

The Copyright Reform

In an information-based economy, copyright is an underlying mechanism of our activity in the digital world. The copyright reform is a chance to update copyright to the reality of the digital era. Is the European Commission up to the challenge?

a guide for the perplexed

What was proposed?

The Commission aims at modernising EU copyright law to make it work in the Digital Single Market (DSM). Three important changes proposed are: some new rights for users, a new type of levy for news publishers and an upload filter for digital content hosted on platforms.

What is the problem?

The solutions proposed neither respond to the needs of the society nor bring the DSM closer:

- Users across EU will continue to have different rights depending on the country they live in.
- With the snippet levy and the upload filter proposals the Commission tries to solve revenue loss problems that are a result of a changing global economy as well as users' practices. It chose the wrong method – by reinforcing copyright, ignoring the existing evidence, and not looking into the broader market reality.
- The snippet levy and content filtering will infringe fundamental rights of access to information, freedom of communication and privacy.

Why is it important?

The reform is a chance to empower users across Europe to access culture in ways that have been proved not to undermine authors' revenues. This would boost the creation of new business models that will support authors, creators and journalists, and not only powerful intermediaries. The copyright reform should also safeguard freedom of expression and privacy by curbing the surveillance capacity of filtering technologies. The Commission's proposal fails to act on all of these opportunities to secure a better future of Europeans.

Will the proposal fix the problems?

No. The Commission tries to respond to the global change with reinforcing outdated business models. It proposed a solution that proved to be harmful to the market, as the case of the snippet levy in Spain and Germany. It proposed a solution on filtering which has already been rejected by the Court of Justice of the EU. It allows for further fragmentation of European copyright by allowing licensing and negotiation schemes in member states for casewes that are currently exempt from those schemes.

How can this be fixed?

- The legislators should make it mandatory for member states to implement all available freedoms to use copyrighted works ("copyright exceptions and limitations") that do not harm the author.
- The snippet levy and the upload filter should not be introduced into the new directive.

1

Copyright proposal: Copyfails reloaded

Different rights for users in different EU countries

What was proposed?

The copyright framework has been outdated for a long time. The current copyright reform creates the opportunity to make the framework both less chaotic and more relevant to the challenges of the digital age. Instead, the European Commission proposed a few patches that do not go far enough to secure user rights online and unleash creative potential of European citizens and business.

What is the problem?

Europeans enjoy different freedoms in relation to copyright. For example, the use of a film character to make a parody of a politician could be an infringement in the UK but not in Portugal. Similarly, in many member states users can copy legally purchased films and music for private use, but in some they cannot, legally. Instead of harmonising the existing user rights, the Commission proposes exceptions that either allow for national licensing schemes (education exception) or exclude important stakeholders from their benefits (text and data mining exception).

Why is this important?

The lack of a harmonised framework creates unnecessary barriers between Europeans and their culture. They cannot learn or produce creative works on equal terms across the EU. Moreover, they cannot get comprehensive information about what they can and cannot do. An [FAQ created by the European Union's Intellectual Property Office](#) demonstrates that European users cannot know which uses of copyrighted materials are legal and which are not.

Will the proposal fix the problems?

No. The directive proposal only partly harmonises a few exceptions and leaves member states the option of creating new barriers to the Digital Single Market by inventing their own licences and practices, which would complicate cross-border collaboration. As a result, citizens will not enjoy equal rights across the EU. SMEs will struggle to create new business models.

How can this be fixed?

A far more extensive and open approach to harmonising copyright exceptions is possible, needed, and legally unproblematic. It is possible without undermining copyright. Make all available copyright exceptions and limitations that do not harm the author mandatory and harmonise them across all member states.

2

Copyright proposal: Copyfails reloaded

Access to news and information content online will be restricted

What was proposed?

The European Commission proposed that online services should pay for linking to articles that are up to twenty years old. Almost every news link with an explanatory extract (a snippet) placed in a search engine will be subject to a fee. The Commission hopes that the payment will reach the publisher of the original news.

What is the problem?

If a service facilitating access to aggregated news content needs to pay for linking, it may decide to exclude some links or news outlets from their service to avoid the costs. As a result, a lot of information will not be accessible to users through online search, for example. Experience from Spain shows that smaller publishers will suffer most. The news will come exclusively from big publishers and companies who have enough negotiating power to contract the flow of the snippet levy revenues.

Why is this important?

The snippet levy creates barriers to freedom of information and expression. The Commission failed to provide a clear definition of what online news services are, so it could include almost all types of publications. Each member state will have its own definition of "news". Furthermore, it is not clear who benefits from the snippet levy. The proposal was made despite clear evidence from Spain and Germany where this experiment was carried out and failed.

Will the proposal fix the problem?

No. The Commission proposes a solution that does not properly address the problem of revenue loss of publishers, while limiting users' access to information. The publishers claim that they lose revenue because readers read the snippets and do not follow through to the original content. The challenges for modern news media are too complex to solve with a simple transfer of revenue from one industry to another, and need to be addressed with policies that do not affect users.

