

OpenForum Europe's voting recommendations for the compromise amendments to the EP draft report on the implementation of Directive 2001/29/EC

Purpose of the document

This document is meant to provide OpenForum Europe's (OFE) voting recommendations regarding the rapporteur's proposals for compromise amendments to the EP's Evaluation Report of the implementation of Directive 2001/29/EC, in their version circulated on 8 June. The recommendations concern those paragraphs which are linked to OFE's top priorities in regards to copyright policy, namely hyperlinking, text and data mining, private copy levies and technological measures. They also cover other connected issues, such as public domain, the re-use of public sector information or the term of protection.

About OpenForum Europe (OFE)

OpenForum Europe (OFE) is a not-for-profit industry organisation launched in 2002 with the mission to facilitate open, competitive choice for IT users. OFE is supported by major IT suppliers, as well as SMEs, user and consumer organisations, and national partners across Europe. We maintain an ongoing dialogue with key decision makers, participate actively in public consultations, and often serve as an interlocutor between legislators and the wider open computing community. Through our programme OpenForum Academy (OFE's think-tank formed by a network of more than 40 academic Fellows) we also encourage constructive policy debates by running a series of focused round table events that bring together academics, industry experts and policy makers.

DRAFT REPORT on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI))

Committee on Legal Affairs
Rapporteur: Julia Reda

Proposals for compromise amendments

By Julia Reda
(08.06.2015)

Green = OFE recommends to vote in favour

Red = OFE recommends to vote against

Draft Report – having regard to the Berne Convention for the Protection of Literary and Artistic Works,	Compromise amendment 0.3 – having regard to the Berne Convention for the Protection of Literary and Artistic Works, <i>and expressly to the Three Step Test,</i>	Vote +
Draft Report A. whereas the European legal framework for copyright and related rights is central to the promotion of creativity and innovation, and to access to knowledge and information;	Compromise amendment 0.5 A. whereas <i>a revision of the European legal framework for copyright and related rights is central to the promotion of creativity and innovation, cultural diversity, economic growth, competitiveness, the Digital Single Market and to access to knowledge and information; while at the same time also providing authors of literary and artistic works with sufficient recognition and protection of their rights;</i>	Vote +
Draft Report C. whereas the Charter of Fundamental Rights protects <i>the</i> freedom of expression, <i>the</i> freedom of the arts <i>and scientific research,</i> the right to education and the	Compromise amendment 0.7 C. whereas the Charter of Fundamental Rights protects freedom of expression, <i>freedom of information,</i> freedom of the arts and <i>science, guarantees protection of personal data and protection of cultural and linguistic diversity,</i>	Vote -

freedom to conduct a business;

the right to property and the protection of intellectual property, the right to education and the freedom to conduct a business;

D. whereas Article 17 of the Charter of Fundamental Rights enshrines the right to property, drawing a distinction between the protection of possessions, on the one hand (paragraph 1), and the protection of intellectual property, on the other (paragraph 2);

D. deleted

Justification of vote: It is important to distinguish intellectual property from physical property.

Draft Report

Compromise amendment 0.8

Vote

E. whereas *decisions on* technical standards can have a significant impact on human rights – *including the right to freedom of expression, protection of personal data and user security – as well as on access to content*¹;

E. whereas technical standards can have a significant impact on human rights, *and whereas in the digital age in particular they can establish a balance between exclusive rights, access to works and interoperability*[†];

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E. a (new) whereas measures that contribute to the further development of cultural interchange and improve legal certainty in the sector need to be considered; whereas many creative on-line services have developed since the application of the Directive, and consumers have never before had access to such a wide range of creative and cultural works, while users need access to a plentiful and diverse supply of high-quality content;

1. Opinion of the European Economic and Social Committee of 16 December 2014 on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social

~~1. Opinion of the European Economic and Social Committee of 16 December 2014 on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Internet policy and governance—Europe’s role in shaping the future~~

Committee and the Committee of the Regions: Internet policy and governance – Europe’s role in shaping the future of internet governance’.

Draft report

5. Recommends that the EU legislator further lower the barriers to the re-use of public sector information by exempting works produced *by the public sector – as part of the* political, legal and administrative process – from copyright protection;

of internet governance’.

