

# Briefing: Central issues of EU copyright reform

A legislative proposal for an EU copyright reform was presented by Günther Oettinger in September of 2016, shortly before leaving his post as Digital Commissioner.

Among several less controversial topics, three proposed measures – “**copyright machines**”, an **extra copyright for news sites** and the very **limited scope of a proposed text and data mining exception** – are highly controversial.

According to the published opinions by the Internal Market, Industry and Culture Committees, and according to Politico’s leak of the Legal Affairs Committee draft, **neither seems to enjoy majority support in the European Parliament**. With Oettinger gone, the EP seems poised to reject his legacy.

Next, the Legal Affairs Committee will debate MEP Comodini’s draft report on March 22/23, amendments may be filed by March 30, and the Committee is ambitiously scheduled to vote on its report in June. The plenary vote is foreseen for late 2017/early 2018.

Prepared by MEP Julia Reda

# Article 11: Extra copyright for news sites

**Also called:** *Publishers' Right, Neighbouring Right, Ancillary Copyright, Leistungsschutzrecht*

## Commission proposal:

Anyone using snippets of journalistic online content must first get a license from the publisher. This new right for publishers would apply for 20 years after publication.

## Example:

The automatic link previews social networks generate when users share links (showing the article headline, a thumbnail picture and a short excerpt) would require a license, as well as anyone analysing news content on the web like news aggregators, media monitoring services and fact checking services.

## Intent:

The Commission wants to generate income for European publishers by allowing them to charge internet platforms for displaying snippets of their content to users. Stated targets are Google, Facebook, Twitter and Pinterest, who use such snippets in the course of linking to news articles.

## Consequences:

- **Likely to fail:** This is an attempt to replicate at an EU level an idea that already failed badly in Germany and Spain – only applied more broadly and longer. The German law is likely about to be pronounced invalid in court, while the Spanish one "clearly had a negative impact on visibility and access to information in Spain" (EPRS). Journalists certainly never saw additional remuneration.
- **Attack on the hyperlink:** Because readers need to know what a link leads to before clicking, sites almost always include a snippet of the linked-to content as part of a link. Any limitation on snippets is therefore a limitation on linking.
- **Limiting freedom of expression and access to information:** This provision would restrict not just businesses, but also individuals who publish news snippets, e.g. bloggers. Because a neighbouring right, unlike a copyright, doesn't require originality to apply to content, it would protect even short and uncreative snippets, such as purely factual headlines.
- **Boosting fake news:** Making it legally risky or expensive to link (with snippets) to news risks disincentivising the sharing of reputable news content. Since "fake news" and propaganda outlets are unlikely to charge for snippets, their content could as a result become more visible on social networks.
- **News-related startups discouraged,** even though this sector is in particular need of innovation and experimentation to find new business models, ways of reaching audiences, fact-checking and combating fake news etc., as technology advances.
- **Small publishers disadvantaged:** Aggregators create a level playing field for independent publishers with less brand recognition to reach audiences.

## Public debate:

The Commission and news industry lobbies have repeatedly claimed that "**individuals and hyperlinks wouldn't be affected**", a claim unsupported by the text of the proposal:

- Because links routinely include snippets, restricting snippets restricts linking.
- Individuals sharing news snippets without additional commentary or context are not covered by copyright exceptions, such as the one for quotation, in many EU member states, e.g. Germany.
- Platforms like social networks would need to deny individuals the sharing of links including unlicensed snippets, impacting directly what internet users can/can't do.

The industry paints this as “**only getting what publishers of other kinds of works already have**”, e.g. music publishers. This argument neglects a major difference:

- While the contribution of a music publisher in turning an abstract song into a concrete recording is self-evident, an article as written by a journalist and its publication on a news site are hardly distinguishable, thus not requiring duplicate layers of rights.

#### **Independent academics heavily criticise the proposal:**

- "Unnecessary, undesirable, would introduce an unacceptable level of uncertainty and be unlikely to achieve anything" [1] / "An interference with freedom of speech", "may well set back the function of the press as public watchdog" [2] / "Contrary to the objective of creating a Single Digital Market", "detrimental for authors' interests", "a negative impact on small publishers", "risks having undesired repercussions for the acceptability and legitimacy of the copyright system as a whole" [3] / "Will not foster quality journalism", "adversely affects authors economically", "directly affects the online communication of the European population", "will not create additional revenues for press publishers" [4] / "will ultimately privilege large incumbent (US-based) online news providers, such as Google", "Small (European) entities and startups will be prevented from entering this emerging market" [5] / "The final result ... may ... be further market concentration and less information diversity." [6]

