

Amsterdam, Barcelona, Berlin, Brno, Cambridge, Florence, Glasgow, München, Paris, Strasbourg, Tilburg, Torino, Trnava

The Copyright Directive is failing

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

We are independent legal, economic and social scientists from leading research centres across Europe.

Many of us participated in the public debate surrounding the [Proposed Directive on Copyright in the Digital Single Market](#) (COM(2016) 593 final), contributing studies, scholarly articles, comments and open letters [1]. We did this work in the belief that it is the responsibility of academics to offer independent expertise in a complex and contested area of policy making.

We acknowledged from the beginning that this was a heavily lobbied field, where there was a danger that the interests of small innovating firms, of non-organised creators and of consumers would not be heard. We therefore repeatedly recommended that the legislative process should be conducted transparently and that the public should be offered proper evidence for review.

We note with dismay that the latest revisions to the Proposed Directive are being negotiated behind closed doors. Independent evidence is ignored in response to heavy lobbying. “Compromise” texts are now being drafted both in the Council of the European Union [2] and in the European Parliament [3]. They are destined for the agenda of the EU Council (Competitiveness Council, 28-29 May 2018) and are scheduled to be voted in the JURI Committee on 21-22 June 2018.

There is scientific consensus

- that the proposed exception for text-and-data-mining in Art. 3 will not achieve its goal to stimulate innovation and research if restricted to certain organisations,
- that the proposals for a new publishers’ right under Art. 11 will favour incumbent press publishing interests rather than innovative quality journalism,
- and that the proposals for Art. 13 threaten the user participation benefits of the [e-Commerce Directive \(2000/31/EC\)](#) which shared the responsibility for enforcement between rightholders and service providers.

When the Commission’s Proposed Directive was published on 14 September 2016, there were grounds for optimism. The Committees of the European Parliament did their job in scrutinising the proposals. In particular the draft report of MEP Catherine Stihler (S&D) for the Internal Market committee IMCO recognised the dangers of Art. 13 (where it may undermine the innovation benefits of the e-Commerce Directive); the report by MEP Michał Boni (EPP) for the

Civil Liberties committee LIBE emphasised the Charter of Fundamental Rights and that Art. 13 should not impose a general monitoring obligation; the report by MEP Zdzisław Krasnodębski (ECR) for the Industry committee ITRE drew attention to the narrow scope of the proposed Art. 3 exception for text-and-data-mining.

In the lead Legal Affairs committee JURI, rapporteur Therese Comodini Cachia (EPP) produced a balanced draft report, published on 10 March 2017 [4] that replaced the deeply problematic new publishers’ right in Art. 11 with a presumption that gives press publishers standing to sue. Comodini’s report also opened the text-and-data-mining exception under Art. 3 to all, and clarified the obligations on service providers under Art. 13.

Comodini resigned as a MEP in June 2017 to take up a seat in the Maltese Parliament and Axel Voss, a German MEP from the EPP Group, was appointed rapporteur. The legislative drafts that have since emerged from his office as well as from the Bulgarian Council presidency (since January 2018) pay lip service to authors’ interest but respond in effect to the agenda of powerful corporate interests.

There is a tremendous amount of noise and misinformation. “Fake news” is dressed as a copyright issue (which can only be characterised as cynical), and the misleading rhetoric of a “value gap” clouds the true nature of the issues for online platforms.

Comodini’s draft report for the JURI Committee in our view still offers the most workable basis for progress because it was based on wide and transparent consultation, taking into account scientific evidence.

If the legislation progresses in the form proposed by the recent drafts of the Bulgarian Presidency and JURI rapporteur Voss, we call on you to reject the Proposed Directive altogether. It will not serve the public interest.

The Copyright in the Digital Single Market Directive is now failing its stated goals to improve choice, access and fairness in the digital environment.

