

## **Annex II**

1. Paper from EDiMA, Impact of ancillary rights in news, 25/11/2016 (Ref.Ares(2016)2874320)
2. Letter from Google, meeting request, 18/12/2015 (Ref. Ares(2015)226774)
3. Paper from EMMA-ENPA, EU Copyright Reform Position of European Press Publishers, 12/01/2016 (Ref. Ares(2016)2875410)
4. Reply to Asociacion Espanola de Editoriales de Publicaciones Periodicas (AEEPP), 04/02/2016, (Ref. Ares(2016)616982)
5. Reply to Newspaper Association of America, on publishers' right, 13/07/2016 (Ref. Ares (2016)3370113)
6. Reply to UKs professors, on a publisher's neighbouring right, 7/109/2016, (Ref.Ares(2016)5106359)

**From:** [REDACTED]  
**Sent:** 09 March 2016 14:22  
**To:** [REDACTED]  
**Subject:** FW: EDiMA Briefing Document: Impact of ancillary rights in news  
**Attachments:** EDiMA - Impact of ancillary rights in news products.pdf

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Friday, November 27, 2015 12:36 PM  
**To:** [REDACTED]  
**Subject:** FW: EDiMA Briefing Document: Impact of ancillary rights in news

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**From:** info edima [REDACTED]  
**Sent:** Wednesday, November 25, 2015 12:24 PM  
**To:** [REDACTED]  
**Subject:** EDiMA Briefing Document: Impact of ancillary rights in news

Dear Mr [REDACTED]

With increased interest in the issue of “ancillary rights” , EDiMA thought it would be of use to gather actual information regarding the issue. As such, EDiMA has prepared a briefing document which summarises research done on, so-called, “ancillary rights” in news, so as to contribute towards an open and evidence-based policy making process.

The research demonstrates an overwhelmingly negative impact for consumers, for news publishers and for innovation in countries which have attempted to create such ancillary rights. Research also highlights key legal issues such as compliance with international law and respect for fundamental rights.

We hope that you find the information we provide in the paper useful and we welcome your thoughts on our comments.

Thank you for your time and please do not hesitate to let us know if you should have any questions.

Best regards,

Siada El Ramly



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### *The impact of ancillary rights in news products*

In this briefing document, EDiMA seeks to summarise research available on, so-called, “ancillary rights” in news, so as to contribute towards an open and evidence-based policy making process. All research cited – economic, empirical and legal - is publically available.

The research demonstrates an overwhelmingly negative impact for consumers, for news publishers and for innovation in countries which have attempted to create such ancillary rights. Research also highlights key legal issues such as compliance with international law and respect for fundamental rights.

Furthermore, there is compelling evidence that online services are increasing the opportunities for news providers to reach their audiences online and develop their business in the digital age and online services are increasing pluralism, media diversity and access to information for EU citizens.

## The impact of an unworkable and invalid concept

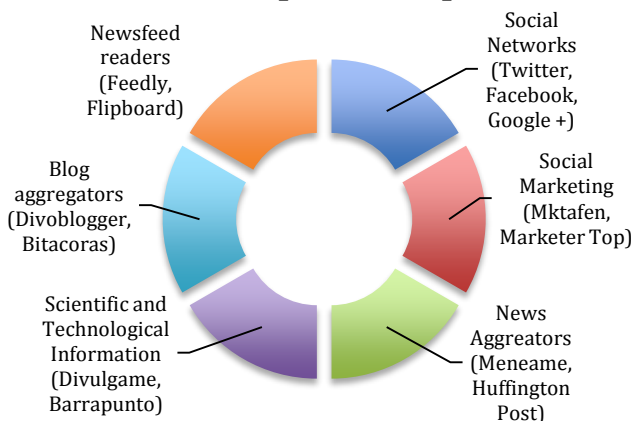
### Negative impact on innovation

The laws in Spain and Germany concerning ancillary rights still appear to face near-insurmountable challenges in their practical implementation. Their scope is very broad, affecting many online activities, including linking and quoting and many services, from websites to apps. Moreover, they touch upon a vast array of creative works, as “news” is a malleable legal concept encompassing content that is regularly updated.

