

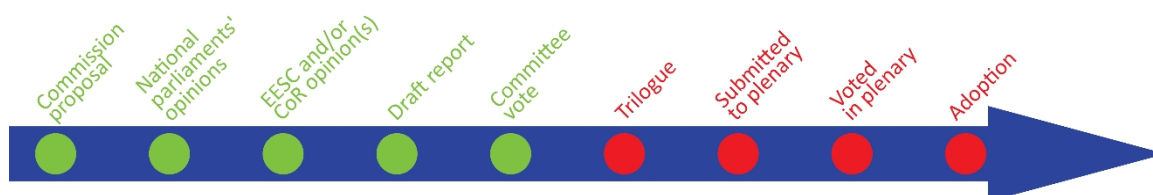
# Copyright in the digital single market

## OVERVIEW

The European Commission presented a legislative package for the modernisation of the EU copyright rules, including a new directive on copyright in the digital single market on 14 September 2016. Stakeholders and academics are strongly divided on the proposal. Much of the debate focuses on (i) the creation of a new right that would allow press publishers to claim remuneration for the online use of their publications; (ii) the imposition of content monitoring measures on online platforms such as YouTube, which seeks to resolve the 'value gap' and help right holders to better monetise and control the distribution of their content online; and (iii) the creation of a new copyright exception for the use of 'text-and data-mining' techniques in the EU. While some argue that the measures will ensure fair remuneration for journalists, publishers and right holders for the online use of their works, others criticise, inter alia, a perceived 'link tax', and highlight the risk of filtering and control of the internet. The Council adopted its common position in May 2018. Following protracted discussions, the Legal Affairs Committee of the European Parliament voted compromise amendments in June 2018, as well as a mandate for trilogue negotiations.

## Proposal for a directive of the European Parliament and of the Council on copyright in the digital single market

<i>Committee responsible:</i>	Legal Affairs (JURI)	COM(2016) 593
<i>Rapporteur:</i>	Axel Voss (EPP, Germany)	14.9.2016
<i>Shadow rapporteurs:</i>	Lidia Joanna Geringer De Oedenberg (S&D, Poland) Angel Dzhambazki (ECR, Bulgaria) Jean-Marie Cavada (ALDE, France) Jiří Mastalka (GUE/NGL, Czech Republic) Julia Reda (Greens/EFA, Germany) Isabella Adolfini (EFDD, Italy) Marie-Christine Boutonnet (ENF, France)	2016/0280(COD) Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Trilogue negotiations, following approval of mandate by plenary	



## Introduction

The emergence of new business models and consumption patterns increasingly characterised by the use of the internet to deliver content cross-border has significant impact on users and the creative industries, and represents a challenge to copyright protection within the internal market. On 14 September 2016, in line with the [digital single market strategy](#), the European Commission presented a legislative package for the [modernisation of the EU copyright rules](#), including a new [directive on copyright in the digital single market](#). The general objective of the EU initiative is to adapt the EU copyright rules to the digital environment that is rapidly changing the way works and other protected subject matter are created, produced, distributed and exploited. The proposed directive supplements the current EU copyright framework, taking into account the increasing digital and cross-border uses of protected content.

## Existing situation

Copyright and related rights are exclusive intellectual property rights (IPRs) that protect, except in specific cases, the author's or creator's original work (e.g. book, film, software) and the interests of others such as publishers and broadcasting organisations who contribute to making the works available to the public. The [2001 Copyright Directive](#) aimed at adapting copyright legislation to technological developments, as well as harmonising certain aspects of the law on copyright within the internal market. However, EU copyright law has struggled to [adapt](#) to the digital, online environment. Following a [series of consultations, communication and green papers](#), the Commission concluded that the EU's copyright legislative framework must be modernised.

### Copyright exceptions in digital and cross-border environment

Exceptions and limitations listed at [Article 5 of the Copyright Directive](#) allow the use of copyrighted works for certain purposes without the authorisation of the author or other rights-holders. However, the list is optional, which means that – apart for the exception for temporary copying – Member States can decide which exceptions and limitations they want to implement. Furthermore, digital technologies allow new types of uses, especially in the field of research, education and preservation of cultural heritage such as online educational activities, and text- and data-mining (TDM), which are not specifically covered by the current EU copyright rules. As a result, there is much legal uncertainty on how to implement some exceptions in the digital environment, and the current EU legal framework does not allow users to benefit from the exceptions on a cross-border basis.<sup>1</sup>

[Text- and data-mining](#) (TDM), which refer to techniques for the exploration and processing of large amounts of text and data, enabling researchers to discover patterns, trends and other information valuable for research, **may infringe copyright in some Member States while being subject to an exception in others** (such as the United Kingdom). This is particularly problematic for [big data industries](#), for instance in the health and internet sectors, where the analysis and treatment of large datasets are key for innovation and competition. National differences in addressing materials for [e-learning](#) also create **legal uncertainty for educational institutions** wishing to offer e-learning programmes throughout the EU.

