The interface of rights to access public sector information and copyright: Opinion of the European Copyright Society

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The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law and policy. Its members are scholars and academics from various countries of Europe, seeking to articulate and promote their views of the overall public interest on all topics in the field of authors rights, neighbouring rights and related matters. The ECS is neither funded nor instructed by any particular stakeholders. Its Opinions represent the independent views of a majority of ECS members.

EXECUTIVE SUMMARY

There exists significant tension between rights to access public sector information and the current copyright acquis. The right to information is fundamental for transparency, democratic accountability, and citizen participation. It is enshrined in international and national fundamental rights law, including the EU Charter of Fundamental Rights. However, Member States apply divergent rules regarding the copyright status of official documents such as legislation, judicial decisions, and administrative acts. This is in keeping with the freedom that the Berne Convention allows under articles 2(4) and 11bis BC.

The concept of work as harmonized to date offers no solution, and existing copyright instruments only indirectly touch upon the relationship, while more recent EU instruments —the Open Data Directive (2019) and the Data Governance Act (2022)—explicitly promote openness and re-use of public sector data. The Public.Resource.Org judgment of the Court of Justice of the European Union (CJEU) brought the tension between copyright and access rights to the fore.

It is time the EU acts on at least the following two points to ensure legal certainty, safeguard transparency, and strike a fair balance between openness of public information and protection of creative works:

1) Establish uniform rules that exclude official documents from copyright protection, and
2) Make explicit that copyright instruments are without prejudice to access rights based on transparency obligations in EU and national laws. Laws on copyright, databases and related rights should not undermine transparency laws, at a minimum not where intellectual property is public sector owned.

1. Why the relationship between copyright and access to public sector information matters

In the past few decades, it has been recognised that the 'right to information' is crucial in ensuring transparency and accountability of public decision-making and in enabling public participation in governance. The right is of the utmost importance in contemporary societies that face complex, urgent problems and issues of trust. The EU has also long promoted the development of services based on public sector information, be it for commercial or non-commercial use. The CJEU's *Public.Resource.Org* case brought to the fore an important issue that had hitherto been overlooked in the EU harmonisation agenda: how to deal with the tension between copyright and the right of access to public documents (the 'right to know')? As public access rights develop at the national and EU levels, the need to regulate their relationship with copyright and related rights intensifies.

2. Recent developments that justify action

So far, the relationship between copyright and rights to information has received only peripheral attention from policymakers. It has been virtually absent from the EU's harmonisation agenda in the field of copyright, even though Member States have different approaches to protecting government information (including laws, court decisions, administrative documents and databases). Access and use of copyrighted materials held by the public sector is also dealt with differently under various national access regimes.

Many EU member-states have enacted access laws in the past decades.[1] A key instrument at EU level is Regulation 2001/1049. However, the EU itself has been unable to agree on a much-needed reform of this premier instrument on access to documents held by EU institutions. This is despite the fact that such reform is called for in light of the fundamental right to access as enshrined in Art 42 Charter of Fundamental Rights of the European Union (CFREU) which applies to all EU institutions, and because of the evolution of access rights under Art 10 of the European Convention on Human Rights (ECHR)[2], which by virtue of Art 52 CFREU also binds the EU. Meanwhile, the fast-developing field of data legislation means that Member States are increasingly obliged to allow the dissemination and (commercial) use of information held by the public sector. For example, with respect to publicly accessible information, the 2019 Open Data Directive severely limits the freedom to exercise copyright and related rights by public sector bodies. The 2022 Data Governance Act requires governments to ensure that more information that they hold becomes available for (commercial) use, even where third parties hold copyright in it.[3] This approach is retained in the Commission's proposal to integrate these instruments into a new Data Act ("Digital Omnibus").[4]

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[1] E.g. The 2009 Council of Europe Convention on Access to Official Documents (CETS No. 205, 'Tromsø Convention) entered into force in 2020 and now has 17 parties, mostly EU Member States. It sets out key principles and minimum standards for national access laws.

