

# techUK response to the Intellectual Property Office's Call for Views on the European Commission's Draft Legislation to Modernise the European Copyright Framework

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## About techUK

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techUK welcomes the opportunity to provide input to the Intellectual Property Office's Call for Views on the European Commission's draft legislation to modernise the European copyright framework. techUK is the industry voice of the UK tech sector, representing more than 900 companies who collectively employ over 800,000 people, about half of all tech jobs in the UK. These companies range from innovative start-ups to leading FTSE 100 companies. The majority of techUK members are small and medium sized businesses.

This input will provide techUK's views on the draft 'Regulation on the exercise of copyright and related rights in certain online transmissions by broadcasting organisations and retransmissions of television and radio programmes' and the draft copyright Directive covering a range of measures under the following subtitles:

- Adapting exceptions and limitations to the digital and cross-border environment
- Ensuring wider access to copyright content
- Achieving a well-functioning marketplace for copyright

techUK also outlines the possible impacts of this legislation in light of the UK's planned exit from the European Union.

## Executive Summary

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- One of the key aims of the Digital Single Market is to establish an environment in which digital start-ups are able to thrive and grow, and to create a data-driven European economy.
- These proposals risk driving start-ups and innovation out of Europe, and preventing the emergence of new players. techUK outlined these concerns when the proposals were first published<sup>1</sup>.
- In a recent techUK delegation of digital startups and SMEs delegates raised their direct concerns with these proposals to EU policy makers, outlining implications for their businesses<sup>2</sup>.
- techUK calls on the UK Government to conduct its own impact assessment on these proposals given that the European Commission's own assessment is lacking in evidence that these proposals will help create a functioning marketplace for copyright.
- The text and data mining exception should be amended to explicitly include commercial text and data mining to ensure legal clarity for all.
- Proposals for a new right for press publishers for the digital use of press publications have been a proven failure where previously implemented. There is no reason to suspect these would benefit online publishers at a European Union level.
- Proposed changes to the online intermediary liability regime and requirements for content filtering technologies for user-uploaded content would create significant burdens for online service providers and new barriers to market.
- Any new copyright proposals must be fit for the digital age, which as drafted these proposals are not. techUK previously outlined four key priorities for any copyright reform which it would encourage the Intellectual Property Office to look at<sup>3</sup>.

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<sup>1</sup> <http://www.techuk.org/insights/news/item/9344-rethink-needed-on-new-european-copyright-proposals>

<sup>2</sup> <http://www.techuk.org/insights/news/item/9566-european-startups-tell-eu-to-let-europe-s-data-flow-freely>

<sup>3</sup> <http://www.techuk.org/insights/opinions/item/6638-copyright-reform-in-europe-getting-eu-copyright-fit-for-the-digital-age>

## Draft Regulation on the exercise of copyright and related rights in certain online transmissions by broadcasting organisations and retransmissions of television and radio programmes.

techUK understands the European Commission, in Article 2 of the draft regulation, is proposing to extend the copyright regime, and specifically the country of origin principle currently applicable to satellite transmission, to online services which to ancillary online services. The proposed definition of 'ancillary online services' by the Commission includes all online services that also broadcast content by satellite. The proposed definition suggests that all content is classified as ancillary even if it is provided as a standalone service.

There is a concern that when taken alongside current DG Competition investigations into cross-border content and the e-commerce inquiry, these proposals, with such a broad definition, will lead to a situation which undermines exclusive territorial licensing for content broadcasters requiring licence agreements to make content available, including separate, standalone services, across the European Union.

techUK encourages the IPO to engage with the Commission to address its definition of ancillary online services to make it clear that this only covers services which are entirely subordinate to a broadcaster's primary service. This would help ensure that broadcasters are able engage in suitable licencing arrangements for their content.

## Proposal for a Directive on copyright in the Digital Single Market

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### 1. Measures to adapt exceptions and limitations to the digital and cross-border environment

We are entering an exciting new era of digital growth across Europe, as new and emerging technologies such as Cloud Computing, Big Data & Data Analytics, Artificial Intelligence and the Internet of Things gather pace. These disruptive technologies offer key benefits to European citizens by enabling the development of more tailored, effective and relevant goods and services. Indeed, the European Commission has identified 'Towards a Data Driven Economy' as one of the key pillars of the Digital Single Market, which techUK strongly supports. The expected value of the data economy in Europe by 2020 is 566 billion euros<sup>4</sup>. The UK in particular is a global leader in digital growth, where digital industries are growing 32% faster than the rest of the economy<sup>5</sup>. Specifically, Big Data and the Internet of Things are expected to contribute £322 billion to the UK economy by 2020<sup>6</sup>.

