

Copyright in the digital single market

OVERVIEW

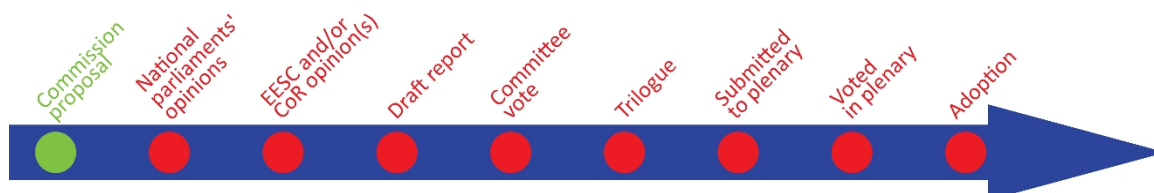
On 14 September 2016, the European Commission presented a legislative package for the modernisation of the EU copyright rules, including a new directive on copyright in the digital single market. The proposal aims at further harmonising the EU copyright framework taking into account the increasing digital and cross-border uses of protected content.

More specifically, it lays down rules on exceptions and limitations to copyright protection, on the facilitation of licences as well as rules aimed at ensuring a well-functioning marketplace for the exploitation of copyright-protected works.

Stakeholders and commentators are strongly divided on the proposal. Much of the debate focuses on the creation of a new neighbouring right for press publishers, the measures imposed on platforms storing and giving access to user-uploaded content, and the scope of the new text- and data-mining exception.

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 14.9.2016
<i>Rapporteur:</i>	Therese Comodini Cachia (EPP, Malta)	2016/0280(COD)
<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) Marie-Christine Boutonnet (ENF, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Discussion in committee	



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.¹

[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.² 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.³

Publishing industry in the digital world

The publishing industry is shifting from print to digital. However, the increase of publishers' digital revenues does not compensate for the decline in print revenues.⁴ 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.⁵ Furthermore, publishers face legal uncertainty over their ability to receive compensation for the use of their publications.⁶ 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.⁷

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 in order still to be indexed by Google.

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. Scholars and commentators have generally been very critical of the Spanish legislation.⁸ A [NERA study commissioned by Spanish publishers](#) concluded that the introduction of the ancillary right fees had had an overall negative impact on the publishing sector.

Challenges in enforcing copyright and allowing appropriate remuneration for authors and rights-holders in a digital environment

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 there is growing concern about the sharing of the value generated by online content distribution. Rights-holders fail to determine when users are uploading protected content on platforms, and there is a lot of legal uncertainty surrounding the conclusion of licences and the protection of copyrighted content available online.⁹ Furthermore, creators are unable to effectively monitor the use, commercial success and economic value of their works, and therefore to claim for remuneration effectively.¹⁰ The current rules applicable to online platforms for enforcing copyright and allowing appropriate remuneration for authors and rights-holders in a digital environment are 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 have led many scholars to **call for amendment of the current rules**.¹¹

Parliament's starting position

The European Parliament, whose Legal Affairs (JURI) Committee 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 order to fight 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

It 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 and taking into account cultural diversity, and to help 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.¹² 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 proposes rather 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 Directive 2001/29/EC (the Information Society Directive) which harmonises the rights relevant for online dissemination of content (notably the reproduction and making available rights). A directive would leave 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.¹³ 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 contractually the use of their data or to receive compensation. However, they are allowed to implement measures to mitigate the risks for the security and integrity of the system or database where data are hosted.

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 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 draft 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 when 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 in its territory an exception or limitation only when the so-called '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.¹⁴ Works covered by a licence may be used in all Member States in accordance with the terms of that licence.¹⁵

On-demand services

The draft 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 there are no such rights for publishers, as was confirmed by the Court of Justice of the EU (CJEU) in the [Reprobel](#) case. To remedy that, the Commission proposes therefore to introduce into EU law a new related right 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 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.

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).¹⁶ Furthermore, publishers' rights would apply without prejudice to authors and other creators' rights on their individual contributions (news or magazine articles, photographs, videos) which make up the protected content (the final press product).

The draft 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'.¹⁷ 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.¹⁸

Measures imposed on platforms storing and giving access to user-uploaded content

The Commission proposes to reinforce the position of rights-holders to negotiate and be remunerated 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 on 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 an automatic means of monetising their content or for removing it in case of infringement.

Fair remuneration

The draft 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 draft 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 assessing the need for action, to ensure that the different levy systems in place in Member States do not raise obstacles in the single market.

National parliaments

So far, national parliaments have not raised objections to the proposal. The [deadline for national parliaments](#) to raise subsidiarity concerns elapses on 30 November 2016.

Stakeholders' views

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'.

Consumers and users' associations

The [European Consumer Organisation](#) (BEUC) warned that the Commission's plans fall short of putting an end to geo-blocking practices, and called for more to be done to include streaming services and to prevent rights-holders (such as film studios or sports leagues) from contractually prohibiting broadcasters from opening up their services to foreign viewers. Furthermore, BEUC criticises the measure obliging online platforms to install software to detect and take down videos containing copyrighted works.

