Statement by EPIP Academics to Members of the European Parliament in advance of the Plenary Vote on the Copyright Directive on 12 September 2018

Vote for a balanced European copyright law

European Policy for Intellectual Property (EPIP) is the leading scientific association for the economics and law of Intellectual Property. The EPIP 2018 conference was held in Berlin, 4-7 September 2018, where the statement was drafted.

On Wednesday, 12 September 2018, the European Parliament will vote in plenary session on the heavily lobbied proposed Directive on Copyright in the Digital Single Market.

On 5 July, a previous plenary vote rejected the report by Axel Voss MEP, the rapporteur for the legal affairs committee JURI. The main concerns related to the effects of Article 11 that introduces a new layer of licensing into the communication of news online, and of Article 13 that introduces new obligations on online platforms that are likely to be met by filtering content uploaded to their services.

Rapporteur Voss has now introduced changes to his earlier text that address some of these concerns. In particular, he has removed any references to filtering technologies that became the rallying cry of opponents of Art. 13 (#saveyourinternet). In addition, he has tried to narrow his new category of 'online content sharing service provider' (who no longer benefit from the safe harbour of the e-commerce directive). Not included now are microenterprises and small-sized enterprises (read: some start-ups), non profit encyclopaedias (read: Wikipedia), some educational or scientific repositories, cloud services for individual use which do not provide direct access to the public (read: Dropbox), open source software developing platforms (read: GitHub), and online market places (read: eBay).

The aim is to single out services such as YouTube as a distributor of audiovisual content who would have to obtain an ordinary copyright licence for some of their activities, if the Directive was adopted.

While we agree with the aim to make services pay that directly and unfairly compete with licensed content, there remain considerable dangers in Mr Voss' approach.

Removing the references to filters while requiring cooperation from service providers so that infringing works uploaded by users "are not available on their services" may amount to a filtering requirement, with fundamental rights implications. The potential negative effects for new entrants, and the inconsistency with the language of the e-commerce directive also remain.

Regarding Art. 11, Mr Voss employed a similar strategy. Rather than removing the problem (requiring an additional layer of licensing where copyright already exists), he introduces reassurances. According to his draft, some bloggers (who fall within "legitimate private and non-commercial use of press publications") do not have to pay. And hyperlinking will remain permitted, disregarding that "hyperlinks accompanied by individual words" only perform

their function if the reader knows where they lead to. Short contextual paragraphs, not individual words are the necessary element in the ecosystem of news.

We also would like to note that the Directive offers important opportunities to improve European competitiveness by introducing an exception for text and data mining in Art. 3 (facilitating for example artificial intelligence technology). Mr Voss' report is an improvement on the Commission's proposal but still limits Art. 3 unnecessarily to research organisations "for the purposes of scientific research by such organisations".

The proposal also misses the opportunity to strengthen the position of creators sustainably, and thereby to bring more balance to European copyright law. Proposals to include exceptions for enabling re(-uses) of protected works that most digital consumers have long taken for granted are (still) absent from the proposed text. We support proposed exceptions for using pictures of publicly displayed artworks or works of architecture (so-called "freedom of panorama") and for creative and expressive uses (e.g. "memes") under an exception for user-generated content. Both of these are not present in Mr Voss' text.

Voting recommendation

We recommend -

- that the text and data mining exception under Article 3 should apply to all lawful users (Schaake, in line with ITRE committee opinion and Commission Impact assessment option 4);
- that new consumer facing exceptions for Freedom of Panorama and Usergenerated content are introduced (Article 5a and 5b, Schaake and Greens);
- that Article 11 is deleted and if there is no majority for deletion, the Comodini presumption be adopted (amendments by Schaake and Greens);
- that Article 13 is amended to the text proposed by the IMCO Committee (preserving the integrity of the e-commerce directive) – and if there is no majority for the IMCO position, amendments by Schaake or Woelken be adopted.
- A new Article 12a protecting sport event organizers was introduced at a late stage.
 This is completely unacceptable without conducting an Impact assessment. We recommend deletion.

The arguments and evidence offered by academics from the leading European research centres over the last two years have remained consistent. Copyright policy is a complex field of regulation. It is misleading to present the debate as a war between US technology giants and European creators. European culture, society, and economy will be best served by an evidence-led approach.

