



## EUROPEAN COMMISSION

LEGAL SERVICE  
The Director General

Brussels,

Ms Anna Mazgal  
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### BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGEMENT OF RECEIPT

**Subject:** Request for access to documents

**Ref.:** Your request of 13 February 2017 registered under reference GestDem 2017/861

Dear Ms Mazgal,

I refer to your request for access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>. Your request refers to "*the European Commission's legal service opinion(s) on the drafts of the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD)*".

#### 1. IDENTIFICATION OF DOCUMENTS

After examination of the Legal Service files, the following documents have been identified as falling within the scope your request:

1. Note of the Legal Service to the Head of Cabinet of the Vice-President of the Commission of 21 June 2016: Legal concerns with "clarifying" the notion of communication to the public [registered under Ref. Ares(2016)2882089].
2. Note of the Legal Service to the Director General of DG CONNECT of 30 August 2016: Copyright Reform - Fast-Track Consultation ISC/2016/04250 from DG CNECT [registered under Ref. Ares(2016)4876233].
3. Legal Service comments on the Draft Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (Annex 1 to document under number 2).

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<sup>1</sup> OJ L145, 31.05.2001, page 43.

Having carefully examined the concerned documents, I have come to the conclusion that partial access can be granted to those parts of documents under numbers 2 and 3 that are not covered by any of the exceptions provided under article 4 of Regulation (EC) No 1049/2001, whereas access to document under number 1 must be refused in total.

The withheld parts of the documents and the refused document cannot be disclosed since they are covered by the exceptions provided for in article 4(2) second indent ("*protection of court proceedings and legal advice*"), article 4(3) first and second subparagraphs ("*protection of the decision-making process*") and in article 4(1)(b) ("*protection of personal data*") of Regulation (EC) 1049/2001.

Accordingly, please find enclosed an expunged version of documents under numbers 2 and 3. Please note that you may reuse these documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of them. Please also note that the Commission does not assume liability stemming from the reuse.

## **2. ASSESSMENT**

On 14 September 2016 the Commission adopted the Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market<sup>2</sup>.

At the outset, I must underline that the requested documents were drawn up for purely internal purposes within the Commission in the context of preliminary consultations and deliberations in view of the adoption of the proposed directive.

While the Commission has adopted its proposal, this proposal is still being considered by the co-legislators<sup>3</sup>. At this stage, only limited access could be granted to preparatory documents related to this legislative procedure according to the exceptions provided for in Regulation (EC) No 1049/2001, as will be explained below:

### **2.1 Protection of legal advice and of the decision-making process**

According to Regulation (EC) No 1049/2001, Article 4(2) second indent: "*The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] legal advice [...] unless there is an overriding public interest in disclosure*".

Also, according to Article 4(3) first and second paragraphs of Regulation (EC) No 1049/2001: "*Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

*Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

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<sup>2</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593.

<sup>3</sup> [http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52016PC0593&qid=1487682788559#2017-02-08\\_OPI\\_OWINI\\_byCOR](http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52016PC0593&qid=1487682788559#2017-02-08_OPI_OWINI_byCOR)

Full disclosure of the requested documents would prejudice the capacity of the Legal Service to assist the Commission, depriving, thus, the institution of an essential element in the process of taking sound decisions and would also harm the ongoing decision-making process. More precisely:

Document under number 1 is a Note of the Legal Service containing a legal opinion on the notion of communication to the public within the meaning of Article 3(1) of directive 2001/29/EC. More particularly, the specific note concerns an analysis of legal issues arising out of the relationship between copyright holders and online platforms in view of the pending proposal, revealing the position of the Legal Service on the relevant suggested provision. The notion of communication is extremely delicate, having been formed through international agreements and extensive case law. In view of the suggested provision concerning the notion of communication, the Legal Service proceeds to an assessment of the possible consequences of that specific provision, an analysis which will have to be taken into account in the course of the pending discussions.