A key tenet of data-driven strategies, which underpin wider digital transformation, is the exercising of Text and Data Mining. These techniques are employed widely across every sector of the economy, by businesses large and small, and are a core function of the creative technologies outlined previously. However due to legal uncertainties some analysts within organisations are not conducting their text and data mining in Europe, which is holding back Europe's ability to fully exploit the potential of the emerging data economy and benefit from the economic benefits on offer.

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<sup>4</sup> [https://www.businesseurope.eu/sites/buseur/files/media/position\\_papers/internal\\_market/2016-11-09\\_be\\_european\\_data\\_economy\\_updated\\_v2.pdf](https://www.businesseurope.eu/sites/buseur/files/media/position_papers/internal_market/2016-11-09_be_european_data_economy_updated_v2.pdf)

<sup>5</sup> <http://growthintel.com/tech-nation-2016-2/>

<sup>6</sup> [http://www.sas.com/content/dam/SAS/en\\_gb/doc/analystreport/cebr-value-of-big-data.pdf](http://www.sas.com/content/dam/SAS/en_gb/doc/analystreport/cebr-value-of-big-data.pdf)

In Article 3 of the draft Directive on copyright in the Digital Single Market, the European Commission is attempting to provide legal certainty on the ability of individuals to mine copyrighted works, by clarifying exceptions to copyright where text and data mining technologies are used, which should be welcomed. However, the exception as drafted merely provides an exception for research organisations for the purposes of scientific research. The proposals suggest research organisations should only be understood to be those that conduct scientific research on a not-for-profit basis. This would rule out any commercial organisation from benefiting from the exception even when undertaking pre-commercial or other non-profit activity.

Any copyright exception on text and data mining must be significantly broader than currently drafted. techUK believes that any entity that has lawful access to content should be able to conduct text and data mining on that content as long as it does not undermine the marketability of the original content. techUK suggests this exception is amended to provide the same legal clarity for all.

The UK's current exception for text and data mining for researchers, adopted in October 2014<sup>7</sup>, is even narrower than the proposed Commission exception and is of little practical use to commercial organisations. The UK exception also makes reference to making copies of copyrighted content for the purposes of text and data mining, which is different to accessing content legally. It has also been noted that the UK exception was only drafted in such a narrow way due to constraints placed on it at the European-level.

These proposals offer an opportunity to provide a broader exception, and more legal clarity for all involved in text and data mining. A broad exception would encourage greater innovation across Europe. In addition, a broad exception would help Europe adopt a forward-looking approach to innovation and the emerging data economy, as well as the competitiveness of European companies. techUK encourage the Commission to amend this exception accordingly and would be happy to assist.

## **2. Measures to achieve a well-functioning marketplace for copyright**

- Protection of press publications concerning digital uses (Article 11)

The European Commission is proposing to provide press publishers with an additional right for the digital use of their press publications. techUK understands that the Commission is attempting to address concerns from publishers that they are not benefiting from their content being available to users. However Ancillary, or Neighbouring, Copyrights have been tried and tested in EU member states, to disastrous effect. The European Commission should avoid establishing a model which stifles the digital economy and does not address the concerns of publishers, instead damaging their businesses.

The neighbouring right for press publishers would prevent anyone, including but not excluding news aggregators, blogs and search engines from 'making available to the public' protected content. The proposals offer no clarity as to what constitutes 'making available to the public' however this is expected to include signposting such as hyperlinking, one of the foundations of the internet, and using snippets. Despite the Commission saying these proposals will not include acts of hyperlinking the recent GS Media case ruled that hyperlinking to content where permission has not been given by a rightsholder, that hyperlink constitutes a communication to the public. Paired with these proposals for a neighbouring right, hyperlinking would form a communication to the public and therefore in breach of these new proposals.

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<sup>7</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/375954/Research.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375954/Research.pdf)

It is not clear what this proposal is trying to achieve. **techUK would therefore suggest the UK Government conducts its own impact assessment on these proposals**, as the Commission's assessment provides no evidence to support these proposals. It has been suggested that this right is needed to protect against the clipping and scraping of copyright protected works. However Original Literary Works are already protected in Section 1 (1 (a)) of the Copyright, Designs and Patents Act 1988, and therefore a new right is not required. A new, independent, impact assessment would help provide clarity on what these proposals hope to achieve.

For the digital economy to thrive, a balanced copyright ecosystem is needed. Despite arguing for this additional right, rightsholders have not clarified whether they would utilise it, suggesting they too do not necessarily see any additional benefits. techUK encourages the IPO to engage with publishers to understand what they hope to achieve from this additional right. Press publishers currently benefit from increased website traffic generated from online platforms directing users to their content. Denying platforms the ability to signpost to content will reduce the number of users directed to content, which will be damaging for publishers, particularly small publishers. It would also reduce the positive user experience.