Academics endorsing this statement:

Dr. Christina Angelopoulos, Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge

Professor Tanya Aplin, Dickson Poon School of Law, King's College London

Professor Lionel Bently, Director, Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge

Robert Burrell, Professor of Law, University of Sheffield and Melbourne Law School

Dr Elena Cooper, Leverhulme Research Fellow, UK Copyright & Creative Economy Centre (CREATe), University of Glasgow

Professor Peter Drahos, Professor of Law and Governance, European University Institute, Florence Professor Mireille van Eechoud, Institute for Information Law (IViR), University of Amsterdam Professor Niva Elkin-Koren, Director, Haifa Center for Law & Technology (HCLT), University of Haifa and Faculty Associate, Berkman Klein Center for Internet & Society, Harvard University Assoc. Prof. Kris Erickson, Dept. of Media and Communications, University of Leeds & CREATe Fellow Professor Christophe Geiger, Director, Centre d'Etudes Internationales de la Propriété Intellectuelle (CEIPI), University of Strasbourg

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Professor Martin Senftleben, Professor of Intellectual Property, Centre for Law and Internet (CLI), Vrije Universiteit Amsterdam

Assoc. Professor Caterina Sganga, Scuola Superiore Sant'Anna, Pisa and Central European University, Budapest

Professor Ruth Towse, Professor of the Economics of Creative Industries, Bournemouth University & CREATe Fellow in Cultural Economics

Professor Raquel Xalabarder, Chair of Intellectual Property, Universitat Oberta de Catalunya (UOC), Barcelona

Appendix: Claims and Assessments

A previous academic statement "Misinformation and Independent Enquiry" dated 29 June 2018, addressed commonly made claims in this heavily lobbied debate. These assessments are still valid.

Claim: The proposals will increase legal certainty

Assessment: Not true. Licences contemplated by Article 13, paragraph 1a are simply not available at the moment and even if they were, collecting societies have no mandate to license all works to all users, but only those of their members. Moreover, even if licences were available, they would cover only the individual member states and thus would cause further fragmentation of content along national boundaries.

The proposals in Article 11 too are likely to lead to different regimes in different member states, as different thresholds and exceptions may be applied.

Claim: The Internet will not be filtered

Assessment: Not true. Upload filters are likely to become an obligation for platforms that want to enter the market. The distinction between Internet and platforms is artificial. There is hardly any internet service without active user involvement. The spectrum of user generated content ranges from newspaper websites, blogs and social networking sites to online forums and cloud solutions.

Claim: There is no problem relating to freedom of expression

Assessment: Not true. Article 11 directly affects the dissemination of news. While a safeguard for links has been added as paragraph 2a, links only work if you know what they refer to. The new right is intended to extend to snippets that offer this context.

Article 13 motivates firms to use cheap upload filters which will block legitimate content. Complaint and redress mechanisms are insufficient to cope with this problem. Expressions such as permissible parodies will be affected.

Claim: Memes will not be affected

Assessment: Not true. The guarantees introduced for freedom of expression are insufficient to address the issues highlighted by the Court of Justice of the European Union in the Sabam cases, namely that statutory exceptions to copyright vary from one member state to the other. In particular, it remains unclear how freedom of expression assessments could ever be made by automated filtering systems. These systems are simply not intelligent enough to draw a line between permissible quotations, parodies, remixes, mashups etc. and impermissible copying in the light of the fragmentation of the national copyright legislation across member states.

Claim: Complaint and redress mechanisms will protect the interests of users

Assessment: Misleading. The proposals are insufficient, see above. Users already do not bring many complaints. When they do, platforms and rightholders (which, under the proposal, are responsible for collaborating in responding to the complaint) will find it difficult to react within a reasonable period of time, given their divergent positions in the debate. Although Article 13 only creates obligations for platforms rather than end-users, undoubtedly, filtering will have a deep impact on consumers. They may still try to upload works to 9GAG (a comedy website), Facebook and other platforms. However, these uploads will never arrive at the platform if they are identified as infringing by the filtering mechanisms applied.

Claim: Authors will receive an increased share of copyright remuneration

Assessment: Misleading. Stating the intention does not necessarily produce the desired effect. The evidence on past measures, such as the provisions accompanying the term extension directive, show that benefits go to major rightholders (which are disproportionally big firms and the estates of dead famous artists). The evidence on the introduction of press publishers' rights in Germany and Spain shows that journalists have not seen any financial benefits. The voices of artists and journalists deserve great attention but are often organised by lobbyists. Caution is advised.

Key academic contributions to consider:

- Sophie Stalla-Bourdillon et al. (40 academics) (2016), 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: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483
- Lionel Bently & Martin Kretschmer (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:
 http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf
- Reto M. Hilty & Valentina Moscon (eds.) (2017), Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition:
 https://www.ip.mpg.de/de/projekte/details/modernisierung-des-eu-urheberrechts.html
- Martin Senftleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera and Ole Andreas Rognstad (2018), The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform, European Intellectual Property Review, 40(3), 149-163: https://ssrn.com/abstract=3054967
- Marco Ricolfi, Raquel Xalabarder, Mireille van Eechoud (2018), Academics against Press Publishers' Right, Statement from 169 EU academics (228 signatories by 06.09.2018): https://www.ivir.nl/academics-against-press-publishers-right/

More than 200 academics from over 25 research centres, including the leading European institutes, have signed open letters opposing Articles 11 and 13. Further information about this initiative, including monitoring of legislative progress, a database of scientific studies and Open Letter #1 (24 February 2017) and Open Letter #2 from European Research Centres (26 April 2018) can be accessed here: http://bit.ly/2loFISF