Document under number 2 is a Note of the Legal Service which contains a concrete assessment by the Legal Service on various aspects of the draft Directive, in the light of the possible legal basis of the Directive and taking also into account the established principles on the Union copyright law. More precisely, several provisions are analysed in detail as to their possible meaning and consequences within the framework of European Union copyright law and suggestions which should be considered when deciding on the adoption of the directive.

Document under number 3 is an attachment to document under number 2, including the Legal Service comments in the form of track changes on the Draft Proposal for the Directive.

As already mentioned, even though the Proposal has already been adopted by the Commission, the legal analysis and opinions expressed in the requested documents are still relevant today in the light of the ongoing negotiations and the pending decision-making process. The redacted parts of the documents relate to sensitive issues in particular to the issue of the introduction of a new related right in favour of press publishers and the adaptation of certain exceptions and limitations in the copyright acquis. Depending on the negotiations on this particular issue, the Commission may indeed have to adapt its current proposal. For this reason, the likelihood of the interests in the protection of legal advice and in the decision-making process being compromised is not hypothetical.

Indeed, the above mentioned documents contain purely internal legal opinions in matters of a sensitive nature, drafted under the responsibility of the Legal Service. Disclosure of the expunged parts of the requested documents and of the opinion expressed in document under number 1 would undermine the protection of legal advice provided for under article 4(2), second indent, of Regulation (EC) No 1049/2001 which, as recognised by the Court of Justice, must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice<sup>4</sup>.

Furthermore, while the legislative proposal is still being discussed, disclosure would undermine the pending decision-making process and could also prejudice the legislative process itself. Putting in the public domain the legal considerations of the Commission's services, including the legal point of view of the Legal Service, before any decision is

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<sup>4</sup> Judgment of 1 July 2008 in *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.



adopted by the Union legislature, would severely reduce the Commission's ability to defend its proposal before the legislator throughout the legislative procedure and affecting its capacity to possibly amend its proposal so that its position as facilitator will be clearly undermined. For this reason, the withheld parts of the documents and the refused document are also covered by the exception provided for in article 4(3) first and, in the alternative, second subparagraphs ("*protection of the decision-making process*") of Regulation (EC) No 1049/2001.

Under these circumstances, granting full access to the requested documents at this stage is not possible.

## **2.2. Protection of personal data**

According to Article 4(1)(b) of Regulation (EC) No 1049/2001: "*The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*".

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>5</sup> becomes fully applicable<sup>6</sup>. In accordance with the exception regarding the protection of personal data, the names and personal details of the Commission's officials not having the function of senior management staff, as well as all handwritten signatures have been expunged from document under number 2.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. Those two conditions are cumulative.

I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Accordingly, the requested documents are disclosed expunged from personal data.

If you wish to receive the expunged personal data, I invite you to provide us with arguments showing the need to have the personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data would be disclosed.

Please note that the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

## **2.3. Possibility of granting partial access to document under number 1**

As laid down in article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of giving partial access to the document which has been refused in total. However, after careful examination, I have come to the conclusion that it is entirely

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<sup>5</sup> OJ L 8, 12.1.2001, p. 1.

<sup>6</sup> Judgment in *European Commission v The Bavarian Lager Co. Ltd.*, C-28/08 P, EU:C:2010:378.

covered by the invoked exceptions so that a partial disclosure cannot be granted without harming the protected interests.

Considering that the discussion on the proposal remains open, premature disclosure of the suggested legal positions would render the Commission's Legal Service subject to external pressure, limiting substantially its margin of manoeuvre while providing legal advice. Furthermore, as already explained, the risk of the decision-making process being undermined is reasonably foreseeable and not purely hypothetical in view of the ongoing negotiations.

### **3. OVERRIDING PUBLIC INTEREST**

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest permitting the full disclosure of the requested documents. In order for such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under Article 4(2) second indent and Article 4(3) first and second subparagraphs. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused parts of the documents that would outweigh the public interest in the protection of legal advice and the decision-making process.

### **4. MEANS OF REDRESS**

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,



Luis ROMERO REQUENA

Attachments: 2