### Wider and cross-border access to content

A major problem identified by the Commission in its [impact assessment](#) is the difficulties faced by some stakeholders such as broadcasters, service-providers and cultural institutions for clearing rights and making their content available online in a cross-border context. The Commission's investigations show that there are some contractual blockages linked to licensing practices based on exclusivity of exploitation rights and on the 'release windows'

system (organising the release of content in different stages for DVD, pay-TV, video-on-demand – VoD – and mainstream broadcast networks) which greatly limit the online availability of audiovisual works on VoD platforms.<sup>2</sup> As a result, a large proportion of European audiovisual productions are not available on VoD platforms. Similarly, cultural institutions face difficulties in digitising and disseminating their collections to the public across borders. This is especially true for out-of-commerce works (OoC), which are works still covered by copyright protection but are no longer readily available to the public.<sup>3</sup>

### **Publishing industry in the digital world**

The publishing industry is shifting from print to digital. However, the increase in publishers' digital revenues does not compensate for the decline in print revenues.<sup>4</sup> According to the Commission, this is due to various factors, including the inability of publishers to monetise their digital content (while using social media, news aggregators and search engines have become the main ways for consumers to read news online) and the difficulty they face in concluding licences with online service providers for use of their content.<sup>5</sup> Furthermore, publishers face legal uncertainty over their ability to receive compensation for the use of their publications.<sup>6</sup> Despite attempts by some Member States to set up special compensation measures (e.g. ancillary rights), the lack of specific rights for the benefit of publishers weakens their bargaining powers when they negotiate with large online service providers, and threatens the sustainability of the publishing industries, which invest in publications but do not receive appropriate revenues.<sup>7</sup>

### **Challenges in enforcing copyright and allowing appropriate remuneration for authors and rights-holders in a digital environment (value gap)**

In its impact assessment, the Commission stressed that rights-holders face difficulties when seeking to monetise and control the distribution of their content online, and that there is growing concern about the sharing of the value generated by online content distribution. This has been described as the '[value gap](#)'. Rights-holders fail to determine when users are uploading protected content on platforms, and considerable legal uncertainty surrounds the conclusion of licences and the protection of copyrighted content available online.<sup>8</sup> Furthermore, creators are unable to effectively monitor the use, commercial success and economic value of their works, and therefore to claim for remuneration effectively.<sup>9</sup> The current rules applicable to online platforms for enforcing copyright and allowing appropriate remuneration for authors and rights-holders in a digital environment are also questioned.

The 2000 [E-Commerce Directive](#) **exempts from liability** (including for copyright infringement) information society service-providers hosting or transmitting illegal content provided by a third party in the European Union (EU) when they qualify as merely **technical, automatic and passive internet intermediaries**. However, there is a lot of **legal uncertainty** and an **unsettled case law** on the exact scope of the activities and providers exempt from liability, which has led many academics to **call for amendment of the current rules**.<sup>10</sup>

### **Parliament's starting position**

The European Parliament, whose Legal Affairs Committee (JURI) has set up a [working group on Intellectual Property Rights and Copyright Reform](#), has long pleaded for EU copyright legislation to be reviewed, in a number of resolutions, including on [online distribution of audiovisual works](#) (2012) and on [enforcement of Intellectual Property Rights](#) (2015).

On 9 July 2015, the Parliament adopted a resolution on [the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related](#)

[rights in the information society](#). It called upon the Commission to present an ambitious proposal for reform, and invited it, inter alia, to study the impact of the introduction of a single European 'copyright title', to strengthen some exceptions to copyright protection (especially for institutions of public interest such as libraries, and for research and education purposes) and to examine carefully the possibility of making certain exceptions mandatory. The Parliament also urged the Commission to propose ways to improve the cross-border accessibility of services and copyrighted content for consumers and in the interest of cultural diversity. Furthermore, in its 19 January 2016 resolution, [towards a digital single market act](#), the Parliament welcomed the Commission's commitment to modernise the current copyright framework to adapt it to the digital age, and urged the Commission to assess the role of online platforms in fighting illegal content on the internet. It also emphasised that the principle of territoriality remains an essential element of the copyright system in the EU, and stressed the approach for tackling geo-blocking and fostering cross-border online services should protect cultural diversity and the industry's economic model.

### European Council starting position

In its [25-26 June 2015](#) and [28 June 2016](#) conclusions, the European Council advocated a swift reform of the copyright and audiovisual frameworks. It called on the Commission to guarantee portability and facilitate cross-border access to online material protected by copyright, while ensuring a high level of protection of intellectual property rights, taking cultural diversity into account, and helping creative industries to thrive in a digital context.