**Small innovative companies are impacted as a result.** For smaller European companies ancillary right provisions represent a strong deterrent because of the legal uncertainty and the enforcement through collecting societies. These concerns were already raised before the adoption of the law in Germany, but were not taken into account. In Spain, Planeta Ludico, NiagaRank, InfoAliment and Multifriki have already closed down, in addition to Google News (AEEPP/NERA, 2015).

**Ancillary rights would also create a competitive advantage** for already established, successful online services, making it harder for new European companies to compete and develop new services. There is a wealth of scientific opinions supporting this view, from the Max Plank Institute to the report of the Spanish Competition authority.

### Services impacted - Spain



### European start-ups hit by ancillary rights

*“The development of mobile apps sorting information and data, an area with an interesting future, will remain curtailed in Spain”,* Niagarank, a now closed product of Spanish start up CodeSyntax, employing 15.

*“A legal dispute with [the German publisher association] would have dragged on for years, finally leading to bankruptcy of tersee.de - regardless of the outcome. Four years of intensive research and development would have been for vain. We thought about removing German media from our search index and to relocate our headquarters abroad”,* Mikael Voss, from tersee.de, a German start-up.

Other start-ups and services already affected in Germany and Spain include Radio Utopia (news agency), Unbubble.eu, Links.Historische (news for historians), Rivva (blog aggregator), Nasmua.de (news search engine), Newsclub.de, commentarist.de, DeuSu.de, Planeta Ludico, NiagaRank, InfoAliment, Multifriki, Meneame, Astrofísica y Física, Beegeinfo...

**Services and publications that rely on disseminating content under creative commons type licenses cannot escape the law.** Similarly, scientific publications that rely on open access, e.g. Public Library of Science, would see a fee collected for the circulation of their information (Xalabader, 2014). This hampers innovation and knowledge sharing in Europe.

## Negative impact on news publishers and pluralism

The introduction of ancillary rights creates significant problems for news publishers in Europe, which has led to a number of news publishers already condemning the creation of those rights.

Ancillary rights act as **a barrier to competition and pluralism**, by making it harder for publishers to reach their readers online. Smaller publishers, regional publishers or new online news publishers are disproportionately affected, suffering a competitive disadvantage. In Spain, the decline in traffic following the adoption of the law saw **smaller publishers losing twice as much traffic as large publishers** (AEEPP/NERA, 2015).

Ancillary rights make it harder for news publishers to generate online traffic, creating more obstacles to the dissemination of their content. In Spain, **the loss for the news publishing industry, suffered predominantly by smaller, free or online publishers, is estimated to reach EUR 10 million a year**. The reduction in traffic threatens their advertising revenues (AEEPP/NERA, 2015).

The **property rights and freedom to conduct a business of publishers** is negatively impacted by the creation of these rights. Publishers are forced, through the Spanish law, to charge a fee, through the intermediary of a collecting society, for the dissemination of their news products online.

The **global competitiveness and diversity of domestic European publications** suffers. European publications such as the Daily Mail and The Guardian – respectively the 4<sup>th</sup> and 5<sup>th</sup> largest global audiences for news in 2014, Comscore – would find it harder to use online channels to reach their audiences. According to the Max Planck Institute the availability of local domestic content will be reduced and non-domestic content will be more visible (MPI, 2012).

### Sources:

- Max Planck Institute for Intellectual Property and Competition Law, *Statement on the draft law for an amendment of the German Copyright Act (Urheberrechtsgesetz) to include ancillary copyright for publishers*, 27 November 2012. Available in German [here](#).
- AEEP, *Open Letter to Commissioner Oettinger*, 10 December 2014. Available [here](#).
- El Confidential, *“Cebrián dinamita el 'lobby' de la prensa”*, 7 July 2015. Available [here](#).
- *Schweizer Radio und Fernsehen*, *“Schweizer Verleger geschäftig mit Google”*, 11 December 2014. Available [here](#).
- *Der Standard*, 22 June 2015

## Publisher views on ancillary rights

*“There is a formidable consensus that no-one likes the law”; “as long as I am president of Prisa, no part of the media group will collect the [Ancillary Copyright] fee”, Juan Luis Cebrián, CEO of Prisa (owner of leading Spanish publication such as El País, Diario AS and Cinco Días).*

Rainer Esser, CEO of German weekly “Die Zeit”, refers to the German law as a **“hazardous construction”**.