First signatories include academics of the following Research Centres:



Further information about this initiative, including monitoring of legislative progress, a database of scientific studies and [Open Letter #1](#) by European Research Centres (24 February 2017) can be accessed here: <http://bit.ly/2loFISF>

References

[1] Academic contributions since 2017

(studies published prior to February 2017 are referenced in [Open Letter #1](#))

Lionel Bently, Martin Kretschmer & Technopolis Consultants (2017) The position of press publishers and authors & performers in the copyright directive, Study commissioned by European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs (100pp): http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf

Better Regulation for Copyright: Academics meet Policy Makers (2017), with contributions by Rosati, Gompel, Höppner, Stalla-Bourdillon, Mazziotti, Rendas, Ramalho, Hugenholtz. Proceedings published by Greens|EFA & Southampton University: https://juliareda.eu/wp-content/uploads/2017/09/2017-09-06_Better-Regulation-for-Copyright-Academics-meet-Policy-Makers_Proceedings.pdf

Kristofer Erickson and Martin Kretschmer (2018) 'This Video is Unavailable': Analyzing Copyright Takedown of User-Generated Content on YouTube, *Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC)*, 9(1). Available at SSRN: <https://ssrn.com/abstract=3144329>

Reto M. Hilty and Valentina Moscon (eds.) (2017) Modernisation of the EU Copyright Rules - Position Statement of the Max Planck Institute for Innovation and Competition (Research Paper, No. 17-12, 208pp): <https://www.ip.mpg.de/en/projects/details/modernisation-of-european-copyright-rules.html>

Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko (2017) Opinion of the CEIPI on the European Commission's Proposal to Reform Copyright Limitations and Exceptions in the European Union. Available at SSRN: <https://ssrn.com/abstract=3053983> (published version: "The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction", *European Intellectual Property Review* 2018, 4)

Christophe Geiger, Giancarlo Frosio, Oleksandr Bulayenko (2018) The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market, Legal Aspects, Study commissioned by European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs for JURI Committee (29pp): [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA\(2018\)604941_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA(2018)604941_EN.pdf)

Martin Husovec (2017) Compromising (on) the Digital Single Market? A Quick Look at the Estonian Presidency Proposal(s) on Art 13, *Kluwer blog* (08/09/2017) available at <http://copyrightblog.kluweriplaw.com/2017/09/08/compromising-digital-single-market-quick-look-estonian-presidency-proposals-art-13/>

Matthias Leistner and Axel Metzger (2017) The EU Copyright Package: A Way Out of the Dilemma in Two Stages, [*International Review of Intellectual Property and Competition Law \(IIC\)*](#) 48(4), pp 381–384

Thomas Margoni (2018) The Text and Data Mining exception in the Proposal for a Directive on Copyright in the Digital Single Market: Why it is not what EU copyright law needs. CREATE blog (25/04/18) available at: <http://www.create.ac.uk/blog/2018/04/25/why-tdm-exception-copyright-directive-digital-single-market-not-what-eu-copyright-needs/>

Jan Nordemann (2017) Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?, Study commissioned by European Parliament, Policy Department A: Economic and Scientific Policy (30pp): [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA\(2017\)614207_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA(2017)614207_EN.pdf)

Marco Ricolfi, Raquel Xalabarder, Mireille van Eechoud (2018) Academics against Press Publishers' Right, Statement from 169 EU academics: <https://www.ivir.nl/academics-against-press-publishers-right/>

Giovanni Sartor (2017) Providers Liability: From the eCommerce Directive to the future, Study commissioned by European Parliament, Policy Department A: Economic and Scientific Policy (36pp): [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA\(2017\)614179_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA(2017)614179_EN.pdf)

Martin Senftleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera and Ole Andreas Rognstad (2017) The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform (24pp). Available at SSRN: <https://ssrn.com/abstract=3054967>

Raquel Xalabarder (2017) 'CREATE Public Lectures on the Proposed EU Right for Press Publishers', European Intellectual Property Review 39(10): 607-622. Available at SSRN: <https://ssrn.com/abstract=3050575>

[2] Bulgarian Presidency draft compromise proposal (13 April 2018):

<http://data.consilium.europa.eu/doc/document/ST-7927-2018-INIT/en/pdf>

[3] Rapporteur Voss draft compromise proposal (28 March 2018):

<https://juliareda.eu/wp-content/uploads/2018/03/voss11.pdf>

[4] Rapporteur Comodini draft report for JURI (10 March 2017):

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-601.094+01+DOC+PDF+V0//EN&language=EN>

List of First Signatories

– 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; Dr. Jennifer Davis



– CEIPI, University of Strasbourg, France

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

Dr. Giancarlo Frosio; Oleksandr Bulayenko



UNIVERSITÉ DE STRASBOURG

– CIPPM, Bournemouth University, United Kingdom

Professor Maurizio Borghi, Director, Centre for IP Policy & Management (CIPPM)