### Preparation of the proposal

The Commission carried out a review of the existing copyright EU framework between 2013 and 2016, and launched several public consultations.<sup>11</sup> On this basis, it has identified a number of [actions](#) in the field of copyright, as part of its strategy to achieve a fully functioning [digital single market](#), in particular the modernisation of EU copyright law. The Commission also conducted a set of [legal](#) and [economic](#) studies on the application of Directive 2001/29/EC, on the economic impacts of adapting some exceptions and limitations, on the legal framework of text- and data-mining and on the remuneration of authors and performers. Furthermore, [Eurobarometer](#) survey data were gathered on internet users' preferences for accessing content online. Finally, the Commission conducted an [impact assessment](#). In 2015 EPRS published an [Implementation Assessment on the implementation, application and effects of the Information Society Directive 2001/29/EC](#) and of its related instruments, as well as three European Added Value briefing papers suggesting possible options for reform. EPRS also published a briefing [EU copyright reform: revisiting the principle of territoriality](#).

### The changes the proposal would bring

#### Legal basis

The Commission does not make use of [Article 118 TFEU](#) (which creates a specific [competence](#) for the EU in the IPR field) as the legal basis for new legislation, but instead proposes to rely on [Article 114 TFEU](#) conferring on the EU the power to adopt measures that have as their object the establishment and functioning of the internal market. The same legal basis was used for the Information Society Directive 2001/29/EC, which harmonises the rights relevant for online dissemination of content (notably the reproduction and making available rights). A new directive would allow the necessary margin of manoeuvre for Member States to implement modifications of the existing directives.

### **Exceptions and limitations**

The new copyright directive proposal includes new measures to adapt certain exceptions and limitations to the digital and cross-border environment. Three new mandatory exceptions would be introduced in EU law.

#### *Text- and data-mining*

Member States are required to introduce in their national law a new mandatory copyright exception to the right of reproduction and the right to prevent extraction from a database (see Article 3). This new exception would allow research organisations to carry out text- and data-mining (TDM) of copyright-protected content to which they have lawful access for the purposes of scientific research (e.g. scientific publications to which they have subscribed) without the need for prior authorisation.<sup>12</sup> The new text- and data-mining exception would, however, be implemented only for the benefit of universities or research centres which are not for profit, or act in the context of a public-interest mission recognised by the state (for a commercial or non-commercial purpose). The exception would also apply to research organisations engaged in public-private partnerships with commercial companies, but not to commercial companies (see Article 2). Rights-holders have no right to restrict the use of their data contractually or to receive compensation. However, they are allowed to implement measures to mitigate the risks concerning the security and integrity of the system or database hosting the data.

#### *Teaching activities*

Member States are required to introduce in their national law a new copyright exception or limitation to the rights of reproduction, communication and making material available to the public for the purpose of illustration for teaching (see Article 4). The new exception would benefit all educational establishments that pursue their activity for a non-commercial purpose, and cover both use through digital means in the classroom and online use through a secure electronic network (e.g. intranet). The proposed directive would introduce a specific legal mechanism to ensure the new teaching exceptions apply in cross-border situations. However, the new rules do not fully harmonise the scope of the teaching exception in the EU, and leave Member States the possibility to subject the application of this exception to a licence regime (i.e. the teaching activities would benefit from the copyright exemption where licensing schemes allowing digital uses are in place). Member States may decide that rights-holders can receive fair compensation for the digital use of their works.

#### *Cultural heritage*

Member States are required to introduce in their national law a new mandatory copyright exception permitting cultural heritage institutions (e.g. public libraries and museums) to make copies in the digital environment of any copyright-protected works they have in their collection (see Article 5). This exception applies to works which are in the permanent collection of an institution, and covers works created directly in digital form as well as digitisation of works in analogue formats.

#### *The 'three criteria' test remains*

A guiding principle of current copyright legislation is that a Member State can implement an exception or limitation within its territory only when what is known as the 'three-step test' is passed, i.e. when this is for a special case, which does not conflict with normal exploitation of the copyrighted work and does not unreasonably prejudice the legitimate interests of the rights-holder. This guiding principle, the aim of which is to balance the interests of authors and other rights-holders with the interests of users, remains

applicable to the new exceptions created by the proposed new copyright directive (see Recital 6).

### **Measures to improve licensing practices and ensure wider access to content**

#### *Out-of-commerce works*

The new copyright directive would introduce a licensing mechanism for the digitisation and dissemination of out-of-commerce works.<sup>13</sup> Works covered by a licence may be used in all Member States in accordance with the terms of that licence.<sup>14</sup>

#### *On-demand services*

The proposed directive intends to facilitate the licensing of audiovisual works available on video-on-demand platforms. To that end, each Member State is required to set up a negotiation mechanism to make it easier to conclude licences for the online exploitation of audiovisual works (see Article 10). This proposal complements the recent proposal to revise the [Audiovisual Media Services Directive](#), which requires on-demand providers to ensure their catalogue includes at least 20 % of European content.