[2] See notably the landmark ECtHR case *MHB Magyar Helsinki Bizottság c. Hongrie* ([GC], no 18030/11, §§ 156-170, 8 Nov 2016 which sets out when the right to access public sector information comes within scope of Art 10 ECHR, building on a longer line of case-law.

[3] Directive (EU) 2019/1024 on open data and the reuse of public-sector information, OJ 2019 L 172; Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724, OJ 2022 L 152.

[4] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/679, (EU) 2018/1724, (EU) 2018/1725, (EU) 2023/2854 and Directives 2002/58/EC, (EU) 2022/2555 and (EU) 2022/2557 as regards

It is time for legislative intervention, given the problematic current situation.

3. Problems with the current situation

EU copyright instruments only cursorily address the interplay between copyright law and the regulation of access to public sector information. Only the 2001 InfoSoc Directive (Art 9) and 1996 Database Directive (Art 13) contain provisions that declare that they are without prejudice to (inter alia) provisions regarding "access to public documents."[5] The latest horizontal directive, the CDSM Directive of 2019/790[6], has no such provision, but only a recital (Recital 60) in similar terms. Recital 84 CDSMD states that the Directive should be interpreted and applied in accordance with the rights and principles enshrined in the CFREU (thus including Art 42 on the right of access to documents). These are not hard provisions, just recitals, and it is, of course, obvious that the provisions of a Directive must be interpreted in the light of the EU's fundamental rights framework. In sum, the provisions do not resolve potential conflicts between copyright and rights to access and reuse.

3.1 Exceptions and limitations

Several copyright limitations and exceptions are informed by a public interest in transparency. These include Art 5(3)(c) InfoSoc, allowing free use of certain works for press reporting on current events, and (5(3)(f)), allowing the use of political speeches or extracts of public lectures. Article 5(3)(e) allows use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. The CDSM Directive's exception for text and data mining for scientific research purposes (Article 3-4 CDSMD) also applies to works held by public sector bodies and can be used for transparency or accountability purposes (e.g. analysing government funding decisions).

However, none of the flexibilities in the acquis explicitly targets access and use of public sector information. What is more, they only apply to works already made public (in a copyright sense) or to which the beneficiary has lawful access. This is understandable from the perspective of protecting the author's interest in controlling the first publication. Arguably, a (statutory) right to access information held by public sector bodies constitutes 'lawful access' under the TDM provisions. Of note, national transpositions of the abovementioned provisions, which are generally diverse and fragmented, do not refer to public documents in their text. This is also true of the information purposes exceptions, despite the potential anchorage that they offer for the goal of providing governmental information.

It is perhaps not surprising that the Database Directive and InfoSoc Directives did not resolve the relationship between copyright law and the regulation of governmental transparency and accountability. However, it is more surprising that there has been no further action in the past two decades, even in the face of the EU developing a framework aimed at enabling (commercial) reuse of public sector information and of data sharing.

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the simplification of the digital legislative framework, and repealing Regulations (EU) 2018/1807, (EU) 2019/1150, (EU) 2022/868, and Directive (EU) 2019/1024 (Digital Omnibus), COM(2025) 837 final.

[5] 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, OJ 2001 L 167; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ 1996 L 151.

[6] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130.

3.2 CJEU's case-law on copyright

The lack of clarity on the relationship between the right to access public sector information and copyright is particularly problematic considering the CJEU's caselaw on copyright subject-matter and on the system of exceptions and limitations.

First, it remains unclear how the Court would apply the autonomous concept of "work" to various categories of government-produced information, especially to laws and administrative and court decisions, which are excluded from copyright protection in many Member States. The *Funke Medien* case (C-476/17) sheds a little light. The German Government attempted to block the publication in the press of military status reports, invoking the copyright-protected status of those reports. The court stated that if such reports "constitute purely informative documents", they do not meet the required originality standard (§24).[7] Moreover, the Court reiterated that if the content of such documents is "essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable', such documents are thus excluded from copyright protection due to their technical functionality (§24).

