RCUK Centre for Copyright and New Business Models in the Creative Economy

EU Copyright Reform

Image credit: European Commission: Modernisation of the EU copyright rules web pages

EU Copyright Reform is needed. It has been in the making for many years. This webpage follows the progress of the Commission's Reform Package through the complex EU process of law making. The aim is to contribute to a European public sphere. We will offer an independent academic perspective and provide access to resources and evidence.

CONTEXT

On 14 September 2016, the European Commission published a package of reform proposals, including two Regulations (that have direct effect in Member States) and two Directives (that will have to be implemented into national laws).

In February 2017, these proposals were at the Committee stage in the European Parliament. Progress on the Copyright in the Digital Single Market Directive (COM(2016) 593 final – the most important intervention) can be followed under this link.

There is also legislation on the cross border portability of online subscriptions for content: Proposed Regulation COM(2015) 627 final (provisionally agreed in negotiations between the Council and the European Parliament on 7 February 2017).

And there is a proposal to amend the Audiovisual Media Services Directive (AVMSD) published by the European Commission on 25 May 2016. Legislative progress can be followed here.

It is a complicated package, supported by over 400 pages of Impact Assessments. The aims of the Copyright Reform agenda, as articulated by the Commission, are laudable.

1. More cross-border access to content online;
2. Wider opportunities to use copyrighted materials in education, research and cultural heritage;
3. A better functioning copyright marketplace.

While the Proposed Directive on Copyright in the Digital Single Market (COM(2016) 593 final) contains a number of reasonable, common sense measures (for example relating to cross border access, out-of-commerce works, and access for the benefit of visually impaired people), there are two provisions that are fundamentally flawed. These show the direct result of lobby influence and do not serve the public interest.

Below is an Open Letter sent to MEPs and members of the IP working party of the European Council on 24 February 2017.

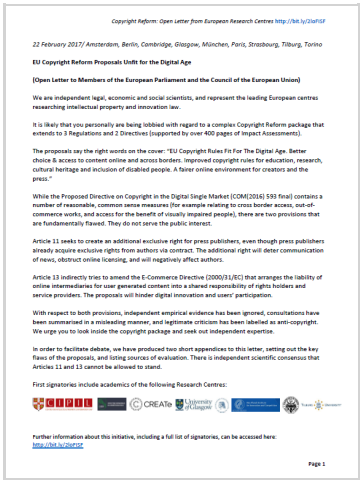
An update of developments by 11 May 2017 can be found in this blog post by Martin Kretschmer: http://www.create.ac.uk/blog/2017/05/11/eu-copyright-reform-quo-vadis/

OPEN LETTER TO MEMBERS OF THE EUROPEAN PARLIAMENT AND THE EUROPEAN COUNCIL

Amsterdam, Berlin, Cambridge, Glasgow, München, Paris, Strasbourg, Tilburg, Torino

24 February 2017

EU Copyright Reform Proposals Unfit for the Digital Age



Copyright Reform: Open Letter from European Research Centres http://bit.ly/2IaFISF

22 February 2017/ Amsterdam, Berlin, Cambridge, Glasgow, München, Paris, Strasbourg, Tilburg, Torino

EU Copyright Reform Proposals Unfit for the Digital Age

(Open Letter to Members of the European Parliament and the Council of the European Union)

We are independent legal, economic and social scientists, and represent the leading European centres researching intellectual property and innovation law.

It is likely that you personally are being lobbied with regard to a complex Copyright Reform package that extends to 3 Regulations and 2 Directives (supported by over 400 pages of Impact Assessments).

The proposals say the right words on the cover: "EU Copyright Rules Fit For The Digital Age. Better choice & access to content online and across borders. Improved copyright rules for education, research, cultural heritage and inclusion of disabled people. A fairer online environment for creators and the press."

While the Proposed Directive on Copyright in the Digital Single Market (COM(2016) 593 final) contains a number of reasonable, common sense measures (for example relating to cross border access, out-of-commerce works, and access for the benefit of visually impaired people), there are two provisions that are fundamentally flawed. They do not serve the public interest.

Article 11 seeks to create an additional exclusive right for press publishers, even though press publishers already acquire exclusive rights from authors via contract. The additional right will deter communication of news, obstruct online licensing, and will negatively affect authors.