How can this be fixed?

This measure does not address the challenges of the digital era, and harms access to information. The only option is to remove the snippet levy from the proposal.

3

Copyright proposal: Copyfails reloaded

Mandatory upload filters create a censorship machine

What was proposed?

The European Commission proposed rules that appear to have the goal of enabling payments from online content-sharing services to the owners of rights to music, films, and other types of content. Internet hosting services will be obliged to monitor all uploads to identify and filter copyrighted works. The effectiveness and proportionality of the software that would need to be created for this purpose are not evident in the Commission's proposal.

What is the problem?

The proposed measures will require monitoring and filtering of anything that European citizens upload to content-sharing services. The censorship machine required for this will have to ignore any freedoms (existing exceptions to copyright) to use somebody else's creation: for example for the purpose of quotation, teaching or parody, as already foreseen by the European legislator.

Why is this important?

The proposal poses a threat to human rights protected by the European and international law. The censorship machine proposal chooses to ignore the case law of the Court of Justice of the European Union stating that monitoring and filtering content is a breach of freedom of expression and of privacy ([Scarlet/Sabam ruling](#) and [Sabam vs. Netlog](#)).

Will the proposal fix the problem?

No. Creation of a filter that can potentially serve as a censorship machine will infringe users' fundamental rights.

How can this be fixed?

The European Institutions should develop a fundamental rights-compatible approach that would improve payment arrangements between rightsholders and large online services.

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Copyright proposal: Copyfails reloaded

Innovative business models will likely emerge *outside* Europe

What was proposed?

The European Commission proposed a mandatory exception to allow automated analysis of large sets of data and texts for purposes of scientific research. The aim is to enable research organizations to use text and data mining (TDM) tools on legally accessed copyrighted material without payment or prior authorisation from authors or owners.

What is the problem?

The proposal tackles the issue in the wrong way. It excludes all other actors from the benefits of the exception, such as R&D units of companies, startups, journalists, civil society organisations, cultural heritage institutions, and public bodies. Any entity not considered a research organisation will need to negotiate a license. This would be incredibly difficult - or even impossible - considering that TDM incorporates thousands of articles or datasets per topic.

Why is this important?

Today, knowledge is produced not only at universities, but also within businesses and public institutions, and by citizens contributing increasingly to the advancement of science and innovation. Automatisations with the use of algorithms is essential to make sense of large amounts of data. From price comparison websites to scientific evidence on cancer treatment, universally exempted TDM can help bring closer solutions to both small and fundamental problems facing Europeans.

Will the proposal fix the problems?

No. Although it is a step in the right direction, the proposal is not ambitious enough. By excluding the majority of potential beneficiaries, the exception does not respond to the massive opportunities for scientific discovery and innovation. As a result, those who want to build their business model on TDM will do it outside of Europe, where such limitations do not limit their activity - to the detriment of the European economy and jobs.

How can this be fixed?

Europe needs a mandatory TDM exception for all users, and for any purpose. It can be best achieved by broadening the scope of the exception in the directive proposal. Alternatively, TDM could be included in the scope of existing exceptions for temporary acts of reproduction.

5

Copyright proposal: Copyfails reloaded

Different licences in MS will further fragment access to education in Europe

What was proposed?

The Commission proposed an additional mandatory exception (a freedom to use copyright protected works), for digital cross-border teaching activities. This would allow teachers and students to use copyright protected works in the premises of a recognised educational institution or through a closed online system. However, this freedom can be limited because the member states will be able to introduce compensation agreements ('adequate licences').

What is the problem?

Currently, teachers who want to use copyright protected movies, texts or pictures in any educational activity across Europe face different rules in every member state. The new exception is mandatory only for digital uses, and in practice it will not make the framework any more consistent. Because member states can choose to override the exception with 'adequate' licences, it may turn out that a film used in teaching in an international online course, can be accessed by students from one EU country but not from the other. Also, anything that is taught outside a school will not be exempted.

Why is it important?

High-quality, lifelong education based on equal opportunities in access to knowledge is a cornerstone of an innovative society. In Europe, with its diverse cultural backgrounds, it is especially important that the citizens can learn and study without borders – neither political nor regulatory. Teaching happens also informally, at NGOs, museums, and libraries. Therefore providing fair and equal access to any material that is useful in formal and informal teaching is an investment in a better future for Europeans.

Will the proposal fix the problems?

No. The proposal overlaps with the existing educational exception and may create even more legal uncertainty for teachers. The introduction of licences could effectively exclude vast amounts of texts and audiovisual materials from unrestricted use in education. The licences will be paid for by a school system, which is underfinanced in many European countries. NGOs, museums, libraries and other entities will not be able to benefit from the exception.

How can this be fixed?

A harmonised mandatory education exception is needed. It should cover all uses in educational institutions and other formal and informal educational activities run by any person or entity, in and outside of the classroom. These benefits could be achieved by making the existing educational exception mandatory across EU to cover both analogue and digital use.