### **Publishers' neighbouring right**

#### *New right concerning digital uses of press publications*

Copyright primarily protects the authors' (or creators') original literary, scientific or artistic works, and grants economic rights to rights-holders, giving rise to remuneration for the use of protected works. EU copyright law also grants to film producers, phonogram producers and broadcasting organisations some 'neighbouring rights' (or ancillary rights) which reward their economic and creative contribution in assembling, editing and investing in content. However, so far no such rights for publishers exist, as was confirmed by the Court of Justice of the EU (CJEU) in the [Reprobel](#) case. To remedy this situation, the Commission therefore proposes to introduce a new related right into EU law that would allow online publishers to copyright 'press publications' (see Article 11).

#### *Scope of the new publishers' right*

Publishers of press publications would be provided with an exclusive related right (for reproduction and making material available to the public) for digital use of their publications. This new right would be granted for a 20-year period to the publishers of 'press publications', defined as journalistic publications only, such as daily newspapers and weekly magazines, but excluding scientific and academic journals. Based on this new right, publishers would be able to conclude licence agreements with news aggregators, for instance. Furthermore, Member States would be able to set in their legislation that, once an author has transferred or licensed a right to a publisher, there is sufficient legal basis for the publisher to claim compensation (see Article 12). The Commission's proposal therefore leaves a margin of manoeuvre for Member States to introduce a compensation mechanism for the benefit of publishers into their national legislation.

**Ancillary rights** have been implemented in two Member States so far. A [law](#) enacted in **Germany** in 2013 provides that press publishers must be paid a fee for 'ancillary copyright' when search engines and news aggregators display digital excerpts from newspaper articles. This right does not apply to 'single words or small text excerpts' which can be shown without gaining permission from publishers. In practice however, one of the main stakeholders (Google) refused to negotiate licensing fees and therefore a number of major publishers decided to waive their ancillary right to ensure continued Google indexation.

In **Spain**, the [Copyright Act](#), modified in October 2014, limits the quotation exception and instituted a copyright fee to be paid by online news aggregators to publishers for linking to

their content. Publishers cannot opt out of receiving this fee, and as a result, the Spanish law makes it mandatory to pay the copyright fees to publishers. On 11 December 2014, Google [announced](#) that due to this law, it had removed Spanish publishers from Google News and closed the Spanish version of Google News. Academics and commentators have generally been very critical of the Spanish legislation.<sup>15</sup> A [NERA study commissioned by Spanish publishers](#) concluded that the introduction of the ancillary right fees had resulted in a negative impact on the publishing sector overall.

#### *Exceptions and relationship with authors' rights*

Under the Commission proposal, the new right is subject to the existing copyright exceptions (including an exception for quotation).<sup>16</sup> Furthermore, publishers' rights would apply without prejudice to authors and other creators' rights regarding their individual contributions (news or magazine articles, photographs, videos) that make up the protected content (the final press product).

The proposed directive clarifies that the protection of the new right **does not extend to acts of posting hyperlinks**, which do not constitute communication to the public under current EU law (see Recital 33). This is in line with the recent **CJEU ruling** in [GS Media](#) in which the Court held that posting a hyperlink to copyrighted content published online without consent of the copyright holder does not in principal constitute a 'communication to the public'.<sup>17</sup> However, the **exact scope of the new publishers' right still raises some questions**. Several clarifications are needed, including whether or not the new right applies to **publication on blogs**, whether end-users will still be free to use **snippets** (i.e. small fragment of a text) and what type of use is going to be considered **'digital use' of a press publication**.<sup>18</sup>

#### **Measures imposed on platforms storing and providing access to user-uploaded content (value gap)**

The Commission proposes to reinforce the position of rights-holders to negotiate and obtain remuneration for the online exploitation of their copyrighted content on video-sharing platforms. Providers storing and providing to the public access to 'large amounts of works or other subject-matter uploaded by their users' would be required to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rights-holders to detect when protected content is uploaded by their users, and authorise or remove it (see Article 13). This obligation would apply irrespective of whether or not they benefit from the liability exemption under the E-Commerce Directive. In practice, the Commission's proposal requires information service providers to collaborate with rights-holders to use technologies such as content recognition technologies in order for rights-holders to be informed about the use of their content (see Article 13 and Recital 39).

Article 15 of the E-Commerce Directive **prohibits service providers from implementing general monitoring obligations**. The CJEU ruled in two separate cases ([Scarlet v. SABAM](#), 2011 and in [SABAM v. Netlog](#), 2012) that the prohibition on general monitoring derives from Articles 8 and 11 of the European Charter of Fundamental Rights, which safeguard personal data and freedom of expression and information, and that a [balance](#) must be struck between the preventive measures imposed on technical intermediaries and fundamental rights. However, platforms routinely perform monitoring action through **content-recognition technologies** at the request of rights-holders or on court injunctions in order to prevent particular infringements. For instance, video-sharing platforms like Google and Dailymotion implement sophisticated copyright-management systems (e.g. [Content ID](#), Audible Magic, etc.) that provide rights-holders with an automatic means of monetising their content, or for removing it in case of infringement.

