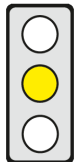


KEY ISSUES

Objective of the Directive: The Commission wants to facilitate the use of copyright-protected content for specific public interest objectives and ensure fair remuneration for rightholders and press publishers.

Affected parties: Rightholders; users of copyright-protected content



Pro: (1) An exception for text and data mining facilitates the automated analysis of large volumes of digital text and data without affecting the exploitation of the content by the rightholders.

(2) The restrictions on copyright facilitate the use of protected content in the public interest.

(3) The licensing mechanism improves the accessibility of out-of-commerce works.

Contra: (1) The fact that the exception applicable to text and data mining only applies to research institutes leads to distortions of competition.

(2) The ancillary copyright for press publishers does not provide adequate protection for press publishers.

CONTENT

Title

Proposal COM(2016) 593 of 14 September 2016 for a **Directive** of the European Parliament and of the Council on **copyright in the Digital Single Market**

Brief Summary

► Context and objectives

- The internet facilitates access to digital content such as books, films, music, databases and computer programs. Copyright determines the conditions under which such content can be used. Copyright for specific uses - e.g. duplication - in particular requires the consent of the rightholder in the form of the acquisition of a licence or gratis permission. However, there are also restrictions which facilitate certain uses without the consent of the rightholder.
- According to the Commission, the internet - particularly as a result of the digital transformation of physical content, the large-scale analysis of digital content ("big data") and new distribution methods - has radically changed the way in which subject matter is distributed, exploited and sold.
- By way of this Directive, the Commission wants to bring copyright into line with these changes. For this purpose it wants to
 - introduce three additional restrictions on copyright (Art. 3-5),
 - facilitate the acquisition of licences for the digital transformation and publication of out-of-commerce content (Art. 7-9),
 - provide rightholders with greater protection with respect to the operators of online services (Art. 10, 13),
 - introduce an EU-wide ancillary copyright for press publishers (Art. 11),
 - allow press publishers to share in the compensation for rightholders for restrictions of copyright (Art. 12),
 - strengthen the bargaining power of authors in licensing negotiations (Art. 14-16).

► Restriction on copyright in favour of research institutes for text and data mining

- "Text and data mining" is the automated analysis of digital texts and data in order to determine e.g. patterns, trends or correlations (Art. 2 (2)).
- "Research institutes" are organisations (Art. 2 (1)),
 - whose primary goal is scientific research or scientific research in conjunction with teaching and
 - which operate on a not-for-profit basis, reinvest profits in research or operate pursuant to a public interest mission.
- Research institutes do not require any authorisation in order to conduct "text and data mining" if they already have lawful access to the processed content.