Second, for those informational works that are protected by copyright, it matters greatly how rights to access and/or re-use are construed: as copyright exceptions and limitations or as external constraints. In early cases, the CJEU took a restrictive approach. However, it has gradually abandoned the principle of strict reading of the InfoSoc exceptions and limitations. The current approach is less strict, allowing broader interpretations where this is needed to ensure the effectiveness of a limitation and the fulfilment of its purpose (see, e.g. C-403/08 *FAPL*) and where necessary to ensure a fair balance between copyright and fundamental rights (see, e.g. C-275/06 *Promusicae*). This line was confirmed in the landmark triad of decisions in July 2019 (C-469/17 *Funke Medien*, C-476/17 *Pelham,* and C-516/17 *Spiegel Online*), in which the Court specified that a fundamental right-oriented interpretation of the EU copyright acquis does not allow exceptions and limitations beyond the boundaries set by EU Directives and Regulations, since allowing a free derogation from the exhaustive list provided by the EU legislator would endanger the effectiveness of harmonization. However, at the same time, the CJEU stated - for the first time explicitly - that copyright exceptions and limitations should be understood as users' rights (see *Funke Medien*, §70; *Spiegel Online*, §54).

The right of access to public sector information held by EU institutions is guaranteed by Art 42 CFREU. More generally, the right to receive and impart information is protected under the right of freedom of expression, enshrined in Article 11 CFREU. The ECtHR has recognized that a right to access public sector information is within the scope of Art 10 ECHR.[8] However, absent an explicit provision balancing copyright against the right to access to public information, courts will probably opt to operate within the boundaries of existing copyright exceptions. Of note, public sector bodies are not beneficiaries of fundamental rights, so where a public sector body is owner of copyright, that copyright is protected as a fundamental right is not an argument to curtail freedom of expression through the exercise of copyright.[9]

With regard to the applicability of the informatory purpose and quotation exceptions enshrined, respectively, in Art 5(3) (c) and (d) InfoSoc, the CJEU underlined in *Funke Medien* that the two provisions

[7] The Advocate-General in Funke Medien expressed serious doubts that documents such as at issue meet the threshold for copyright protection. Opinion 25 October 2018, ECLI:EU:C:2018:870, para 19.
[8] See note 2.
[9] See AG para 53-54, note 5.

are "specifically aimed at favouring the exercise of the right of freedom of expression (…) and to freedom of the press (…) over the interest of the author" (*Funke Medien*, §70). Reiterating what was also stated in *Pelham* and *Spiegel Online*, the Court recognized that it may be necessary to relax the strict interpretation of exceptions in order to strike a balance between conflicting fundamental rights (§71). Then, citing the ECtHR's case law, it recalled "the need to take into account the fact that the nature of the "speech" or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of public interest (see, to that effect, ECtHR, 10 January 2013, *Ashby Donald and Others v France*)" (§74). On this basis, it noted that Funke Medien published the military status reports with the aim of reporting events and mandated the national court to rely on an interpretation of Articles 5(3) (c) and (d) InfoSoc "which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter" (§76).

3.3 PublicResourceOrg case

The case *Public.Resource.Org.Inc v European Commission* brought the relationship between access to public information and copyright into sharp focus. The proceedings concerned an application under Regulation (EC) No 1049/2001 for access to certain harmonised standards concerning toy safety.[10] The Commission is empowered to request European Standardisation Organizations (which are private entities in which public and private partners cooperate) to develop standards in support of certain secondary legislation such as regarding toy safety.

The Commission rejected the application, citing an exception which applied where "disclosure would undermine the protection of… commercial interests of a natural or legal person, including intellectual property" unless there was an overriding public interest in disclosure. In this instance, the commercial interests were those of the European Committee for Standardisation (CEN), under whose auspices the standards were drafted, and its national partners. Standardisation bodies rely on the sale of standards -- and thus on copyright-- to recoup (part of) the costs of developing and disseminating them.