### **Fair remuneration**

The proposed directive requires publishers and producers to be more transparent, and to inform authors and performers on the exploitation of their works and performance – including on the revenue generated – on a regular basis. A contract-adjustment mechanism (including regarding remuneration) would then be implemented and a voluntary alternative dispute resolution mechanism would be set (see Articles 14-16).

### **Issues not addressed under the proposed directive**

#### *Freedom of panorama*

According to the Commission's [impact assessment](#), the first results of the [public consultation](#) held between 23 March 2016 and 15 June 2016 do not indicate a need to address problems at EU level, notably because most Member States have incorporated such an exception in their national legislation.

#### *Copy levies*

Concerning private copying, the Commission announced it would continue to assess the need for action, to ensure that the different levy systems in place in Member States do not raise barriers in the single market.

### **National parliaments**

The deadline for the submission of reasoned opinions on the grounds of subsidiarity was 30 November 2016. A number of [national parliaments](#) have examined the proposal, without raising any objections on the grounds of subsidiarity.

### **Stakeholders' views<sup>19</sup>**

#### **Consumers and users' associations**

[Communia](#), an association defending the 'digital public domain', stresses that the Legal Affairs Committee's position amounts to a power grab by rights-holders, who will enjoy much greater control over how people use the internet to communicate, share, create and inform themselves, and warn that is a big step away from an open internet and a huge loss for European cultural diversity and the freedom of expression online. The [European Consumer Organisation](#) (BEUC) also criticises the Legal Affairs Committee's report which, they believe means that platforms will need to systematically filter content that users want to upload, resulting in a place where consumers can enjoy sharing creations and ideas turning into an environment that is restricted and controlled. An association supporting civil rights, [EDRi](#), stresses that MEPs ignore expert advice and vote for mass internet censorship and highlights [major concerns](#) with the text voted by the Legal Affairs Committee. [Creative Commons](#), a non-profit organisation that fosters free sharing and reuse of creativity and knowledge, stresses that Article 11 is ill-suited to address the challenges of supporting quality journalism, and that it will further depress competition and innovation in news delivery. Creative Commons also fear that Article 13 will limit freedom of expression, as the required upload filters will not be able to tell the difference between copyright infringement and permitted uses of copyrighted works under limitations and exceptions.

#### **Authors, publishers and journalists**

The [European Authors' Society](#) (GESAC) welcomes the European Parliament's text, which clarifies that platforms such as YouTube cannot benefit from 'safe harbours' and should remunerate creators fairly. They believe the text provides further legal safeguards and guarantees for consumers to continue to post, access and share the content they enjoy on those platforms. [Europe's leading newspaper and magazine publishers' associations](#)



applaud the text of the European Parliament's Legal Affairs Committee, on the grounds that it will provide publishers with the legal tools to negotiate remuneration with companies which are monetising their content online, whilst continuing to allow individuals to share links for free. The [Federation of European Publishers](#) (FEP) also welcomes the Parliament's position on creating copyright exceptions for teachers, students, and cultural heritage institutions, although in their view, the text requires further clarification, especially on the question of the remuneration of publishers when a book is used under an exception (Article 12). The [International and the European Federation of Journalists](#) (IFJ and EFJ) supports the Legal Affairs Committee's position, but is nevertheless concerned that the text adopted provides no real possibility for journalists to receive a share of the benefits of the exploitation of the new right for press publishers.

### **Platforms**

The association representing online platforms, [EDiMA](#), believes that the report adopted in committee is irreconcilable with current EU law, unworkable in practice, and that the upload filter and neighbouring right will result in the censorship of free speech online and disintegration of the current internet. The [Computer and Communications Industry Association](#) (CCIA) stresses that national versions of the publishers' right have already failed in Germany and in Spain, and will undermine free expression online and access to information if mandated at EU-level. They also warn that introducing a general obligation to monitor user-uploaded content will damage European citizens' fundamental rights and undermine platforms' limited liability regime, which is a legal cornerstone for the European digital sector. [Digital Europe](#) believes that the European Parliament has missed an opportunity to achieve a meaningful and forward-looking solution on text- and data-mining, which is fundamental for innovation, growth and research in artificial intelligence, and that the proposed solution will increase fragmentation among Member States. Digital Europe also fears that the new right for press publications and believes that the liability regime with content filtering will damage, rather than aid, the online and creative market.

