies in favor of European copyright industries,” Damle said. “I would imagine a very different political dynamic plays out here.”

John A. Polito, the co-head of the copyright practice at the firm of Morgan Lewis & Bockius LLP, said

passage of Article 17 would certainly "spur some changes to the treatment of user-generated and user-uploaded content" in the EU, but that it was "unlikely to give rise to a parallel requirement in the U.S."

"Here in the U.S., it would be a seismic shift in the law to require platforms to seek authorization from rights-holders based on what the platforms' end users might do," Polito said.

--Editing by Rebecca Flanagan.