Compromise amendment 5

5. Recommends that the EU legislator *should consider, to protect the public interest while protecting personal information, how to* further lower the barriers *to the* re-use of public sector *information, notes that such adjustment of the legislation should be made with due regard of directive 2013/37/EU, of the principles underpinning the copyright system and of the relevant case law of the EU Court of Justice;*

Vote

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Justification of vote: The suggested amendment makes a clear reference to the PSI Directive, which is more comprehensive and provides more background and clarification. However it is worth underlining that the absence of any copyright is not always the best way to promote the re-use of public sector information. Under certain circumstances, open licences might be more appropriate.

Draft report

6. Calls on the Commission to safeguard public domain works, which are by definition not subject to copyright protection and should therefore *be able to* be used and re-used without technical or contractual barriers; also calls on the Commission to *recognise the freedom of rightholders to voluntarily relinquish their rights and* dedicate their works to the public domain;

Compromise amendment 6

6. Calls on the Commission to *effectively safeguard* public domain works, which are by definition not subject to copyright protection; *therefore urges the Commission to clarify that once a work is in the public domain, any digitisation of the work which does not constitute a new, transformative work, stays in the public domain;* also calls on the Commission to *examine whether rightholders may be given the right to* dedicate their works to the public domain, *in whole or in part;*

Vote

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Justification of vote: Considering that currently there are various attempts to protect newly digitised non-transformative works, which previously were in the public domain, the Commission needs to clarify that the simple digitisation does not equate to transformation of work and thus it should remain in the public domain. Moreover, in the current framework, the public domain is the absence of copyright. Instead, public domain should be defined in a positive way: creators should be able to relinquish their works to the public domain by positive

action, not by choosing not to protect them.

Draft report

7. Calls on the Commission to harmonise the term of protection of copyright to a duration that does not exceed the current international standards set out in the Berne Convention;

Compromise amendment 7

7. Calls on the Commission to *further* harmonise the term of protection of copyright, *while refraining from any further extension of the term of protection, according to the international standards set out in the Berne Convention, encourages Member States to finalise the transposition and implementation of Directives 2006/116/EC and 2011/77/EU in a streamlined manner, calls on the Commission to explore the optimal duration of the harmonised terms of protections of copyright within the framework of a modern trade policy agenda, taking into account the time needed to recover investment costs, the average marketing life of a work and the public interest in the dissemination of creative works;*

Vote

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Justification of vote: The term of protection should be reduced to a reasonable number of years which realistically allow to recover of investment. The optimal term of protection should be based on actual studies which assess for how long after the death of the author the investment is recovered. In any case, the term should not be further extended.

Draft Report

9. Notes that exceptions and limitations in the digital environment should be enjoyed without any unequal treatment as compared with those granted in the analogue world;

Compromise amendment 9

9. Notes that exceptions and limitations *must be applied in such a way as to take account of the purpose for which they were designed and the particular respective characteristics of the digital and analogue environments, while maintaining the balance between the interests of rightholders and the interests of the public;* therefore calls on the Commission to examine the possibility of reviewing a number of the existing exceptions and limitations in order to better adapt them to the digital environment, taking into account the ongoing developments in the digital environment and the need for competitiveness;

Vote

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9.1 (new) Underlines the importance of exceptions and limitations being accessible

for persons with disabilities; in this regard notes the conclusion of the Marrakesh Treaty, which will facilitate access for the visually impaired to books, and encourages swift ratification; believes that the Treaty is a good step forward, but that much work remains to be done in order to open up access to content for people with different disabilities;

Justification of vote: It can be challenging to apply exceptions and limitations in both digital and analogue worlds in exactly the same way (e.g. CJEU ruling on the Allposters case compared to the arguments developed in the UsedSoft case). The intention to extend analogue world exceptions to the digital world is welcome, and when this is not practically possible, it should be duly justified.

Draft Report

10. *Views with concern the increasing impact of* differences among Member States in the implementation of exceptions, *which creates legal uncertainty and has direct negative effects on the functioning of the digital single market, in view of the development of cross-border activities;*

Compromise amendment 10

10. *Notes the importance of European cultural diversity, and notes that the differences among Member States in the implementation of exceptions can be challenging for the functioning of the internal market in view of the development of cross-border activities and EU global competitiveness and innovation, and may also lead to legal uncertainty for authors and users, considers that some exceptions and limitations may therefore benefit from more common rules; remarks however that differences may be justified to allow Member States to legislate according to their specific cultural and economic interests, and in line with the principles of proportionality and subsidiarity;*

Vote

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Justification of vote: Allowing for differentiated application of exceptions increases legal uncertainty and impedes the achievement of a truly Digital Single Market.