Article 13 indirectly tries to amend the E-Commerce Directive (2000/31/EC) that arranges the liability of online intermediaries for user generated content into a shared responsibility of rights holders and service providers. The proposals will hinder digital innovation and users' participation.

With respect to both provisions, independent empirical evidence has been ignored, consultations have been summarised in a misleading manner, and legitimate criticism has been labelled as anti-copyright. We urge you to look inside the copyright package and seek out independent expertise.

In order to facilitate debate, we have produced two short appendices to this letter, setting out the key flaws of the proposals, and listing sources of evaluation. There is independent scientific consensus that Articles 11 and 13 cannot be allowed to stand.

First signatories include academics of the following Research Centres:

Further information about this initiative, including a full list of signatories, can be accessed here: http://bit.ly/2IaFISF

Page 1

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First signatories include academics of the following Research Centres:

Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge, United Kingdom;
Centre d'Etudes Internationales de la Propriété Intellectuelle (CEIPI), University of Strasbourg, France;
RCUK Copyright Centre (CREATe), University of Glasgow, Scotland, UK;
Chair for Civil and Intellectual Property Law, Humboldt University, Berlin, Germany;
Institute for Information Law, University of Amsterdam, Netherlands;
Max Planck Institute for Innovation and Competition, Munich, Germany;
Center for Internet & Society (NEXA), Politecnico di Torino, Italy;
Universitat Oberta de Catalunya (UOC), Barcelona, Spain
SciencesPo Paris, France;
Tilburg Institute for Law, Technology and Society & Tilburg Law and Economics Center, University of Tilburg, Netherland

The full list of signatories can be found at the end of this page.

***Download the letter as pdf*.**

APPENDIX I: What is wrong with Article 11?

Proposed Directive on Copyright in the Digital Single Market: Article 11

Protection of press publications concerning digital uses

The Proposal aims to change the legal framework for the online use of news, by creating a new exclusive right for press publishers. Any statement that this intervention will not affect the communication of information in a democratic society (and thus the right to freedom of expression) is seriously misleading. While the motivation for the proposed new right is to help publishers in a time of technological change, the consequence will be a ***fundamental change in the copyright treatment***

of news. The onus must be on the proponents of the new right to present independently verifiable evidence on the effects and the proportionality of the intervention (including an assessment of the lack of alternatives). This is entirely missing from the Commission's package, a scandalous omission.

There is consensus, as Recital 31 puts it, that "[a] free and pluralist press is essential to ensure quality journalism and citizens' access to information". But it is wrong to present copyright as the solution. Exclusive rights cut two ways. They incentivise and they prevent. Already the Berne Convention for the Protection of Literary and Artistic Works (1886), the 'mother' of the international copyright system, explicitly permits free press summaries, recognising the sensitive status of information and news. ***No evidence is presented by the Commission that restricting the communication of news would address the decline in revenues from advertising and subscription of many traditional newspapers.*** Will citizens read more, and read more European sources?

The second main argument offered by the Commission is that there is nothing problematic or unusual under copyright law to recognise investment through a related right (Recital 32: "the organisational and financial contribution of publishers"). This too is misleading. The contribution of a producer of a phonogram or the producer of an audio-visual recording is very different from a publisher, even a news publisher. ***Through employment contracts or contracts with free-lance journalists, press publishers already acquire the authors' copyright.*** So the proposal in effect establishes a double layering of rights for the same creation.

If the real issues relate to licensing and enforcement (e.g. proof of ownership), ***the answer needs to focus on licensing and enforcement rather than on creating new rights***. Article 5 of the Enforcement Directive (2004/48/EC) could be amended to create a presumption that a press publisher is entitled to bring proceedings to enforce the copyright in any article or other item appearing in a journal of which it is the identified publisher.