- ▶ **Restriction on copyright in favour of educational establishments for digital teaching activities**
 - Educational establishments do not require any authorisation in order to use copyright-protected digital content insofar as (Art. 4 (1))
 - such use is for non-commercial teaching purposes,
 - such use takes place on the premises of an educational establishment or through a secure electronic network accessible only by the establishment's pupils or students and staff, and
 - the source, particularly the author - where possible -, is indicated.
 - Member States may provide that the exception does not apply where licences are available for the content and the issue of a licence is certain (Art. 4 (2)).
 - In the case of the cross-border use of content via a secure electronic network, copyright law, in the Member State where the educational establishment is established, applies (Art. 4 (3)).
 - Member States may provide for "fair" compensation for financial losses incurred by rightholders as a result of the restriction on copyright (Art. 4 (4)).
- ▶ **Restriction on copyright in favour of cultural heritage institutions for digital archiving**
 - "Cultural heritage institutions" are publicly accessible libraries, museums, archives or "film or audio heritage" institutions (Art. 2 (3)).
 - Cultural heritage institutions do not require any authorisation in order to archive content where they (Art. 5).
 - make copies of content for the purpose of preservation and
 - the content is already permanently in the institutions' collections.
- ▶ **Licenses for the digital transformation and publication of out-of-commerce content by cultural heritage institutions**
 - "Out-of-commerce" refers to content which is not available to the public, in any of its translations, versions or manifestations, through customary channels of commerce and cannot be expected to become available in the future (Art. 7 (2)).
 - Until now, cultural heritage institutions have had to acquire licences from the respective rightholder in order to digitally transform and publish their out-of-commerce contents, insofar as the rightholder was not represented by a national collective management organisation.
 - In future, a non-exclusive licence issued by a collective management organisation - representing a large number of rightholders - for the digital transformation and publication of out-of-commerce works for non-commercial purposes, also applies to out-of-commerce works of rightholders that are not represented by a collective management organisation (Art. 7 (1)). This requires in particular that
 - the works are permanently in the cultural heritage institution's collection,
 - the collective management organisation is "representative" of the works and rights which are the subject of the licence,
 - the rightholders can at any time object to their works being categorised as out-of-commerce and thus exclude the application of the licence to their works, and
 - the non-represented rightholders belong to the same group of rightholders - such as authors or performers - as those that are represented.
 - The licence extended to cover non-represented rightholders applies in all Member States (Art. 8 (1)).
- ▶ **Protection of rightholders with regard to online services**
 - Online services storing or providing public access to large amounts of content uploaded by users must, in cooperation with rightholders, take appropriate and proportionate measures - such as content recognition technologies - in order to ensure that content is only used where this has been authorised by the rightholder (Art. 13 (1)).
- ▶ **Ancillary copyright for press publishers**
 - Digital reproduction of press publications - particularly online newspapers, magazines and news websites - and the provision of public access thereto, by third parties, requires the authorisation of the press publisher (Art. 11 (1); hereinafter "ancillary copyright for press publishers").
 - Any existing rights of other rightholders, particularly the author, to the content of the press publication, remain unaffected (Art. 11 (2)).
- ▶ **Compensation for publishers**
 - Rightholders generally receive compensation for a restriction of copyright - such as the ability to make private copies without authorisation.
 - Member States can provide that press publishers may share in this compensation where an author has transferred its rights to content to the press publisher (Art. 12).

► Strengthening the bargaining power of authors in licensing negotiations

- Licensees must provide authors and performers - but not other rightholders - with regular, timely, adequate and sufficient information on the exploitation of their works - notably as regards modes of exploitation and remuneration due (Art. 14 Abs. 1).
- Member States may relax this obligation where the burden resulting from the provision of information is disproportionate to the revenues generated (Art. 14 (2)).
- Member States can waive this obligation completely if the contribution of an individual rightholder to the overall work is not significant (Art. 14 (3)).
- Authors and performers - but not other rightholders - are entitled to request additional, appropriate remuneration from the licensee where the remuneration originally agreed is "disproportionately low" compared to the revenues and benefits actually generated (Art. 15).

Statement on Subsidiarity by the Commission

Effective EU-wide harmonisation of copyright provisions is only possible at EU level.

Policy Context

The Proposal for a Directive forms part of the Commission's package to reform European copyright law which also contains a Proposal for a Regulation on copyright applicable to online transmissions of broadcasting organisations and retransmissions of television and radio programmes [COM (2015) 594, see [cepPolicyBrief](#)]. The package aims to realise the Digital Single Market Strategy in Europe [COM (2015) 192, see [cepPolicyBrief](#)].

Legislative Procedure

14 September 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Communications Networks, Content & Technology (leading)
Committees of the European Parliament:	Legal Affairs (leading), Rapporteur: Therese Comodini Cachia (EPP-Group)
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Justice and Consumer Protection (leading)
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Restrictions on copyright constitute an encroachment upon the author's right to property. They must therefore be materially justified. This is the case for all three proposed restrictions:

text and data mining has a broad scope of application. It is used, for example, by automated translation services, in market analysis and for programming spam filters. Up to now, there has been legal uncertainty about when researchers have to obtain the authorisation of the rightholder before conducting text and data mining. Removing legal uncertainty by way of **the proposed restriction for text and data mining is appropriate because** when conducting text and data mining, **researchers essentially do not use the knowledge of individual rightholders but in fact create their own value added which does not affect the use of the content by the rightholders**. For this reason, it is also appropriate that the Commission Proposal does not provide for any compensation for rightholders. **What is problematic, however, is the fact that the restriction only applies to research institutes because**, firstly, in addition to **research institutes**, companies are also affected by legal uncertainty. Secondly, research institutes **compete with companies, for example in public tendering procedures**. **The restriction therefore leads to distortions of competition** in favour of research institutes.