Draft Report

11. Calls on the Commission to *make mandatory* all the exceptions and limitations referred to in Directive 2001/29/EC, to allow equal access to cultural diversity across

Compromise amendment 11

11. Calls on the Commission to *examine, where Member States have implemented the same exceptions and limitations, the possible application of common rules in order to ensure the reduction of differences between those Member States* to allow equal access to

Vote

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borders within the internal market and to improve legal certainty;

cultural diversity across borders within the internal market and to improve legal certainty,

11.a. (new) Welcomes, in that respect, the adoption of Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights, which provides the right balance between the public's access to cultural works, ease of rights clearance for users and adequate remuneration for creators, and believes that implementation of this directive will lead to a clearer set of EU-wide standards resulting in a faster and more flexible licensing infrastructure adapted to specific usage; notes, however, that fragmentation persists and that solutions must be considered, including in the area of common approaches providing for targeted exceptions that affect cross-border exchange of works, which is necessary for the completion of the digital single market;

Justification of vote: Suggesting to aim for minimum standards across exceptions and limitations and not making all exceptions mandatory is not ambitious enough and is not taking into account the challenges of creators when faced with legal uncertainty or difficulties because certain Member States decide not to implement exceptions in their national legislation.

Draft Report

13. *Calls for the adoption of an open norm introducing flexibility in the interpretation of exceptions and limitations* in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or rightholder;

Compromise amendment 13

13. *Stresses that, where an exception or limitation already applies, new usages of content which are made possible by technological advances or new uses of technology should be, insofar as possible, construed in line with the existing exception or limitation, provided that the new usage is similar to the existing one, in order to improve legal certainty; this would be subject to the three-step-test;*

Vote

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Justification of vote: Explicitly referring to the three-step-test ensures that additional flexibility can be provided, by taking into account future adjustment of exceptions to new uses of technology. Not referring to it as "open norm" is positive, because it avoids confusion or need of definition of a new concept.

Draft report

15. Stresses that the ability to freely link from one resource to another is one of the fundamental building blocks of the internet; calls on the EU legislator to make it clear that reference to works by means of a hyperlink is not subject to exclusive rights, as it does not consist in a communication to a new public¹;

Compromise amendment 15

~~15. Stresses that the ability to freely link from one resource to another is one of the fundamental building blocks of the internet; calls on the EU legislator to make it clear that reference to works by means of a hyperlink is not subject to exclusive rights, as it does not consist in a communication to a new public²; (deleted)~~

Vote

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Justification of vote: The act of linking is a fundamental function of the open Internet that we know today and this should be clearly recognised. It should not be subject to any copyright authorisations or arbitrary levy that covers any type of content. Links are no more than pointers to a place where to find a webpage and quoting e.g. a title or a few words and linking, should be recognized as rights falling outside the scope of copyright protection throughout the EU, subject neither to permission, nor to payment. EU rules should be enforced to nullify national legislation which amounts to a levy on linking and free expression. We believe the rights of users to link and point to information should be strongly recognized and upheld.

Draft Report

18. Stresses the need to enable automated analytical techniques for text and data (e.g. ‘text and data mining’) for *all* purposes, provided that permission to read the work has been acquired;

Compromise amendment 18

18. Stresses the need to enable *properly assess the enablement of* automated analytical techniques for text and data (e.g. ‘text and data mining’ *or ‘content mining’*) for *research* purposes, provided that permission to read the work has been acquired;

Vote

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Justification of vote: The compromise amendment entirely weakens the original text, by calling only for an assessment of the possibility to enable TDM for legally acquired content, instead of enabling clear permission to mine legally acquired content. Researchers and other stakeholders advocate for the freedom to mine, without additional licenses or formalities. The original text is aligned to these requests, justified in various studies which quantify the costs of additional licenses or which point out to the discouragement of researchers to mine, because of the legal uncertainty.