In their joint position, [Communia and EDri](#) (two associations defending the 'digital public domain' and supporting civil rights) stressed that the solutions proposed are not fit for purpose. They believe that the scope of the proposed publishing rights is not clear and that such a proposal repeats mistakes made in Germany and Spain, which proved to be harmful to the market. They criticised the mandatory filtering obligation imposed on service-providers, which they consider would be at odds with the E-commerce Directive and the CJEU case law. Furthermore, they call for a far more extensive and open approach to harmonising copyright exceptions, by making most available copyright exceptions and limitations mandatory and harmonising them across all Member States. Similarly, the [Electronic Frontier Foundation](#), a non-profit organisation defending civil liberties in the digital world, considered that the Commission proposal would force companies into private agreements, contrary to the prohibition of general monitoring under the E-commerce Directive.

[Creative Commons](#), a non-profit organisation that fosters free sharing and reuse of creativity and knowledge, shares the same concerns, and also criticised the proposed copyright exception for education covering digital content that means Member States can ignore an available content-licensing option for educational materials.

Authors

The [International Confederation of Societies of Authors and Composers](#) and the [Authors' Group](#) welcomed the European Commission's proposal to address the issues of creators' weak bargaining position in their contractual relationships, and fair remuneration in contracts. They support the introduction of a mandatory reporting obligation detailing the revenues generated and remuneration, the introduction of a dispute resolution mechanism and the provisions of the directive clarifying the liability of online platforms. However, authors consider they need further mechanisms against unfair copyright contracts and that substantial work remains to be done with regard to proportionate remuneration of authors, particularly for the online exploitation of their works.

[Europe's leading Newspaper and Magazine Publishers' Associations](#) supported the proposal by the European Commission to recognise publishers as rights-holders in EU copyright law. The [Federation of European Publishers](#) (FEP) stressed that the proposal sends a clear message in favour of licences and negotiated solutions, especially for out-of-commerce works and illustrations for teaching. However, FEP found the proposal fails to clarify the concept of legal access (i.e. the accessing of content under one exception does not give the user the right to make further use of that content under another exception) which is a problematic issue for publishers.

Traders, content and online providers

[EDiMA](#), the association representing online platforms, warned against introducing a new neighbouring right for publishers into EU law. It stressed this would be highly problematic from a legal perspective, going against well-established international law and respect for fundamental rights, and would also have an overwhelmingly negative impact for consumers, news publishers and innovation as had had the approaches in Germany and Spain. Furthermore, EDiMA opposed the introduction of mandatory monitoring measures. It believes this could hamper the growth of a diverse and innovative ecosystem and lead to overbroad filtering of user-generated content. Finally, EDiMA criticised the fact that the proposed new text- and data-mining (TDM) exception is limited to only 'public interest research institutions'.

Libraries, cultural heritage and scientific institutions

[Libraries and cultural heritage institutions](#) welcomed the proposal to make the right to perform text- and data-mining (TDM) on legally accessed materials mandatory across Europe. However, they stressed that there are also conspicuous gaps, such as on e-lending, remote access to library resources through closed networks, and cross-border collaboration. The [International Association for Scientific, Technical and Medical Publishers](#) complained that the new publishers' related right does not extend to STM publishers and urged European copyright policymakers to make other existing copyright exceptions related to research mandatory, and to extend the benefit of the TDM exception more widely (than only for the purpose of scientific research). Similarly, the [League of European Research Universities](#) (LERU) asked the co-legislators to strengthen the TDM exception by deleting the reference to technical safeguards, and to widen its scope and its beneficiaries.

Academic views

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 publishing requires very limited upfront investment in technical infrastructure. Also,

setting an extra layer of rights would create legal complexity and even have detrimental impact on the open access strategy of EU research policy. Furthermore, they warned that there have been serious regulatory design flaws, and unintended consequences from the recent attempts to introduce ancillary rights for press publishers in Germany and Spain.¹⁹ Other [scholars](#) have questioned the practical benefits of creating a new right for press publishers.²⁰

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

Legislative process

The proposal for a [directive on copyright in the digital single market](#) was published on 14 September 2016. It was initially referred to the Committee on Legal Affairs (JURI) which on 12 October 2016, appointed Therese Comodini Cachia (EPP, Malta) as rapporteur.

EP supporting analysis

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

- Madiaga, T., [EU copyright reform: revisiting the principle of territoriality](#), EPRS Briefing, September 2015.

Other sources

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

- 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, 201, 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

- ¹ See European Commission [impact assessment](#) at pp. 80-81 and 87-90, and EPRS [Review of the EU Copyright Framework: European Implementation Assessment](#).
- ² See [Impact assessment](#) at pp. 52-55.
- ³ See [Impact assessment](#) at pp. 65-69.
- ⁴ See [PwC Entertainment and media Outlook 2016-2020](#).
- ⁵ See [Impact assessment](#) at pp. 155-160.
- ⁶ 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).
- ⁷ See [Impact assessment](#) at p. 160.
- ⁸ 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).
- ⁹ See [Impact assessment](#) at pp. 137-144.
- ¹⁰ See [Impact assessment](#) at pp. 173-177.
- ¹¹ 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](#).
- ¹² 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.
- ¹³ 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.
- ¹⁴ See Article 7. Rights-holders may exclude at any time their works from the scope of a licence for out-of-commerce works.
- ¹⁵ 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.
- ¹⁶ 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).
- ¹⁷ 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?](#)).
- ¹⁸ 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](#)'.
- ¹⁹ 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](#).
- ²⁰ See E. Rosati, '[The proposed press publishers' right: is it really worth all this noise?](#)'.

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