It is false to claim that the proposed new right for press publishers will have no effect on authors who are protected under the "no prejudice" clause in Art. 11(2) (and Recital 35). In the public consultation, journalists and photographers expressed their concern that by granting publishers a related right, the freedom to republish the work (under contract or as a matter of national law), would be even more difficult to exercise. From a user perspective, a service that wishes to republish works covered by the new right will have to approach whom? If the pie does not get bigger, ***the authors' share will become smaller as additional rights are introduced into play.***

The proposal adds another layer of rights that new services and innovators have to clear in ***all*** Member States. ***This will hinder European innovation compared to the rest of world.*** The empirical evidence from the introduction of ancillary rights for press publishers in Germany (2013) and Spain (2014) indicates that big firms can adjust their business model, pay licence fees or negotiate free licences. The innovation effects on independent news services and start-ups are not assessed by the Commission.

There are many technical issues around the drafting language of Article 11. The term of 20 years appears to apply retrospectively, and is never justified. The subject matter is defined very broadly, covering professional publications, blogs and websites. Despite Recital 33 stating that "this protection does not extend to acts of hyperlinking which do not constitute communication to the public" (reasserting case law of the European Court of Justice), the recitals and explanatory documents state the intention to make aggregators, search engines and social media pay. It is unclear for what activity. ***Non-linking digital uses, such as scanning, indexing, and text-and-data-mining may become a target. There are potential consequences for open data and open access policies.*** It is no surprise that academic publishers are taking a close interest in the Article.

Article 11 is fundamentally misconceived, and should be removed from the Proposed Directive.

Independent studies and opinions

- European Copyright Society (20 academics), Opinion on European Commission Proposals for Reform of Copyright in the EU (24 January 2017): https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/
- Lionel Bently et al., Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled 'Protection of press publications concerning digital uses'on behalf of 37 professors and leading scholars of Intellectual Property, Information Law and Digital Economy (5 December 2016): https://www.cipil.law.cam.ac.uk/press/news/2016/12/cambridge-academics-respond-call-views-european-commissions-draft-legislation
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- Joan Calzada and Ricard Gil (2016), What Do News Aggregators Do? Evidence from Google News in Spain and Germany, Universitat de Barcelona and John Hopkins Carey Business School Working Paper (Shutdown of Google News in Spain decreased the number of daily visits to Spanish news outlets by 11%. In Germany, the opt-in policy adopted by the German edition of Google News in October 2014 did not significantly affect the daily visits of all outlets that opted out, but reduced by 7% the number of visits of the outlets controlled by the publisher Axel Springer): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553
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- European press publishers associations (EMMA, ENPA, EPC and NME): Putting the record straight on copyright, links and other questions (17 November 2016), Letter send to every MEP (presenting the new right as "straightforward" and "in line with the copyright acquis") [link to pdf]
- CopyrightEvidence.org: Wiki resource, cataloguing empirical evidence relating to copyright

APPENDIX II: What is wrong with Article 13?

Proposed Directive on Copyright in the Digital Single Market: Article 13

Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users

The Proposal aims to change the legal framework for online use of copyright works. ***Without acknowledging it and contradicting the results of the public consultation, it reverses the allocation of responsibilities between rightsholders and service providers that was adopted by the European legislator in the E-Commerce Directive (2000/31/EC).***

The E-Commerce Directive had two main goals. First, it was to support the economic growth of digital services relying on user-generated content by providing them with legal certainty. Second, it was to legislate for rapid, reliable and proportionate enforcement of copyright and other rights.

The resulting mechanism adopted for hosting services, known as ***"notice and takedown"***, splits the responsibility and costs associated with preventing copyright infringements between rightsholders and intermediaries. It does so by making a host of content uploaded by users liable only upon obtaining knowledge of the content and its illegality. As a result, while rightsholders bear the burden of identifying and notifying infringements, intermediaries oversee verification and subsequent takedown of the notified content.

The proposed Article 13 attempts to change this by creating an obligation on intermediary services to take "appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies" (Recital 38). The aim is to force platforms into licensing agreements that close the so-called "value gap" between the benefits platforms derive from hosting user uploaded content and the money paid to rightsholders of that content.

The Proposal is poorly drafted. ***It is unclear if it imposes a novel filtering obligation only on platforms with existing licensing agreements, or on all platforms regardless of such agreements***. In any case, Article 13 avoids answering the central question: ***when and on what legal grounds should platforms pay for their users' content?***

But most importantly, Article 13 is not based on any assessment of the consequences of the intervention that conforms to "better regulation principles" agreed by Commission, Parliament and Council: a duty to strive "for simple, evidence-based, predictable and proportionate rules that are fit for purpose and deliver maximum benefits to citizens and businesses" (Jean-Claude Juncker, State of the Union Address 2016).