The applicants asked the General Court to annul the Commission's decision, arguing (i) that copyright could not subsist in the harmonised standards, (ii) that no harm to the commercial interests of CEN and its national members could be established and (iii) that the Commission had erred in failing to recognise an overriding public interest in disclosure. The General Court rejected these arguments, and the applicants appealed to the CJEU, claiming (i) that the General Court had erred in holding that the requested harmonised standards were capable of falling within the exception for commercial interests and (ii) that there was no overriding public interest in disclosure. The CJEU dealt only with the second of these claims, concluding, in accordance with its own previous authority,[11] – that in cases such as this where it concerns harmonized standards under EU secondary law such standards formed part of "EU law" and that the rule of law and the principle of transparency demanded that access to those standards should be freely available to all. Accordingly, there was an overriding public interest in permitting public access to the standards.

[10] 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. The applications for access to information were also brought under the Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. However, the CJEU's Judgment is not based on these Regulations.

[11] See, CJEU 27 October 2016, case C-613/14, *James Elliott Construction* ECLI:EU:C:2016:821 para 40.

PublicResource.Org.Inc[12] was concerned only with a subset of public information, namely legislation. However, whatever the practical and financial consequences,[13] it confirms clearly that "EU law" must be freely available to those who are subject to it. This principle must necessarily also extend to EU-related law in a national context and, as a consequence, Member States' copyright law cannot be employed to generate a fee for access to such rules[14]. Perhaps wisely, the CJEU did not deal explicitly with the copyright-related arguments considered by the General Court, preferring instead to treat any copyright interest as subservient to the fundamental interests in the rule of law and transparency in this context. Therefore, the CJEU avoided the General Court's strained efforts to establish whether a law-maker's creative skill in drafting legislation might be sufficient to satisfy the threshold for copyright protection.[15]

It has been suggested that the Court's Judgment has created a form of copyright exception and that the principle that it establishes is therefore subject to the "three-step test".[16] This argument seems misconceived. In reality, the Judgment reflects the principle that the exercise of copyright is, in an appropriate case, subject to competing "external" constitutional principles. National rules excluding important public information from copyright law are limitations on copyright's scope, rather than exceptions to any claim for infringement. As the process of European copyright harmonisation proceeds, it may make sense to enshrine this principle at Union level.

4. Divergent laws in Member States

In the Public.Resource case, the CJEU limited itself to repeating its standard of originality (i.e. "the subject matter reflects the personality of its author, as an expression of his or her free and creative choices"), stating that the EC had not erred in law in applying this standard. The Court also noted that "exceptions to that [copyright] protection, remain governed by the laws of the Member States, which are free to determine the protection to be given to official texts of a legislative, administrative or judicial nature (§ 40, 57 Public.Resource)".

This is indeed what Article 2(4) Berne Convention (BC) provides;[17] it also leaves it to members to decide whether political speeches and speeches delivered in the course of legal proceedings are protected (Art. 11bis BC). Member States' laws do differ in their treatment of official texts. For example, the Dutch Copyright Act excludes laws, regulations, court and administrative decisions from copyright altogether and provides that, unless government bodies reserve their copyright in other works published by or on behalf of the government, such works are free to use.[18] Czech, Slovak, Slovenian and Spanish laws exclude official legislative, administrative or judicial texts from copyright.[19] Belgian law exempts 'official acts of the government' and also allows free use of speeches given (among other instances) in

[12] CJEU (Grand Chamber) 20 March 2024, case C-588/21P, EU:C:2024:201.
[13] See A Soroiu, "The Fall of the Great Paywall for EU Harmonised Standards", *Verfassungsblog,* 19th March 2024.
[14] Ireland may be the only country concerned. See (C-588/21P) *Public.Resource.Org. Inc v European Commission* (Opinion of AG Medina), EU:C:2023:509 para 62.
[15] EU General Court 14 July 2021, (case T-185/19) Public.Resource.Org, Inc v Commission, EU:T:2021:445 paras 58-59.
[16] See E Tzoulia, "Harmonized Standards in the Public Domain? Better Not …" [2025] IIC 692-712, 708-710.
[17] Art. 2(4) BC: "It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts."
[18] Art. 11 and 15b Dutch Copyright Act. A similar provision is contained in the Database Act (which implements the sui generis database right).
[19] The scope of these provisions is not identical. Slovenia: https://www.wipo.int/wipolex/en/legislation/details/21946; Spain: https://www.wipo.int/wipolex/en/legislation/details/21371, Section 3 of the Czech Copyright Act, Section 5 of the Slovak Copyright Act.