### **Libraries, cultural heritage and research and scientific institutions**

[A large group of organisations](#) representing universities and research organisations (as well as industry players) warns that the scope of application of the text- and data-mining exception proposed by the Commission is too narrow, and also warns that limiting the ability of private companies to carry out TDM in Europe will negatively impact research on artificial intelligence. The [European Bureau of Library, Information and Documentation Associations](#) (EBLIDA) welcomes some parts of the text agreed by the EP committee, especially the creation of a mandatory copyright exception for text- and data-mining for the purposes of scientific research by research organisations. However, they oppose other provisions, including Article 11 which, in their view, creates legal uncertainty as additional rights clearances could now be required to link to news content, which could badly impact sharing and linking to news articles.

### **Academic views**

#### **Press publishers' right (Article 11)**

With regard to the publishers' ancillary right, the [European Copyright Society](#), when assessing the Commission's public consultation, argued that the rationale for creating neighbouring rights for publishers is limited. In their view, extending neighbouring rights to publishers by equating them with phonogram producers would be unjustified, given that publishing requires very limited upfront investment in technical infrastructure. In addition, creating an extra layer of rights would generate legal complexity and even have

detrimental impact on EU research policy's open access strategy. Furthermore, the European Copyright Society warned that the recent attempts to introduce ancillary rights for press publishers in Germany and Spain involved serious regulatory design flaws, and unintended consequences.<sup>20</sup> Other [scholars](#) have questioned the practical benefits of creating a new right for press publishers.<sup>21</sup>

A group of more than 160 scholars have signed a [petition](#) against the text proposed by rapporteur Axel Voss (EPP, Germany) and adopted by the Legal Affairs Committee. A particular criticism is that the European Parliament's text extends the press publisher rights to 'news agencies' and expands the rights conferred beyond 'reproduction' and 'making available' to encompass rental, lending and other forms of distribution to the public, thereby creating an unwaivable right to fair and equitable remuneration for all the use of their publications for the benefit of press publishers.

A [study](#) from the Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament concludes that there are real concerns surrounding the uncertain effects of the right, and proposes not creating a *sui generis* right, but instead a presumption that press publishers are entitled to copyright/use such rights in the contents of their publications.

### **Value gap (Article 13)**

With regard to measures imposed on platforms, a [group of academics](#) considers that requiring providers of intermediary services to use automated means (such as Content ID-type technologies) to detect systematically unlawful content amounts to imposing a general monitoring obligation on these providers to actively monitor all the data of all of their users. They argue that Article 13, in its current wording, contradicts Article 15 of the E-Commerce Directive, the CJEU case law forbidding the imposition on providers of such a general monitoring obligation and is contrary to the [European Charter of Fundamental Rights](#). Maintaining the prohibition against general monitoring obligations would, in their view, preserve legal certainty, encourage innovation and safeguard internet users' human rights. Furthermore, other [academics](#) have argued that monitoring measures imposed on platforms are ill-conceived, badly worded and incompatible with established law.

A group of more than [70 academics and internet experts](#) have issued a letter outlining the danger of Article 13 and stress that, while filtering may pose little impediment to the largest platforms such as YouTube (which already uses its Content ID system to filter content), the law will create an expensive barrier to entry for smaller platforms and start-ups, which may choose to establish or move their operations overseas to avoid the European law. Furthermore, they warn that many harmless uses of copyright works (in [memes](#), [mashups](#), and [remixes](#)) may be considered by the filtering techniques as infringing copyright, which would radically curtail the scope of freedom of expression in Europe. The Special Rapporteur of the United Nations on the promotion and protection of the right to freedom of opinion and expression also highlighted [concerns](#) regarding the negotiated text.

Other academics [believe](#) that that the Commission's proposal does not establish general monitoring obligations for service providers and therefore is consistent with Article 15 of the E-Commerce Directive. Finally, it has been [argued](#) that it would be more efficient to tackle the 'value gap' through harmonising and standardising the current [notice and action mechanisms](#) (to remove illegal online content), rather than by implementing a filtering obligation.

**Text- and data-mining (Article 3)**

Several academics argue that the scope of the text- and data-mining exception should be broader. A study for the Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament [warns](#) that if the scope of the TDM exception is too narrow this risks stifling innovation coming from research organisations or businesses. Another study prepared for the Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament [argues](#) for an extended scope for the TDM exception, beyond research organisations, to cover all those enjoying lawful access to materials (including to start-ups and journalists), and call for an exception applicable both to commercial and non-commercial uses. In their study for the Max Planck Institute, Reto Hilty and Heiko Richter suggest allowing the TDM exception so that everyone can carry out TDM on lawfully accessible content, as well as permitting research organisation TDM on content to which they do not have lawful access.

**Legislative process****Council's position**

The legislative proposal has been under discussion in the Council since November 2016. After protracted negotiations to find a compromise between the Member States, the Council reached an agreement on a [general approach](#) on 25 May 2018. The main points of discussion concerned:

*Text and data mining (Article 3)*

As proposed by the Commission, the Council agrees with the creation of a mandatory copyright exception for text and data mining in the field of scientific research (Article 3). However, the Council stresses that data-mining techniques are widely used both by private and public entities to analyse large amounts of data, for instance for providing government services, taking complex business decisions and developing new applications or technologies. The Council therefore wants to introduce an optional exception (Article 3a) for enabling public and private entities to use mining techniques to access data which are lawfully accessible (for instance when they are freely available to the public online).