*“This legislation is a step away from a competitive and diverse press. It will only make it harder for us to compete with other news outlets”, Arsenio Escolar, Spanish Association of Periodical Publications, Benedetto Liberati, President of the Italian Online Publishers Association, Alexandre Malsch, Co-founder and CEO of meltygroup, Tomasz Machała, CEO and Editor-in Chief, naTemat, Łukasz Mężyk, Founder & Editor-in Chief, 300polityka.*

*“The very few large and international publishing houses [...] want to prove that despite their dwindling journalistic influence, they are still in a position to instrumentalise parliaments in Europe for their purposes and to create obstacles for unwelcome competition. In my opinion, those few large companies have never been after the ancillary copyright per se, but after strengthening their future bargaining position [...]”, Wolfgang Blau, The Guardian, Director of Digital Strategy.*

Hanspeter Lebrument, President of the Swiss media Association: the adoption of the Spanish law is **“shooting yourself in the foot”**.

## Negative impact on consumers and citizens

Ancillary right type laws create **increased search costs for consumers**, as it makes it harder for them to access news from aggregators, apps, blogging services, social networks etc. In Germany, 57% of the consumers find text “snippets” helpful (Bitkom, 2015).

The choice and diversity of news sources available to consumers is also reduced.

Reduced access to online news aggregation services results in **users being less likely to investigate additional, related content in depth** (Chiou and Tucker, 2015).

Concretely, in Spain alone, this mean a **loss of EUR 1.85 billion a year for consumers – in so-called “consumer surplus”** (AEEPP/NERA, 2015).

Links, without context, are practically useless to consumers and Internet or app users. Without small extracts of text, links in apps and on the Internet would be reduced to “[blue URLs](#)”. URLs themselves often include text for instance using the title of an article. This is why the Max Plank Institute clearly states that “copyright law cannot be applicable in such cases, as otherwise **the use of links which contain minimum indications of the content to be found would often be blocked**”.

There would be a clear impact on the ability of Europeans to exercise their right to information (accessing information online), a chilling effect on freedom of expression and broader social and economic consequences from such a course of action.

EU citizens also exercise their own freedom of expression online, using many online tools and services that will be affected by an ancillary right. As an indication of the scale of those activities, in 2013, over 20% of EU news users engaged in some form of news commentary every week. Close to 8% commented on news stories online, over 2% wrote blogs on news or political issues, over 3% sent news videos or pictures to a news website (Reuters Institute, 2014).

## Sources:

- *Reuters Institute for the Study of Journalism and Oxford University (2014), Reuters Institute Digital News report 2014. Available [here](#).*
- *Lesley Chiou and Catherine Tucker (2015), Content Aggregation: The Case of the News Media, NET Institute Working Paper No. 11-18. Available [here](#).*
- *Pedro Posada de la Concha, Alberto Gutiérrez García and Hugo Hernández Cobos (2015), Impact of the New Article 32.2 of the Spanish Intellectual Property Act, Conducted by NERA Consulting, Commissioned by AEEPP. Available [here](#).*
- *Bitkom (2015), Ancillary Copyright for Publishers – Taking Stock in Germany. Available [here](#).*

## Distortions of copyright and legal impact

Ancillary rights for publishers **distort copyright law**, using copyright to subsidise a part of the news publishing industry (Xalabarder, 2014). The Max Planck Institute adds that “[i]ndustrial property rights are only required where such a market failure is imminent. This situation does not exist in the case of published works in relation to aggregators.”

The 1886 Berne Convention protects the right to quote from newspaper articles, the only mandatory exception under international law. Incorporated under EU law via the TRIPs agreement, **restrictions against quotations rights infringe EU and international law** (Xalabarder, 2014).

Restricting the ability to link meaningfully with accompanying words of context infringes the right to **freedom of information** and the right to link (MPI, 2012).

The obligation to charge a fee administered by a collecting society infringes **the right of rightholders to conduct a business and their right of property** – or to dispose thereof (Xalabarder, 2014). This includes the loss of the ability to apply creative commons licences and to allow indexing, linking and sharing freely to one’s works.

Ancillary rights generate **legal uncertainty**, as they create rights which are ill-defined and overlap with the existing rights of publishers and journalists, to such an extent that “circumstances in which the right is based can scarcely be rewritten” (MPI, 2012).