parliaments.[20] Sweden distinguishes various types of text that are not subject to copyright, and also regulates the status of works contained in documents subject to access laws: the right to access does not imply that works lose copyright status.[21]

Whether the protection of copyright is a legitimate reason to refuse access (e.g. under right to information laws) is another matter. For documents in which copyright belongs to a public sector body, the highest administrative court in the Netherlands has repeatedly ruled that it is not.[22] Also, in cases where a third party is the copyright holder, this does not necessarily justify a refusal to grant access; although the recipient will, in principle, have to respect copyright in information obtained. France is an example of a Member State where the text of the copyright act is silent on the status of official texts, but it is recognized in case-law that these are not protected.[23]

This short list of examples shows considerable variety in national laws. Recognizing this, the 2010 'Wittem' proposal for a European copyright code proposes a two-pronged approach[24]: the exclusion of official legislative, administrative and judicial nature from copyright altogether, and the exclusion of (other) official documents once published by public authorities.

5. Conclusion

In EU copyright law-making, public access to documents should be recognised as an important policy priority.

The EU is competent to determine and clarify the scope of EU copyright law. As stated, the Berne Convention leaves ample room for the EU and its Member States to harmonise the copyright status of information produced by legislative, adjudicative and executive authorities in the exercise of their legislative/public tasks by excluding it from the notion of work.

The EU should use this competence to clarify and harmonise the copyright status of government information by excluding at a minimum official documents (laws, regulations, administrative, and court decisions) produced in the exercise of legislative/public tasks from the notion of a "work." This exclusion must be carefully drafted to avoid affecting cultural production funded or commissioned by the government. For other types of information held by public sector bodies, it could be clarified that the existence of copyright (or sui generis database rights or related rights) in certain information is not in itself reason to refuse access under freedom of information laws, especially not where intellectual property is owned by the public sector.

To enhance legal certainty, it would help if it were consistently made explicit that provisions of national and EU copyright instruments are without prejudice to access rights based on transparency laws. Laws on copyright, databases and related rights should not undermine the goals of horizontal policies, such as

[20] Book XI - Code of economic law Art. XI.172.
[21] Art 9-10 Act (1960:729) on Copyright in Literary and Artistic Works.
[22] Council of State Administrative Jurisdiction Division (ABRvS) 27 March 2019, X v Police Commissioner, ECLI:NL:RVS:2019:923; ABRvS 29 April 2009, Amsterdam v Landmark, ECLI:NL:RVS:2009:BI2651.
[23] E.g. Cour de Cassation (Civ. 1"), 5 February 2002, Banque de France C. Ste Editions Catherine Audval, Comm. com. electr., mars 2002, comm. n° 34, p. 20, note C. Caron.
[24] Art 1.2 European Copyright Code– Excluded works. The following works are not protected by copyright: 1) Official texts of a legislative, administrative and judicial nature, including international treaties, as well as official translations of such texts; 2) Official documents published by the public authorities.

information access provisions. More specifically, copyright law should not prescribe that any conflict between access to information versus copyright protection can only be resolved within copyright instruments, that is, by only using balancing tools internal to copyright law.

As for the internal balancing tools, any clarifications, whether adopted on the scope, exclusive rights, exceptions and limitations, or enforcement of copyright law, should extend to economic and moral rights alike. This is to prevent the rules permitting public access to documents from being undermined by unharmonized areas of copyright law.

Rights to access information held by the public sector do not necessarily give recipients the liberty to with the information as they please, for example by commercializing it. Whether the uses permitted should be broader than copyright law currently provides is a matter of debate. However, the interventions proposed in this opinion would be beneficial even if they stop short of guaranteeing further reuse rights for the public.

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