*Press publishers' right (Article 11)*

As proposed by the Commission, the Council agrees with the creation of a new right protecting the online use of press publications. However, the Council wants to limit the scope of application of the right, which would not apply to 'uses of insubstantial parts of press publication'. Moreover the copyright protection on such rights would only last one year, instead of 20 years as proposed by the Commission.

*Value gap (Article 13)*

As proposed by the Commission, the Council agrees with imposing monitoring obligations on online content sharing service providers. However, the Council goes beyond the Commission's proposal, since it considers that those providers would perform an 'act of communication to the public' when their users upload content protected by copyright and make it available to the public and would not, as a matter of principle, be eligible to the exemption of liability provided by the E-Commerce Directive (for the content infringing copyright uploaded by their users). However, online providers would not be held liable if they demonstrate that they have acted in a diligent manner and made their best efforts to prevent infringed content on their platform, acting expeditiously to remove or disable access to this material.

**European Parliament Legal Affairs Committee's position**

The proposal for a directive on copyright in the digital single market was referred to the European Parliament Committee on Legal Affairs (JURI). On 12 October 2016, the JURI Committee appointed Therese Comodini Cachia (EPP, Malta) as rapporteur. In June 2017, Axel Voss (EPP, Germany) was appointed rapporteur as a replacement for Comodini Cachia. The JURI committee approved the Voss [report](#) on 20 June 2018, in a tight vote (14 votes to 9 with 2 abstentions), and by the same majority, adopted a decision to enter into negotiations with the Council. The latter needs now to be confirmed in plenary before negotiations can begin. The main points of discussion concerned:

*Text and data mining (Article 3)*

As proposed by the Commission, the European Parliament agrees with the creation of a mandatory copyright exception for text- and data-mining in the field of scientific research. However, in line with the Council's position, the EP also wishes to introduce an optional exception (Article 3a) to enable public and private entities to use mining techniques to access lawfully accessible data.

*Press publishers' right (Article 11)*

As proposed by the Commission, the European Parliament agrees with the creation of a new right protecting the online use of press publications. The rapporteur's compromise amendment was adopted by the Legal Affairs Committee with a slim majority, and introduced some substantive amendments. The new right for press publishers would be granted for a five-year period (and not for 20 years as proposed by the Commission) and the text clarifies that such a right would not apply to hyperlinks.

*Value gap (Article 13)*

As proposed by the Commission, the Parliament agrees with imposing monitoring obligations on online content sharing service providers.<sup>22</sup> The text from the Legal Affairs Committee states that such providers perform an 'act of communication to the public' and therefore they are required to conclude a fair and appropriate licensing agreement with right-holders in order not to be held liable for the content (that infringes copyright) uploaded by their users. In the absence of licensing agreements, they are required to take appropriate and proportionate measures to deter the availability of the content infringing copyright. The text indicates that such measures would not require implementation of a general monitoring obligation, in accordance with the E-Commerce Directive, and that effective and expeditious complaints and redress mechanisms are put in place (including access to a court or a relevant judicial authority).

**EP supporting analysis**

[The Exception for Text and Data Mining \(TDM\) in the Proposed Directive on Copyright in the digital single market - Technical Aspects](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018.

[The Exception for Text and Data Mining \(TDM\) in the Proposed Directive on Copyright in the digital single market-Legal Aspects](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018.

[Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

[The proposed Directive on Copyright in the digital single market \(Articles 11, 14 and 16\) Strengthening the Press Through Copyright](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

[Legal analysis with focus on Article 11 of the proposed Directive on Copyright in the Digital Market](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

Eisele, K., and Tack, N., [Modernisation of EU copyright rules: Initial Appraisal of a European Commission Impact Assessment](#), EPRS, European Parliament, 2016.

Reynolds, S., [Review of the EU Copyright Framework: European Implementation Assessment](#), EPRS, European Implementation Assessment Study, European Parliament, October 2015.

Madiega, T., [EU copyright reform: revisiting the principle of territoriality](#), EPRS, European Parliament, September 2015.

## Other sources

[Copyright in the digital single market](#), European Parliament, Legislative Observatory (OEIL).

R, Hilty and H, Richter., [Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules Part B Exceptions and Limitations \(Art. 3 – Text and Data Mining\)](#), January 2017.

Angelopoulos, C., [EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence](#), October 2016.

Kretschmer, M.; Dusollier, S; Geiger, C.; Hugenholtz, P.B., [The European Commission's public consultation on the role of publishers in the copyright value chain: a response by the European Copyright Society](#), EIPR 2016, 38(10), pp. 591-595.