Professor Dinusha Mendia; Co-Director CIPPM; Professor Ruth Towse, Professor of the Economics of Creative Industries & CREATE Fellow in Cultural Economics



– University of Copenhagen, Denmark

Professor Thomas Riis; Professor Jens Schovsbo; Dr. Sebastian Felix Schwemer

Centre for Information and Innovation Law (CIIR)



UNIVERSITY OF COPENHAGEN
FACULTY OF LAW

– CREATE, University of Glasgow, Scotland, UK

Professor Martin Kretschmer, Director, RCUK Copyright Centre (CREATE), University of Glasgow, and Braudel Fellow, European University Institute, Florence, Italy

Professor Lilian Edwards, Deputy Director CREATE, Professor of E-Governance, Strathclyde University; Professor Sayantan Ghosal, Professor of Economics, Adam Smith Business School; Professor Andreas Rahmatian; Assoc. Prof. Kris Erickson (University of Leeds & CREATE); Dr. Elena Cooper; Dr. Thomas Margoni; Dr. Sukhpreet Singh



– European University Institute, Florence, Italy

Professor Peter Drahos, Professor of Law and Governance

Professor Giovanni Sartor, University of Bologna and EUI; Kasper Drazewski

– European University Viadrina, Frankfurt (Oder), Germany

Professor Katharina de la Durantaye, Chair of Private Law and Media Law

– Goethe Universität, Frankfurt am Main, Germany

Professor Alexander Peukert, Chair in Civil and Intellectual Property Law

– Hanken School of Economics, Helsinki, Finland

Professor Niklas Bruun, Director, IPR University Center

Professor Nari Lee, Professor of Intellectual Property Law



– Humboldt-Universität Berlin, Germany

Professor Axel Metzger, Chair in Civil and Intellectual Property Law

HUMBOLDT-UNIVERSITÄT ZU BERLIN



– IviR, University of Amsterdam, The Netherlands

Professor Nico van Eijk, Director, Professor of Media and Telecommunications Law and Director of the Institute for Information Law (IviR)

Professor P. Bernt Hugenholtz, Professor of IP Law and former Director, Institute for Information Law

Professor Mireille van Eechoud; Dr. Stef van Gompel; Dr. João Pedro Quintais

Assoc. Professor (economics) Joost Poort

– Max Planck Institute for Innovation and Competition, München, 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
Dr. Valentina Moscon, Senior Research Fellow



– Masaryk University, Brno, Czech Republic

Dr. Radim Polčák, Head of the Institute of Law and Technology, Faculty of Law
Dr. Matěj Myška, Deputy Head ILT



Nexa Center for Internet & Society
Politecnico di Torino

– Nexa, Politecnico 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
Assoc. Professor Miquel Peguera



– OIPRC, University of Oxford, UK

Assoc. Professor Dev Gangjee, Director, Oxford Intellectual Property Research Centre

– Queen Mary, University of London, UK

Professor Guido Westkamp, Professor of Intellectual Property and Comparative Law

– Adam Mickiewicz University, Poznań, Poland

Dr. Rafal Sikorski, Professor of Law, Faculty of Law and Administration

– Universidade Católica Portuguesa, Portugal

Tito Rendas, Lecturer in Copyright Law

– SciencesPo, Paris, France

Professor Séverine Dusollier, School of Law; Natacha Estèves

– Trinity College Dublin, Ireland

Assoc. Professor Eoin O'Dell

– Tilburg University, The Netherlands

Professor Ronald Leenes, Professor in Regulation of Technology, Tilburg Institute for Law, Technology and Society (TILT)

Dr. Martin Husovec, TILT & Tilburg Law and Economics Center (TILEC)

Professor Eleni Kosta (TILT); Dr. Maurice Schellekens (TILT)

Dr. Lapo Filistrucchi (TILEC); Dr. Jens Prüfer (TILEC); Dr. Florian Schuett (TILEC)



– University of Trnava, Slovakia

Dr. Zuzana Adamova, Head of Intellectual Property and Information Technologies Law Institute

– University of Trento, Italy

Assoc. Professor Roberto Caso, Assoc. Professor of Comparative Private Law, Co-director of LawTech Group

– Vrije Universiteit Amsterdam, The Netherlands

Professor Arno Lodder, Professor of Internet Law, Centre for Law and Internet (CLI)

Professor Martin Senftleben, Professor of Intellectual Property (CLI)

