

Policy paper #16 on public sector documents and public speeches

Background

Public sector documents and public speeches are of key concern to the public. New legislation and court decisions lay down the rules that govern our daily lives, and provide obligations and privileges to people who need to be aware of their presence in order to act upon them. Public documents produced by the executive branch ensure transparency and accountability, and commissioned research underpins evidence-based policymaking, providing important context to political decisions. In addition to the “standard” written forms, public sector documents also include any content in any medium, such as public sector software, which is essential to participate in digital society, or public sector datasets, which compile vast amounts of data in various areas of public sector activity. Beyond public sector documents, public speeches serve various informatory purposes and are important historical records.

Despite the importance of public sector documents as well as public speeches, they are not necessarily publicly available as they can be protected under copyright and hidden behind paywalls. Where this is the case, access to, and use of, these materials can be difficult or prohibitively expensive. This paper addresses many areas where existing European legislation, notably the Open Data Directive, falls short, and presents European-level policy options to remove copyright barriers and ensure that this information can be used for the common good.

Importantly, there are many factors which hinder or restrict access to public sector documents and public speeches. Some of them are based on legitimate concerns, such as national security, privacy concerns and data protection; others are usually the result of a lacklustre technological or legislative framework like the lack of a proper platform for distribution, unsuitable data formats, as well as the fact that freedom of information laws often prove to be of limited use in practice. However, in this paper we will exclusively focus on copyright barriers which should not be invoked as an argument to withhold access to public sector documents or public speeches from the public.

This policy paper looks at documents originating from public sector bodies and public undertakings. We include here commissioned research, but we leave aside publicly funded

research, which we will address in our next policy paper.

Make public sector documents truly public

There are many good public-policy grounds to exclude official texts of a legislative, administrative and legal nature from copyright protection. When it comes to legislation and court decisions, these texts lay down important rules for our society and rights for the individual. In order for people to be aware of provisions affecting them, they need to be able to access and share the information – what good is a right, if nobody knows about it?

Importantly, reserving the rights for these types of documents is also at odds with the ideas behind copyright. The inherent goal of copyright protection is to create economic incentives for the creation and publishing of works. In the case of legislative, administrative and judicial texts, these incentives are a given. Judges, lawmakers and public officials in general are not reliant on economic incentives derived from copyright to do their job. Instead they are funded by the public and produce those documents within the exercise of their public tasks. As such, their contributions must be publicly available and re-usable.

Regarding public governmental documents, public sector studies, public sector software and public sector databases, these are also funded by the public but more importantly the public interest in these documents, once again, far outweighs any considerations of state ownership. Public governmental documents are generally necessary to hold governments accountable and ensure transparency of public administration. Studies commissioned or conducted by the public sector often provide the factual evidence upon which political decisions are based. Software developed or procured by the public sector is essential to deliver public services and enable a more engaged citizenry. Public sector databases, on the other hand, enclose a variety of public data with societal, economic, legal or political value. In order to ensure an informed society, enable citizen participation and foster democracy, these documents must not only be subject to open access, but also be free from copyright and copyright-like rights, such as sui generis database protection.

Speeches for the public

Public speeches on political or religious matters are intended for and directed at the public and include, for example, speeches made in public political meetings, in meetings of public bodies, at parliamentary sessions, in religious ceremonies, or in demonstrations. These speeches are delivered by individuals at important public events, by elected representatives in the exercise of their mandates or by public servants in the exercise of their public tasks. Their use fulfils important informatory purposes.

Speeches delivered in the course of legal proceedings, on the other hand, include speeches delivered during public hearings of the courts, in the course of administrative proceedings, or during parliamentary sessions. They are delivered by judges, by the parties to the proceedings or their legal representatives, and their use not only ensures the proper performance of these proceedings, but also the reporting of said proceedings.

None of these speeches are driven by the system of incentives that copyright provides, and should therefore be free from copyright restrictions. Alternatively, they could benefit from limited protection subject to broad usage rights, to allow any person to freely reproduce, distribute and communicate them to the public.