Montagnani, L., [The EU Consultation on ancillary rights for publishers and the panorama exception: Modernising Copyright through a 'one step forward and two steps back' approach](#), 20 September 2016.

Rosati, E., [Neighbouring Rights for Publishers: Are National and \(Possible\) EU Initiatives Lawful?](#) International Review of Intellectual Property and Competition Law, August 2016, pp. 569–594.

Senftleben, M., [Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?](#), November 2016.

Shapiro, T., 'EU copyright will never be the same: a comment on the proposed Directive on copyright for the digital single market (DSM)', European Intellectual Property Review, 2016, pp. 771-776.

Stalla-Bourdillon, S. and others, [Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society](#), 30 September 2016.

## Endnotes

<sup>1</sup> See European Commission [impact assessment](#) at pp. 80-81 and 87-90, and EPRS [Review of the EU Copyright Framework: European Implementation Assessment](#).

<sup>2</sup> See [Impact assessment](#) at pp. 52-55.

<sup>3</sup> See [Impact assessment](#) at pp. 65-69.

<sup>4</sup> See [PwC Entertainment and media Outlook 2016-2020](#).

<sup>5</sup> See [Impact assessment](#) at pp. 155-160.

<sup>6</sup> The CJEU has ruled that publishers are not rights-holders under current EU law and as a result the lawfulness of mechanisms allowing publishers to receive compensation for uses of their publications under exceptions and limitation (e.g. private copy) have been questioned (see [Hewlett-Packard and others](#), C-572/13).

<sup>7</sup> See [Impact assessment](#) at p. 160.

<sup>8</sup> See [Impact assessment](#) at pp. 137-144.

<sup>9</sup> See [Impact assessment](#) at pp. 173-177.

<sup>10</sup> See B. Hugenholtz, [Codes of Conduct and Copyright Enforcement in Cyberspace](#), in Copyright Enforcement and the Internet (ed. Stamatoudi), 2010. See also C. Angelopoulos, [Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe](#).

- <sup>11</sup> See European Commission, [Report on the responses to the Public Consultation on the Review of the EU Copyright Rules](#), 2014; European Commission, [First brief results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy](#), 2016; European Commission, [Synopsis reports and contributions to the public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'](#), 2016.
- <sup>12</sup> Text- and data-mining carried out in relation to mere facts or data which are not protected by copyright does not require authorisation. Also the new exception is without prejudice to the existing mandatory exception for temporary acts of reproduction laid down in Article 5(1) of the Copyright Directive which continue to apply.
- <sup>13</sup> See Article 7. Rights-holders may exclude at any time their works from the scope of a licence for out-of-commerce works.
- <sup>14</sup> Member States must ensure that information allowing the identification of the works and the possibility for the rights-holders to object are made publicly accessible in a single online portal to be established and managed by the European Union Intellectual Property Office.
- <sup>15</sup> See for instance R. Xalabarder, [The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance with International and EU Law](#), 2014. Other sources stress, however, that if the Spanish online newspapers initially suffered a loss, the overall impact of the law was not that negative in terms of decrease of traffic (See data discussed on the blog The IPKat: ['Spain: Did the "Google Tax" really change the market?'](#), 17 March 2015) and some scholars believe the law is beneficial to rights-holders (See C. Gagne, [Canon AEDE: Publishers' Protections from Digital Reproductions of Works by Search Engines under European Copyright Law](#), in: Temple International & Comparative Law Journal 29, 2015. pp. 203-238).
- <sup>16</sup> See Recital 34. The Commission proposal seems to differ from the Spanish law which limits the quotation exception. Some scholars have warned that the Spanish law – limiting the quotation exception – would be contrary to the Berne Convention (See R. Xalabarder, [The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance with International and EU Law](#), 2014).
- <sup>17</sup> Scholars have however [raised](#) the difficulties in applying this jurisprudence since where the posting of a hyperlink is done for profit, the Court considered that a communication to the public is taking place (see also M. Senftleben, [Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?](#)).
- <sup>18</sup> See T. Shapiro, 'EU copyright will never be the same: a comment on the proposed Directive on copyright for the digital single market (DSM)', and K. Ehle and S. McLean, ['Copyright: Europe Explores Its Boundaries – Digital Single Market Update: The European Commission's Proposal to Modify and Harmonize EU Copyright Law'](#).
- <sup>19</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.
- <sup>20</sup> See, M. Kretschmer, S. Dusollier, C. Geiger, P. B. Hugenholtz, [The European Commission's public consultation on the role of publishers in the copyright value chain: a response by the European Copyright Society](#).
- <sup>21</sup> See E. Rosati, ['The proposed press publishers' right: is it really worth all this noise?'](#).
- <sup>22</sup> According to the Legal Affairs Committee's text, services acting in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all concerned right-holders, such as educational or scientific repositories, should not be considered online content sharing service providers within the meaning of this Directive.

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