### Sources:

- AEEPP/NERA, *ibid.* Available [here](#).
- MPI, *ibid.* Available in German [here](#).
- Raquel Xalabarder (2014), *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, IN3 Working Paper Series, WP14-004, Internet Interdisciplinary Institute. Available [here](#).
- Bundestag Expert Hearing (2014), “Experten für den Wegfall des Leistungsschutzrechts”. Available [here](#).

### Academic opinions on ancillary rights

Max Planck Institute for Intellectual Property and Competition Law: “*When considered overall, the [bill does] not appear to have been well thought-through. Furthermore, it is not possible to justify the draft with any objective argument. Even the publishers are not fully supportive of the measure*”.

Prof. Raquel Xalabarder, Universitat Oberta de Catalunya: “*The proposal amounts to an attempt to subsidise an industry at the expense of another and it does so by distorting copyright law rules and infringing EU law and international obligations*”.

Prof. Dr. Gerald Spindler, University of Göttingen: “*The [law] is a strange entity in copyright law and is posing several problems which can’t be overcome effectively.*” “[*It] needs to be abrogated as press products cannot be differentiated from other parts of texts. Even the weather forecast is covered by the AC*”.

Prof. Dr. Axel Metzger, Humboldt University Berlin: “*The [legislation] is a lobby-driven law*” and “*created a massive bone of contention in the information society. Legislation in this field seems half baked and lobby-driven*”.

Prof. Dr. Thomas Hoeren, University of Münster, “*The introduction of [the legislation] has been a disaster. One needs to have the courage to abolish it again. [...] Actions taken by the [German publisher association] have been a confession of failure and the explanation for this behavior are embarrassing*”.



## A destructive solution in search of a problem: digital technology is a positive force for pluralism and news publishing in Europe

### *In search of a problem*

Research shows that there is no “substitution effect” – online services using links and snippets are not substitutes for news articles and do not reduce traffic to news websites or apps (MPI, 2012; Spanish Competition Authority, 2014; Chiou and Tucker, 2015; AEEPP/NERA, 2015).

Instead, online services drive online viewers to the websites of news publishers, who then generate revenue from advertising and / or subscriptions (AEEPP/NERA, 2015).

Further, news and other publishers can opt-out simply of the various online services that provide links or snippets (Spanish Competition Authority, 2014).

Consumers use a vast number of different online tools to access news and inform themselves (Reuters Institute, 2014) – meaning publishers of news or others are not reliant on a single service to reach their readers.

#### **Sources:**

- AEEPP/NERA, *ibid.* Available [here](#).
- MPI, *ibid.* Available in German [here](#).
- Chiou and Tucker (2015), *ibid.* Available [here](#).
- Comision Nacional De Los Mercados Y La Competencia (2014), “Proposal on the Amendment of Article 32.2 of the Bill to amend the recasted Intellectual Property Act”, PRO/CNMC/0002/14. Available [here](#).

### *Consumers use a broad mix of services to access news*

In the EU (UK, FR, IT, ES, DE, FI, DK), according to the Reuters News Institute, close to 40% of news users directly access news via the website of a news brand. Other tools include email, social networks, news aggregators and micro-blogging services.



### Online services increase diversity and pluralism

European online news users access significantly more news brands than offline users. Users of social media, mobile apps aggregating news and search tools read more diverse news sources.

	UK		FR		ES		FI		IT		DK		IE		DE	
	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users
# of news brands accessed	4.28	2.8	6.12	3.28	6.83	4.13	6.12	3.96	7.05	4.61	6.61	4.47	7.07	4.88	7.07	4.64

Number of news brands accessed, comparison between online and offline news users. Source: [Reuters](#), 2015.

News aggregators allow readers to consume more news overall (AEEPP/NERA, 2015).

French readers are found to consume more news, especially local news, when their news portal service is relevant to their geographical location (Athey and Mobius, 2015).

Internet users in Germany and Italy visit new, smaller sites for their information, in addition to their usual sources. The Italian Institute for Policy and Data Valorisation finds that services such as search engines are significant in allowing smaller, alternative sources to be discovered and gain traffic.

#### Sources:

- Susan Athey and Markus Mobius (2012), *The Impact of News Aggregators on Internet News Consumption: The Case of Localisation*, Preliminary research presented at seminars at Microsoft Research and Toulouse Network for Information Technology. Available [here](#).
- Luca Bolognini et al. (2014), *The Effects of Search Engines on the Pluralism of Information*, Italian Institute for Policy and Data Valorisation. Available [here](#).