Legal framework

The idea that it may not be appropriate to reserve the rights to public sector documents is reflected in Article 2(4) of the [Berne Convention](#), which leaves it up to national determination whether or not to protect official texts:

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.

In fact, national laws in many EU member states already exclude protection in the case of laws, judicial and administrative decisions, and other categories of public governmental documents. However, national provisions dealing with this issue, where they exist, are not always clear and reliable.

The EU has also already attempted to address some of these issues through the 2019 revised Directive on open data and the re-use of public sector information ([Open Data Directive](#)). One of the goals of the legislation was to make public sector documents, including “high-value” datasets, freely available.¹ Unfortunately, as we have already [noted in 2019](#), the Directive undermines its own objective by not limiting the exercise of intellectual property rights held by the public sector. In addition, as it became clear in the [dispute between the Federal Republic of Germany and Funke Medien NRW GmbH](#), a mere right of access to public sector documents is not enough to properly satisfy the public interest, as national governments may still invoke copyright to prevent public sector documents that they have released from being further shared and re-used.

¹ The Open Data Directive aims to introduce a more reliable system of open licences, as has been championed by the open access movement for a long time. However, these provisions are far from perfect as there are a number of problems which stem from the lack of a single European go-to open licence. As such, there are ongoing questions of compatibility between different licences as well as uncertainty as to what should be considered a standard licence.

With regards to political speeches and speeches delivered in the course of legal proceedings, the Berne Convention lays down an optional copyright exclusion in Article 2bis(1):

It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

The 2001 Directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) allows member states to introduce exceptions or limitations to copyright for political speeches (Article 5(3)(f)) as well as to ensure the performance and reporting of administrative, parliamentary or judicial proceedings (Article 5(3)(e)). Currently, these exceptions have been implemented in nearly all EU member states. Article 5(3)(f) has been implemented in 25 member states, Article 5(3)(e) has been implemented in 26.

Conclusions and Recommendations

There is already a significant alignment of national copyright policies across the EU Member States in most of the aforementioned issues. However, relying on national legislation to address this situation is insufficient as it creates an unreliable patchwork of rules which deprives many European citizens of the right to freely access and use documents and information that may be very relevant for them. Resolving these issues would ideally be part of a more comprehensive regulation, a Digital Knowledge Act, which addresses the needs of universities and other knowledge institutions, such as schools and cultural heritage institutions, in the digital environment more broadly.

Recommendation 1: No copyright for important public sector works

In light of the shortcomings of the current legal framework, the EU should step in to create harmonised rules to ensure that access to, and use of, public sector documents originating from public sector bodies, when fulfilling their public tasks, and from public undertakings, when providing services in the general interest, are not restricted on the basis of copyright and copyright-like protection.

We call upon the EU to remedy this situation by stating that public sector documents that are essential to the rule of law, such as legislation, court decisions and decisions by administrative authorities, should not be eligible for copyright protection in the EU.

Likewise, public sector documents that provide information of general interest to citizens, such as public governmental documents, public sector studies, public sector software and public sector datasets, should not be eligible for copyright protection across all Member

States.

Recommendation 2: No copyright or, alternatively, an EU-wide exception for public speeches

Public speeches on political and religious matters and speeches delivered during the course of judicial, administrative or parliamentary proceedings should also not be subject to the exclusivity that is inherent to copyright laws. The use of political and religious speeches fulfils an important informatory purpose, while the use of speeches delivered during the course of legal proceedings is key to the administration of justice. The EU should therefore require Member States to exclude these speeches from the scope of protection of copyright. Alternatively, the EU lawmaker should turn the optional exceptions in Article 5(3)(e) and (f) of the InfoSoc Directive into mandatory exceptions.


Such a harmonised approach at EU level would go a long way in reducing legal uncertainty and ensuring that all European citizens have access to important legal information.

About COMMUNIA

The COMMUNIA association advocates for policies that expand the Public Domain and increase access to and reuse of culture and knowledge. It acts as a network of like-minded activists, researchers and practitioners based in Europe and the United States who seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

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For more information on COMMUNIA visit our website: www.communia-association.org; or contact us at: communია@communია-association.org.

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