

Copyright Reform: Where it currently stands

Introduction

The copyright reform debate in the European Union is in full swing and is approaching its final stages. This briefing is to outline the work SPARC Europe has undertaken within the European Union in the last few months to advocate for copyright that encompasses the idea of open knowledge and access to information. SPARC Europe has been doing this on behalf of a coalition of 15 organisations including CESAER, COAR, The Commons Network, Communia Association, Creative Commons, C4C, EBLIDA, EIFL, EUA, Free Knowledge Advocacy Group EU, IFLA, LIBER, RLUK, Science Europe and SPARC Europe.

Key dates

August-December 2017: Estonian Council Presidency presents a compromise proposal which included a firmer position regarding upload filters' (article 13) and 'link tax' (article 11).

January - Now 2018: The Bulgarian Presidency presents a similar compromise, proposing amendments going further in securing upload filters and 'link tax'.

March/April 2018: JURI to vote on their proposal and amendments.

April onwards 2018: Vote in plenary in the European Parliament on whether to accept or reject the proposal and Council endorsements. The negotiations or "Trilogues" between the Council, the Parliament and the Commission take place.

Key areas of focus

SPARC Europe's primary focus in the past months has been on new copyright for press publishers (Article 11) and the so-called link tax, on upload filters on user platforms (article 13), on Text and Data Mining (Article 3), and on articles that focus on education, preservation and out-of commerce work (Article 4-9). Efforts in the past month and in the upcoming months have concentrated on Articles 11, 13 and 3, as work on articles 4-9 has already reached final stages for the most part.

Article 11: New Copyright for Press Publishers – Link Tax

This new copyright is intended to benefit news publishers, enabling them to secure revenue streams from intermediaries such as Google or Facebook for publishing and distributing the titles and extracts of their articles. This is problematic in many ways, as news has hitherto not been covered by copyright to the same extent as other original work.

The extension of this controversial proposal to academic publications, as proposed by the ITRE Committee at the Parliament, could mean that researchers, students and other users of scientific and scholarly journal articles could be forced to ask

permission or pay fees to the publisher for including short quotations from a research paper in other scientific publications. Since that new proposal to add academic publications to this article, SPARC Europe, on behalf of its consortium, has been investing great efforts to raise awareness, among MEPs, advisers and other influencers, of the importance of safeguarding seamless access to Open Access publications. We published an open letter making our case on all articles we oppose, published flyers, and distributed these widely to essential influencers at the European Parliament. However, at the same time, a strong publisher lobby in Brussels has been advocating heavily in favour of Article 11; so until all European Parliament Committees have voted, ie. JURI, it is still unclear as to whether this will indeed be excluded. Particularly since the rapporteur, or lead of the group, Axel Voss MEP, believes that scientific publications should be covered by the article. It is essential to change his opinion and clarify the German stance on the article.

On the European Council level, however, general consensus has been reached that this article should not cover academic and scientific publications as now described in a recital that has recently been introduced, possibly influenced by our work. The aim is to cover news publications, not scientific publications.

However, our concern with the the new copyright proposal in Article 11 also extends to news of the day and as it strongly influences contemporary historical awareness; also of relevance for research. This new copyright would be a fundamental change in how copyright works; thus, we also oppose the adoption of a new copyright for news publishers. This proposal is in stark contrast with the Berne convention, that explicitly excludes news of the day as being subject to traditional copyright protection. There seems to be a growing consensus within the Council with regards to this article, and countries that have previously been very much against this have been changing their stance after a call from 'highest authorities', meaning the Ministry dealing with copyright in their country. More recently the Council's IP Working Group met, and we published a communication to all members of this group on what was important to consider on Article 11. The chance of a blocking minority within the Council is diminishing.

In short, we are striving for the complete removal of Article 11, or, at the very least, the exclusion of academic publications from the Article. We should know more on this in the Spring.

Article 13: The Upload Filters

The debate regarding upload filters - effectively a censorship filter - is just about to begin full force. We have managed so far to increase the understanding about OA repositories in Europe and the importance of not installing filters on platforms meant for research and educational purposes; and above all, of the threat it potentially has on bringing additional technical, legal and financial burdens to how we manage the content in our repositories. We have done this through our open letter, a flyer on the value of repositories, face-to-face meetings with MEPs, advisers and other influencers in the Parliament. We even tweeted MEPs from the LIBE committee prior to their meeting raising awareness of the numbers of repositories in their countries.