In particular, the Commission's proposals take the "value gap" as given as a rationale for intervention. The idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis. The concept was invented by the music industry in 2006, initially as a "value recognition right" in the copyright levy debate. This led quickly to reports commissioned from economic consultants that confirm the views of the commissioners. It is disturbing that the European legislator now appears to take the concept for granted. The value gap language also obfuscates the legitimate goal of improving the economic positions of creators.

Online service providers that rely on user generated content not only include large multinational companies, such as YouTube or Facebook. There are many European platforms run by SMEs falling into the same category. ***Innovative companies are the engine of European growth and an important source of cultural diversity. They will be affected by Article 13 in unpredictable ways. We need to know how.***

During the scrutiny of this proposal in Parliament and in the Council, the following questions need to be asked: (1) why improving notice and takedown procedure is not sufficient; (2) how expensive and available is the crucial filtering technology; (3) how precise is it; (4) can Internet start-up companies afford it; (5) which services are likely to be affected (e.g. cloud hosts, social media, news aggregators, wikis); (6) will the new obligations raise barriers to entry; (7) if so, for which markets, and with what consequences for European consumers and innovators; (8) will new licensing agreements benefit creators, and why; (9) how effective are counter-notice measures in preventing over-blocking of legitimate content; (10) will there be any systematic impact on freedom of expression; and (11) how does the European Commission plan to assure public oversight of these measures.

The Proposal appears to require private companies to monitor their customers by using unspecified filtering technologies without any public oversight. It appears to encourage value transfer arrangements without considering innovation, consumer and cultural effects.

Article 13 needs radical reform that may not be achievable through amendments within its current structure. We would advise removing the Article from the Proposed Directive, and focussing attention on improving the procedure for "notice and takedown".

Independent studies and opinions

- European Copyright Society (20 academics), Opinion on European Commission Proposals for Reform of Copyright in the EU (24 January 2017): https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/
- Sophie Stalla-Bourdillon et al (40 academics), 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: https://ssrn.com/abstract=2850483
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- European Commission, Public Consultation on the Review of the EU Copyright Rules (5 December 2013 – 5 March 2014: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm
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- European Commission (2016), Synopsis Report on The Public Consultation on The Regulatory Environment for Platforms, Online Intermediaries and The Collaborative Economy: https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries (underreporting concerns about changes to liability regime)
- https://lumendatabase.org/: database of legal complaints and requests for removal of online materials
- CopyrightEvidence.org: Wiki resource, cataloguing empirical evidence relating to copyright

OPEN LETTER: FULL LIST OF SIGNATORIES

First signatories (24 February 2017)

- CIPIL, University of Cambridge, UK

Professor Lionel Bently, Director, Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge, United Kingdom

Dr. Henning Grosse Ruse-Khan, Co-Director CIPIL; Dr. Christina Angelopoulos;
Professor Bill Cornish

- CEIPI, University of Strasbourg, France

Professor Christophe Geiger, Director, Centre d'Etudes Internationales de la Propriété Intellectuelle (CEIPI)

Dr. Giancarlo Frosio; Oleksandr Bulayenko

- CREATe, University of Glasgow, UK

Professor Martin Kretschmer, Director, RCUK Copyright Centre (CREATe), University of Glasgow, Scotland, United Kingdom [drafter]

Professor Lilian Edwards, Deputy Director CREATe, Professor of E-Governance, Strathclyde University

Professor Sayantan Ghosal, Professor of Economics, Adam Smith Business School, University of Glasgow

Professor Ruth Towse, Professor of the Economics of Creative Industries, Bournemouth University & CREATe Fellow in Cultural Economics;

Dr. Elena Cooper; Dr. Kris Erickson; Dr. Thomas Margoni; Dr. Andreas Rahmatian; Dr. Sukhpreet Singh

- Humboldt-Universität Berlin, Germany

Professor Axel Metzger, Chair in Civil and Intellectual Property Law

Jun. Professor Katharina del la Durantaye

- IViR, University of Amsterdam, Netherlands

Professor P. Bernt Hugenholtz, Director, Institute for Information Law

Professor Mireille van Eechoud

Dr. Stef van Gompel

Dr. Joost Poort, Associate Professor (economics)