- [1] 37 professors and leading scholars of Intellectual Property, Information Law and Digital Economy <http://mep.link/study4>
- [2] Prof. Dr. Mireille M.M. van Eechoud, University of Amsterdam <http://mep.link/study5>
- [3] Centre for International IP Studies, University of Strasbourg <http://mep.link/study6>
- [4] Prof. Dr. Alexander Peukert, Goethe-Universität Frankfurt am Main <http://mep.link/study7>
- [5] European Copyright Society <http://mep.link/study2>
- [6] Prof. Dr. Martin Senftleben, VU University Amsterdam <http://mep.link/study3>

**The #SaveTheLink campaign** ([savethelink.org](http://savethelink.org)) run by the NGO OpenMedia, collected over 12,000 responses for the Commission's consultation on the topic and is supported by over 120,000 people online.

#### **European Parliament:**

- **The (leading) Legal Affairs Committee proposes major changes:**  
According to leaks, the draft report by rapporteur MEP Comodini (EPP) rejects the Commission's premise and clarifies that using snippets to make news discoverable is not necessarily harmful to publishers' financial interests, and thus shouldn't be subject to licensing. The report seeks to fundamentally change the proposal: Instead of creating a new right for publishers, it instead facilitates them enforcing the copyright of the content they've published in court in cases of infringement.  
The ALDE group shadow rapporteur is in favour of the Commission proposal, while S&D and Greens/EFA shadow rapporteurs have argued for its removal.
- **The Internal Market Committee** (MEP Stihler's draft report) seeks to delete the provision, while the **Culture Committee** (MEP Joulaud's draft report) seeks to limit the right to business-to-business relations and shorten its duration to 3 years.

**Previously**, the EP voted against adding this idea to the Reda Report in 2015, 83 MEPs asked the Commission to drop the plan in an open letter, and MEPs from all political groups recently joined Julia Reda's video campaign against it.

# Article 13: “Censorship Machines”

**Also called:** *Article 13, Value Gap, Upload monitoring obligation, Robocopyright*

**Commission proposal:**

Internet platforms hosting "large amounts" of user-uploaded content must monitor user behavior to identify and prevent copyright infringement.

**Example:** Fotocommunity.de hosts the portfolios of thousands of photographers. Once any rightholder of a photograph asks the company to keep a look out for one of their works, they must start monitoring and scanning all future uploads to make sure that photo is never uploaded to their service.

**Intent:** The Commission wants to strengthen the music industry in negotiations with YouTube. The industry believes that the revenue Google shares with them from running ads on videos containing their content amounts to too little compared to payments from subscription services like Spotify, calling this the “*Value Gap*”.

**Why is their content on YouTube?** In most cases because they uploaded it for promotional reasons, and in some because fans uploaded videos containing (parts of) it, the infringement was detected, and the labels then decided to take Google’s offer to monetise the videos with ads, rather than removing them.

**Consequences:**

- **Freedom of expression limited:** Upload monitoring software cannot tell infringement apart from legal uses, like parody, specifically enabled by exceptions and limitations to copyright. As a result, legal content will be taken down.
- **Surveillance risk:** The proposal requires the installation of what amounts to surveillance technology. Due to high development costs, content monitoring technology will likely end up being outsourced to a few large US-based providers, giving them direct access to the behavior of all EU users of internet platforms.
- **Startup killer:** This requirement places a huge burden on internet companies and discourages investment in user-generated content startups, preventing EU competition to the targeted dominant US platforms from arising, effectively locking in YouTube’s dominance.
- **Community projects threatened:** Even Wikipedia would likely need to implement such filters: Even though they only accept freely-licensed uploads, they still host “large amounts” of it.

## Public debate:

**Independent academics** unanimously find the Commission proposal to be...

- **Incompatible with existing EU law:** The E-Commerce Directive forbids *general monitoring obligations*, which even the European Parliament Research Service says Article 13 would establish. Other premises of Article 13 are also unsupported by existing law and jurisprudence, including the assertion that platforms “optimizing the presentation” of uploaded content become liable for infringements.
- **Incompatible with the Charter of Fundamental Rights** as interpreted by the ECJ: It violates the principle of a fair balance between competing fundamental rights laid out by the European Court of Justice in case law.
- **Ambiguously worded and inconsistent:** Even the official German translation contains differences that significantly alter the meaning of some provisions.