Similar requirements have been introduced in Germany and Spain, and both have indicated that neighbouring rights for digital uses of press publications does not add value to publishers. In Germany many publishers waived their right as they valued the internet traffic and user visibility of their content. In Spain, where publishers do not have an opportunity to waive this neighbouring right, innovative online services have either shut down or specifically not launched due to the regulatory environment<sup>8</sup>. This is damaging to innovative business models, publishers and users alike. In neither Spain nor Germany have publishers benefited financially or otherwise from these additional rights.

techUK is also concerned by any enforcement mechanism that might be employed in order to facilitate these proposals. techUK would urge the IPO to argue against any suggestions that copyright levies, which are detrimental to innovation, could be a way to enforce a remuneration system.

- Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users (Article 13)

Article 13 of the Directive suggests that online intermediaries and service providers will be responsible for any copyright infringing content uploaded by users, which constitutes significant changes to the liability of intermediaries as set out in the e-commerce directive, and fundamentally alters key aspects of copyright law. Information society service providers would be expected to take steps to ensure that copyrighted material does not appear on their services, even if it is user-uploaded, through content filtering technologies.

This proposed change to the liability of online intermediaries risks driving innovation out of Europe and need to be carefully considered, ensuring legal clarity for all. techUK again calls on the IPO to encourage the UK Government to conduct a new impact assessment given the wide-ranging consequences of these proposals. There are three particularly important aspects techUK would like to raise.

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<sup>8</sup> <http://www.independent.ie/business/neighbouring-rights-and-wrongs-of-european-copyright-law-34792113.html>

First, the requirement to implement content filtering requirements creates a significant barrier to the digital market. Content filtering technologies are expensive to develop and would prohibit start-ups and scale-ups from entering and competing in the market. New and emerging organisations implementing disruptive technologies would look to other global markets to launch their products to avoid the regulatory burdens imposed in Europe.

These requirements on intermediaries would also create administrative burdens. It is not clear how many content filtering solutions each intermediary would have to implement. Additionally, legal uncertainty would be inevitable as a result of the broad drafting of these proposals. It is not clear precisely who would have to comply with content-filtering requirements and there is concern that this could include cloud service providers and others who host or transmit content, but have no active role in the process.

Secondly, the technical solutions that do exist do not seem advanced enough to fulfil the requirements of these proposals and obligations under the e-commerce directive. Many of the available solutions offer a binary choice between publishing copyrighted content or not, rather than allowing the procedure of notice and take down between rightsholder and online intermediary. Reference has been made to Google/YouTube's Content ID system. This cost \$60 million to develop which is well out of reach for the vast majority of intermediaries. It should also be noted that the increased latency caused to services by these technical solutions would significantly affect the user's experience of the internet which should be discouraged.

Thirdly, these changes symbolise a fundamental shift in the balance between rightsholders and users of content and in the basis of copyright law. The Berne Convention<sup>9</sup>, on which modern copyright law is based, outlines that copyright is granted as an economic right and allows the rightsholder the exclusive right to exploit those works. However it is also the duty of the rightsholder to defend their copyright. These proposals from the European Commission attempt to shift the onus and responsibility for defending rightsholders rights from the rightsholders themselves to users and intermediaries. By forcing online intermediaries to take proactive action to defend copyrighted works they are expected to accept the responsibility and cost to allow rightsholders to exploit their works. It should remain the responsibility of rightsholders to defend their copyright, in line with existing copyright law.

It should be remembered that these proposals are being placed over the wider EU framework for intermediary liability, as set out in the e-commerce directive. This sets out a limited liability for intermediaries which is vague and does not provide platforms in Europe with protections against claims from rightsholders or users following action taken after a notice has been given. There is a much clearer system in the United States. These proposals will not help achieve the aims of the Digital Single Market and will make it very difficult for both established and emerging platforms in Europe to compete internationally.

## **UK's planned exit from the European Union**

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techUK is concerned that general regulatory divergence between the UK and EU post-Brexit could create non-tariff barriers for digital services and these copyright proposals mark an excellent example. The UK might well choose to adopt a different approach to foster greater digital innovation, creating differences with the EU copyright regime. These differences could then be used as non-tariff barriers, hampering the UK's digital sector from trading in certain digital services with the EU. Once again, this runs completely counter to the original vision of the Digital Single Market and the UK Government must reshape these proposals before leaving the EU.

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<sup>9</sup> [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html)