



## EUROPEAN COMMISSION

LEGAL SERVICE  
The Director General

Brussels,

Ms Julia Reda  
Parlement européen  
Bât. Altiero Spinelli 05F158  
60 rue Wiertz  
[ask+request-5286-  
d1efdbde@asktheeu.org](mailto:ask+request-5286-d1efdbde@asktheeu.org)

### BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGEMENT OF RECEIPT

**Subject:** Request for access to documents

**Ref.:** Your request of 23 March 2018 registered under reference GestDem 2018/1767

Dear Ms Reda,

I refer to your application for access to documents under Regulation (EC) No 1049/2001<sup>1</sup>, by which you request *"The opinion written by the Legal Service [...] on the Commission proposal for a Directive on Copyright in the Digital Single Market and in particular Article 11 of this Directive"*.

#### 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 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).

---

<sup>1</sup> 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 (Official Journal L145, 31.05.2001, page 43).

## 2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001

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 full.

The withheld parts of the documents and the refused document (thereafter "*the refused documents*") cannot be disclosed since they are covered by the exceptions provided for in article 4(2) second indent ("*protection of 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) No 1049/2001.

Accordingly, you will find attached 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.

### 2.1 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".*

Article 4(3) first and second paragraphs of Regulation (EC) No 1049/2001 provide that:

*"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".*

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, this note contains an analysis of legal issues arising out of the relationship between copyright holders and online platforms and revealing the position of the Legal Service on the relevant suggested provision in the pending proposal. 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 on the adoption of the Proposal by the co-legislators as will be explained below.

Document under number 2 is a note of the Legal Service which contains a concrete assessment 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.

The Digital Single Market Strategy (DSMS)<sup>2</sup>, adopted by the Commission on 6 May 2015, sets out the main elements of the modernization of the EU copyright rules. On 9 December 2015 the Commission adopted, on the one hand, a Communication on copyright<sup>3</sup>, which detailed the next steps in this regard, including possible legislative proposals and timelines and, on the other hand, a proposal for a Regulation on cross-border portability of online content services, adopted by the co-legislators on 14 June 2017<sup>4</sup>. In the framework of the DSMS, the Commission adopted on 14 September 2016 a set of legislative measures, called the "*copyright second legislative package*", including the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market<sup>5</sup> (hereafter "*Proposal for a Directive*"), to which refers your request.

I consider that full disclosure of the legal opinions concerned would, firstly, 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>6</sup>. The redacted parts of the documents and the refused document relate to sensitive issues such as the introduction of a new related right in favour of press publishers and the adaptation of certain exceptions and limitations in the copyright acquis. While the Commission has adopted its Proposal for a Directive, the legislative procedure for its adoption is still pending<sup>7</sup>. Thus, the legal analysis and opinions expressed in those legal opinions are still relevant today in the light of the interinstitutional ongoing discussions and the pending decision-making process.

Disclosing the refused documents would make known to the public internal legal opinions in a matter of a sensitive nature drafted under the responsibility of the Legal Service and intended for the Commission's service responsible for preparing the draft Proposal for a Directive. Their disclosure would prejudice the Legal Service's capacity to assist impartially

---

<sup>2</sup> [http://europa.eu/rapid/press-release\\_IP-15-4919\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4919_en.htm)

<sup>3</sup> [http://europa.eu/rapid/press-release\\_IP-15-6261\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6261_en.htm)

<sup>4</sup> Regulation (EU) No 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Official Journal L168, 30.06.2017, page 1).

<sup>5</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593.

<sup>6</sup> Judgment of 1 July 2008 in joined cases C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, EU:C:2008:374, paragraph 42.

<sup>7</sup> <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52016PC0593&qid=1525698503007>



the Commission and its services in this sensitive subject as well as the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice depriving, thereby, the institution of an essential element in the process of taking sound decisions.

Secondly, disclosure of the requested legal opinions would also harm the interinstitutional ongoing decision-making process for the adoption of the referred Proposal for a Directive, by revealing the preliminary assessments of the Commission's services, including the legal point of view of the Legal Service, before a final decision is adopted by the co-legislators. When preparing a decision the Commission's services must be free to explore all possible options free from external pressure. Depending on the interinstitutional negotiations, the Commission might be called upon to adapt certain aspects of its Proposal in the context of the pending legislative process. Disclosing the refused documents would put in the public domain the possible positions and options the Commission may consider in the course of the legislative debate, thus submitting it to an important external pressure in a sensitive matter and seriously undermining its decision-making process.

It would also severely reduce the Commission's ability to defend its proposal throughout the legislative procedure and negatively affect its capacity for a possible amendment of its proposal so that its position as facilitator will be clearly undermined. Furthermore, it could also prejudice the best outcome of the legislative process itself. For these reasons, the withheld parts of the documents and the refused document are also covered by the exception provided for in article 4(3) first subparagraph ("*protection of the decision-making process*") of Regulation (EC) No 1049/2001.

Should the Commission's decision-making process be considered closed with the adoption of the its decision of 14 September 2016 – *quod non* – I take the view that for the reasons explained above, the opinions reflected in the refused documents would, in the alternative, be covered by the exception of Article 4(3), second subparagraph of Regulation (EC) No 1049/2001, as their disclosure would seriously harm the decision-making process of the Commission even after its proposal has been adopted.

For the explained raisons, the likelihood of the interests in the protection of legal advice and in the decision-making process being compromised is not hypothetical. Under these circumstances, granting full access to the requested legal opinions at this point in time 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>8</sup> becomes fully applicable<sup>9</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 full. However, after careful examination, I have come to the conclusion that it is entirely covered by the invoked exceptions so that a partial disclosure cannot be granted without harming the protected interests.

## **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.

---

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

<sup>9</sup> Judgment in *European Commission v The Bavarian Lager Co. Ltd.*, C-28/08 P, EU:C:2010:378.

#### 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