Sources:

- Dr Angelopoulos study <http://mep.link/study1>
- Open letter by leading EU IP law centres <http://mep.link/openletter>
- European Parliament Research Service evaluation <http://mep.link/eprs-evaluation>
- European Copyright Society opinion <http://mep.link/study2>
- Dr Senftleben study on the effects on startups <http://mep.link/study3>

**Digital rights NGOs launched a campaign** against this provision on March 7, calling to “#SaveTheMeme” (referring to parodies and other expressions of web culture that may be removed by such filtering technology).

- Video: <http://mep.link/censorshipmachine>
- Website: [Savethememe.net](http://Savethememe.net)

## European Parliament:

- **The (leading) Legal Affairs Committee proposes major changes:**  
According to leaks, the draft report by rapporteur MEP Comodini (EPP) proposes to remove the obligation for automated monitoring, leaving platforms to ensure the functioning of agreements with rightholders without prescribing how. The report emphasizes that copyright exceptions must be respected. To remove sources of legal uncertainty, it aims to remove the limitation to services that host “*large amounts*” of content and clarifies that the proposal compliments the E-Commerce Directive, rather than contradicting it.  
The ALDE group shadow rapporteur is in favour of the Commission proposal, while S&D and Greens/EFA shadow rapporteurs have argued for its removal.
- **The Internal Market Committee** (MEP Stihler’s draft report) also seeks to bring the proposal in line with existing law and fundamental rights.

## Article 3: Text and Data Mining exception limited in scope

### Commission Proposal:

Establishes a new EU-wide copyright exception for the modern research method Text and Data Mining, but only for “research institutions” and “for the purposes of scientific research”.

### Consequences:

- **Chilling effect on research and innovation:** Text- and datamining is a technology gaining in importance for tasks such as analysing big data sets and training artificial intelligence systems. Not enabling other actors like independent researchers, journalists, hobbyists and companies from these promising research methods – and not enabling research institutions to commercialize their breakthroughs – will have a chilling effect on discoveries in the public interest.
- **Denying EU startups a level playing field:** Restricting the scope of a TDM copyright exception to research institutions would deny European research- and AI-based companies a level playing field on the international market, harming EU competitiveness in these highly promising sectors.

### Public Debate:

#### Independent academics heavily criticise the scope of the proposal:

- *"Runs counter to the goals of copyright and the functions of economic rights", "data mining should be permitted for non-commercial research purposes, for research conducted in a commercial context, for purposes of journalism and for any other purpose"* –European Copyright Society <http://mep.link/study2>
- *"[The limitation] lacks a substantive justification", "would lead to a fragmentary and incoherent legal development in the longer run"* –Max Planck Institute for Innovation and Competition <http://mep.link/study8>
- *"A reform based on this more flexible approach would have benefits for society as a whole. It would allow to unlock the full potential of innovative text-and-data mining technology and generate new products and services in the field of data analytics. It would allow start-up companies to pave the way for increased EU competitiveness and knowledge leadership in the promising field of (big) data analytics, as desired by the Commission."* –Prof Dr Martin Senftleben <http://mep.link/study3>

#### European Parliament:

The **Internal Market** and the **Industry Committee** want to extend the TDM exception to all people: If you have the right to access/read content, you also have the right to mine it. According to leaks, the (leading) **Legal Affairs Committee** wants to do the same.

# User-generated Content / Remixing Exception

## Commission Proposal:

None

## Consequences:

The legal ability to use parts of works in new works is fragmented across the EU. In some countries, it may be covered by a wide-reaching quotation exception, while others are more restrictive. As a result, many common behaviors of modern internet culture, such as “reaction GIF” and “meme” images, fan fiction, “libdubs” (recording yourself acting as if performing a pop song), “supercuts” (making compilations of movie scenes sharing a particular characteristic) etc. may thus be illegal in large parts of Europe.

## European Parliament:

**The Culture Committee** (MEP Joulaud’s draft report) proposes adding an EU-wide copyright exception to allow *“Digital use of quotations or extracts of works ... within user-generated content for purposes such as criticism, review, entertainment, illustration, caricature, parody or pastiche”*, provided the sources are cited and no commercial harm is caused.

This long overdue, common-sense proposal has caused controversy in France, with French cultural industries petitioning MEP Joulaud’s party colleague, Presidential candidate François Fillon, in an angry letter.

**The Internal Market Committee** also seeks to add a user-generated content exception.