Draft Report

19. Calls for a broad exception for

Compromise amendment 19

19. Calls for an exception for research and

Vote

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- 1 Order of the Court of Justice of 21 October 2014 in Case C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch* (request for a preliminary ruling from Germany’s Bundesgerichtshof).
2 ~~Order of the Court of Justice of 21 October 2014 in Case C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch* (request for a preliminary ruling from Germany’s Bundesgerichtshof).~~

research and education purposes, which should cover not only educational establishments *but any kind of educational or research activity, including non-formal education*;

education purposes, which should cover not only educational establishments, *but all educational or research activities, including online and cross-border activities, linked to an educational establishment or institution recognised by the competent authorities or legislation or within the purview of an educational programme*; calls upon the Commission to take into account the increased cooperation between universities and the private sector;

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Justification of vote: The suggested new wording significantly diminishes the scope of the exception for educational/research activities, by only recognising activities which are linked to an officially recognised establishment. Current technology allows for research and education to happen also outside such formally recognised establishments. The suggested compromise amendment ignores such new trends and existing realities.

Draft Report

21. Calls on the EU legislator to *preclude* Member States from introducing *statutory licences for the compensation of rightholders for the harm caused by acts made permissible by an exception*;

Compromise amendment 21

21. *Deplores the introduction of statutory licences in some member states aimed at news aggregators for acts that are already permissible and calls on the EU legislator to protect consumers by precluding* Member States from introducing such compensation *for alleged harm in the form of neighbouring rights for press publishers, as it can cause significant damage to the digital economy*;

Vote

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Justification of vote: Currently Spain, Germany and France have implemented ancillary copyright laws. The ancillary copyright has led to a considerable degree of legal uncertainty. The unclear wording not only raises questions regarding the object of protection and the scope of the ancillary copyright. The law is also vague on the question who has to meet obligations and who is the beneficiary. Alternative search engines have to be shut down. In addition, the ancillary copyright leads to less diversity of expression and hinders the free flow of information.

Draft Report

22. *Calls for the adoption of harmonised criteria for defining the harm caused to rightholders* in respect of reproductions made by a natural person for private use, *and for harmonised* transparency measures *as regards the private copying levies put in place in*

Compromise amendment 22

22. *Recalls the importance of the private copying exception that may not be technically limited, coupled with fair compensation and remuneration of creators; invites the Commission to analyse on the basis of scientific evidence, the European Parliament's resolution of February 2014⁴ and the results of the latest mediation process*

Vote

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some Member States³;

conducted by the Commission⁵, the viability of existing measures for the fair compensation of rightholders in respect of reproductions made by natural persons for private use, in particular in regard to the harmonisation of transparency measures; notes that the right to impose private copying levies should be governed in such a way as to inform citizens of the actual amount of the levy, its purpose and how it is going to be used;

Justification of vote: 22 Member States have adopted levies. Some of them chose to put in place government funds for compensation, other Member States do not foresee any compensation for private copying and a third category of Member States apply varying levels of levies. This affects the functioning of the internal market and creates market distortions and high administrative costs. Harmonisation of measures and increased transparency are needed.

Draft Report

23. Stresses that the effective exercise of exceptions or limitations, and access to content that is not subject to copyright or related rights protection, should not be hindered by technological measures;

Compromise amendment 23

23. *Notes the importance of article 6(4) of Directive 2001/29/EC* and stresses that the effective exercise of exceptions or limitations, and access to content that is not subject to copyright or related rights protection, should not be ***waived by contract*** or hindered by technological measures of protection or ***contractual terms***;

Vote

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Justification of vote: Technological measures of protection, while justifiable for the prevention of illegal copying of material, may have adverse side effects preventing or hindering the full exercise of copyright exceptions or limitations. In such particular cases, it is important that circumvention of these technical measures be legally permitted.

For more information, please contact OFE's CEO Graham Taylor at graham@openforumeurope.org or OFE's Policy Analyst Diana Cocoru at +32 2 210 02 92 or diana@openforumeurope.org.

About OpenForum Europe

(OFE) is an independent, not-for-profit organisation, supported by major IT suppliers including Deloitte, Google, IBM, Oracle and Red Hat, as well as SMEs, user and consumer organisations, and national partners across Europe. It focuses on delivering an open, competitive ICT market. Views expressed by OFE do not necessarily reflect those held by all its supporters.

³ As stated in António Vitorino's recommendations of 31 January 2013 resulting from the latest mediation process conducted by the Commission in respect of private copying and reprography levies.

⁴ **European Parliament Resolution (2013/2114(INI)) on private copying levies.**

⁵ António Vitorino's recommendations of 31 January 2013 resulting from the latest mediation process conducted by the Commission in respect of private copying and reprography levies.