Until now it has been up to the Member States to decide whether to allow a restriction on copyright for digital teaching activities by educational establishments (Art. 5 (3) Directive 2001/29/EC). The resulting legal patchwork impedes for example the cross-border provision of e-learning platforms. Although Member States will still be able to waive the restriction where licences are available, cross-border provision will no longer be hampered by this because, in the case of cross-border use, copyright law in the Member State where the educational establishment is established will apply. It is appropriate that rightholders receive "fair" compensation, in the case of a restriction, because their revenues will fall.

The restriction applicable to copies of content which is already permanently in the collections of cultural heritage institutions is necessary because data carriers only have a limited life span. Since establishments have already acquired the content once, compensation for rightholders is not necessary.

The proposal to facilitate licences for the digital transformation and publication of out-of-commerce content, does not restrict the author's ability to exploit this content because when content is out-of-commerce, it is generally no longer used commercially. In addition, authors can object to the licence.

Online services storing or providing public access to large amounts of content uploaded by users must in future ensure that this takes place in accordance with the agreements made with the rightholders. This improves the protection of rightholders against the unlawful use of their content. However, it will be virtually impossible to identify all content which is in breach of copyright because the content recognition technologies do not function equally well for all content. In addition, there is a risk that the rule will obstruct new platforms because they will first have to develop or acquire costly content recognition technologies.

Press publishers perform an important service by assembling information, as well as preparing and distributing it. **This service, which is sometimes more important than that of the author, must be reasonably protected and rewarded. The introduction of an ancillary copyright for press publishers making it more difficult for news aggregators, such as search engines, to display small text extracts, is however not fit for purpose.** Experience in Germany and Spain has shown that an ancillary copyright does not improve the situation for press publishers but makes the distribution of their publications via news aggregators more difficult or even impossible. Both publishers and consumers would suffer as a result because they benefit from news aggregators who make it easier for them to gain information from various online sources.

The planned right for authors and performers to request additional, appropriate remuneration from the licensee where the remuneration originally agreed is "disproportionately low" compared to the revenues and benefits actually generated, is misguided because licensees cannot always predict the revenues that they will gain from a licence. In addition, the Commission does not show the extent to which disproportionate remuneration leads to a loss in efficiency. The problem is that the term "disproportionate" is not clearly defined.

Legal Assessment

Legislative Competency

Unproblematic. Art. 114 TFEU authorises the EU to harmonise national copyright regulations in order to promote cross-border access to protected content.

Subsidiarity

Unproblematic.

Proportionality with respect to Member States

Unproblematic.

Compatibility with EU Law in other respects

The encroachment upon the rightholder's right to property, protected under Art. 17 Charter of Fundamental Rights (CFR), as a result of the restriction on copyright, is justified. The restrictions facilitate the use of copyright-protected content for purposes which are in the public interest. They are proportionate because, in the case of text and data mining, it is not the core creative content of a work that is used and the restriction for archiving purposes only affects works already contained in collections and is also only aimed at archiving. Rules on financial compensation are not therefore necessary. In the case of the restriction for teaching purposes, however, rightholders can be reasonably remunerated by way of "fair" compensation. **The licensing mechanism for out-of-commerce works is also justified because it is limited to works in a collection which have already been acquired and which in many cases would not otherwise be accessible to the public.** Rightholders are also provided with reasonable remuneration by way of the applicable licence.

Impact on German Law

In order to transpose the Directive, the German legislator must adapt German copyright law - primarily the German Copyright Act.

Conclusion

The exception for text and data mining is appropriate. The fact that it only applies to non-commercial research institutes may, however, give rise to distortions of competition. The encroachment upon the right to property caused by the exceptions to copyright is justified because it facilitates the use of protected content in the public interest. The licensing mechanism for out-of-commerce works is justified because it improves the accessibility of out-of-commerce works. Press publishers perform an important service which must be reasonably protected and rewarded. The introduction of an ancillary copyright making it more difficult for news aggregators to display text extracts, is however not fit for purpose.