- Max Planck Institute for Innovation and Competition, Munich, Germany

Professor Reto Hilty, Director, Max Planck Institute for Innovation and Competition

Professor Josef Drexl, Director Intellectual Property and Competition Law

Professor Dietmar Harhoff, Director Innovation and Entrepreneurship Research

- Nexa, Politechnio di Torino, Italy

Professor Juan Carlos De Martin, Co-Director, Center for Internet & Society (NEXA)

Professor Marco Ricolfi, Co-Director NEXA

- Universitat Oberta de Catalunya (UOC), Barcelona, Spain

Professor Raquel Xalabarder, Chair of Intellectual Property

- SciencesPo, Paris, France

Séverine Dusollier, Professor, School of Law, SciencesPo Paris, France

- Tilburg University, Netherlands

Professor Panos Delimatsis, Director, Tilburg Law and Economics Center (TILEC)

Dr. Martin Husovec (TILT & TILEC) [drafter]

Professor Eleni Kosta, Professor Ronald Leenes, Dr. Maurice Schellekens (TILT)

Professor Panos Delimatsis, Professor Pierre Larouche, Dr. Lapo Filistrucchi, Dr. Jens Prüfer, Dr. Florian Schuett (TILEC)

New signatories

Dr. Eoin O'Dell, Associate Professor of Law, Trinity College Dublin

Dr. Begoña Gonzalez Otero, Academic Dean of EU Business School Munich and affiliated researcher of the Instituto de Derecho Industrial, Universidad de Santiago de Compostela

Dr. Sabine Jacques, Lecturer, School of Law, University of East Anglia

Professor Fiona Macmillan, Corporation of London Professor of Law, Birkbeck University of London

Miquel Peguera, Associate Professor, Universitat Oberta de Catalunya, Barcelona

João Pedro Quintais, Postdoctoral Researcher, IViR, University of Amsterdam, Netherlands

If you support the Open Letter and wish to add your name, please send an e-mail to the CREATe hub.

CREATe's earlier contributions to the EU Copyright reform debate include the following papers and policy submissions:

- The European Commission's public consultation on the review of EU copyright rules: a response by the CREATe Centre
  CREATe Working Paper 2014/9
  http://www.create.ac.uk/publications/create-response-to-eu-copyright-rules-review/
- Response to the Public Consultation by the European Commission on the Evaluation and Modernisation of the Legal Framework for the Enforcement of Intellectual Property Rights on behalf of CREATe by Elena Cooper, Theodore Koutmeridis and Martin Kretschmer (April 2016)
  http://www.create.ac.uk/wp-content/uploads/2016/05/CREATe-response-to-EC-enforcement-consultation.pdf
- The European Commission's public consultation on the role of publishers in the copyright value chain: A response by the European Copyright Society
  CREATe Working Paper 2016/09
  Martin Kretschmer, Séverine Dusollier, Christophe Geiger, and P. Bernt Hugenholtz
  http://www.create.ac.uk/publications/the-european-commissions-public-consultation-on-the-role-of-publishers-in-the-copyright-value-chain-a-response-by-the-european-copyright-society/
- Why a reform of hosting providers' safe harbour is unnecessary under EU copyright law
  CREATe Working Paper 2016/11
  Eleonora Rosati, University of Southampton and e-LAWnora
  http://www.create.ac.uk/publications/why-a-reform-of-hosting-providers-safe-harbour-is-unnecessary-under-eu-copyright-law/
- EU copyright reform: the case for and against a related right for press publishers
  CREATe Working Paper 2017/08
  Thomas Höppner
  CREATe Working Paper 2016/15
  Raquel Xalabarder
  http://www.create.ac.uk/publications/eu-copyright-reform-the-case-for-a-related-right-for-press-publishers/
  http://www.create.ac.uk/publications/press-publisher-rights-in-the-new-copyright-in-the-digital-single-market-draft-directive/
  ESRC resource from public lectures: http://www.create.ac.uk/create-public-lecture-2017-the-case-for-a-related-right-for-press-publishers/

A full list of interventions is available here: http://www.create.ac.uk/policy-responses/