This has resulted in a new recital being added describing that the upload filters should not apply to ‘*scientific and educational repositories*’. We still remain fully opposed to upload filters as currently proposed as recitals are not legally binding and thus offer no guarantee.

The first draft of the JURI committee for compromise amendments published last week by the rapporteur, the German MEP, Mr Axel Voss, was a disappointment as it did not include any substantial compromises but rather echoed the European Commission’s proposal. It even goes further proposing a licensing requirement for all user platforms, something that would be impractical and almost certainly impossible to implement properly. The draft proposal does not protect university repositories as it adds a stricter licensing obligations on platforms. This would effectively compel universities to acquire multiple licenses if they are to avoid the obligatory upload filters as the previously mentioned recital describes.

This draft compromise amendment was also perceived as a disappointment from the other shadow rapporteurs in the JURI committee. It might very well be that MEP Voss does not intend to provide any substantial compromises and wishes to push the draft through Parliament as-is. How that fits in with the new German government’s position on upload filters and surveillance as stated in their coalition agreement is unclear. These decisions will be voted on in Germany in early March.

This week, the JURI Committee shadow rapporteurs will meet on this article, and SPARC Europe shared a written communication with all JURI members to prepare them for the discussion, making our position clear.

In summary, SPARC Europe and its coalition are striving for the deletion of this article. At the very least, though, we are working to see that academic and educational non-profit repositories are exempt from Article 13. The Spring will bring us more clarity on Parliament and Council positions and decisions.

Article 3: Text and Data Mining (TDM)

LIBER is leading lobbying efforts related to this article and we support their work here. The text and data mining (TDM) article offers an exception for research institutions doing TDM for scientific purposes. We have been advocating for a broader TDM exception to include everyone, including SMEs and society, and we furthermore believe that the current proposal does not take the complexity of the uses and benefits of TDM into consideration. We argue that a TDM exception should be there to safeguard creativity and innovation and to support society.

During the Estonian council presidency a weak addition to the TDM article (article 3a) was proposed where nation states would be allowed to make exceptions or limitations as they wish. This is a compromise not currently favoured by certain countries such as Portugal, Spain, Italy and France. The option is weak as it is overridable with contracts or simple “all rights reserved” caveats and assumes that the data gathered by the process of TDM can only be stored temporarily. This adds complexity to managing copyright in this area. Even though this possibility of a TDM exception is weak, we have decided to support it with the focus on making it stronger

as it is the only way to ensure a possibility of a broader TDM exemption, despite it being flawed.

In the past month more private companies, startups, journalists and independent researchers have voiced their concerns about the narrow exception. The understanding on what TDM is and why it is necessary is growing among policy makers and their staff, and it has helped that companies such as Bayer and Microsoft, and startups that use TDM to tackle fake news as well as journalists have stepped up and started participating in the debate. They have been advocating for a broader TDM exemption and are aligning with our position.

Now the focus is on influencing the European Parliament before the main committee, JURI, votes as the Council seems to have opted for a more conservative exception.

Next steps

The next few months will be heavily focused on influencing the European Parliament and the Council as member states come closer to finalizing their positions on the discussed articles through written communications, and at face-to-face meetings. The European Parliament has the flexibility to be more liberal than the Council and is not as set in its opinions as the Commission. There is uncertainty on when the JURI committee will vote on amendments but it has been stated that it will most likely be at the end of April. As this is one of the most heavily lobbied files in the history of the European Union, it could be pushed forward till May or even June.

SPARC Europe will continue to work with partners and other allies on advocating for a stronger copyright reform that will protect Open Access and Open Science, benefit researchers, educators, creators and artists and will strengthen the European knowledge economy and respect fundamental rights.

We will be reaching out to you soon to inform your national library associations and consortia to further raise awareness of what is needed to ensure Open Access to Europe's research.

27 February 2018, Ásta Helgadóttir, Copyright Adviser, SPARC Europe