### European publishers leading in digital

Digital sales of The Economist have risen 47% in one year. Over two thirds of the FT's total paying readership is online (and its digital circulation is growing 33% per year) and mobile is now generating 50% of total traffic. At the Guardian, print revenues remained stable in 2014 but digital revenues increased 24%.

In Germany, Axel Springer reports that more than half of revenues for 2014 were generated from digital activities and an increase in profits of over 13%.

In Italy, two of the larger national newspapers have successfully implemented paywall strategies. Italy's RCS Media Group, owner of the Corriere della Serra, reported that for the first nine months of 2012, some 20% of paid circulation came from digital subscribers and that digital revenues accounted for around 15% of group revenues.

#### Sources:

- Reuters Institute, *ibid*. Available [here](#)

**From:** CAB OETTINGER ARCHIVES  
**Sent:** 20 January 2015 17:11  
**To:** CAB OETTINGER ARCHIVES  
**Subject:** FW: Google News Follow up

Sent from my iPad

Begin forwarded message:

**From:** "LEHMANN Bodo (CAB-OETTINGER)"  
<[Bodo.LEHMANN@ec.europa.eu](mailto:Bodo.LEHMANN@ec.europa.eu)>  
**Date:** 8 Jan 2015 16:13:25 CET  
**To:** "HEROLD Anna (CAB-OETTINGER)"  
<[xx@xx](mailto:xx@xx)>  
**Subject:** FW: Google News Follow up

Für Dich


**Bodo Lehmann**


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Kabinettsmitglied | Member of Cabinet | Membre de cabinet

Kabinett von Günther H. Oettinger | Cabinet of Günther H. Oettinger |  
Cabinet de Günther H. Oettinger  
Europäische Kommission | European Commission | Commission  
européenne


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**From:**  [[mailto: \[redacted\]@google.com](mailto: [redacted]@google.com)]  
**Sent:** Thursday, December 18, 2014 11:28 AM  
**To:** LEHMANN Bodo (CAB-OETTINGER)  
**Subject:** Google News Follow up

Dear M. Lehmann,

As you may be aware, last week Google took the sad decision  
of [announcing that we are closing Google News in Spain \[link\]](#). This will  
become effective this week.

Our , is  
leading our discussions and partnerships with publishers. He would be  
grateful for the opportunity to meet and further discuss why we had to close

Google News in Spain, as well as address any outstanding questions that you may have regarding copyright and publishing.

[REDACTED] will be in Brussels on the 26th and 27th January 2015. Should this be of interest, I would be more than happy to follow up with your office to find a convenient time.

Thanks you and best regards,

[REDACTED]

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[REDACTED]		European IP Policy				
[REDACTED]		[REDACTED]		<a href="mailto:[REDACTED]@google.com">@google.com</a>		+32-4-
[REDACTED]		+32-	[REDACTED]			

This email may be confidential or privileged. If you received this communication by mistake, please don't forward it to anyone else, please erase all copies and attachments, and please let me know that it went to the wrong person.

**From:** [REDACTED]  
**Sent:** 17 January 2016 21:34  
**To:** [REDACTED]  
**Subject:** Fwd: 20151130 EMMA-ENPA copyright reform paper final  
**Attachments:** 20151130 EMMA-ENPA copyright reform paper final.docx; ATT00001.htm  
**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Sent from my iPhone

Begin forwarded message:

**From:** Catherine Starkie [REDACTED]  
**Date:** 12 January 2016 at 15:14:16 GMT+1  
**To:** [REDACTED]  
**Subject:** 20151130 EMMA-ENPA copyright reform paper final

## EU Copyright Reform Position of European Press Publishers

Ahead of the Commission's upcoming proposals for copyright reform, ENPA, representing publishers of newspapers and news media in Europe and EMMA, the European Magazine Media Association, would like to underline the crucial importance of copyright to the European press sector and the need to cherish the value of content.

Press content, delivered both in print and on a wide variety of digital platforms, is a diverse and multi-faceted embodiment of the freedom of expression that is close to the hearts of millions of European citizens. Effective copyright protection is one of the essential requirements underpinning **the independent journalism, news and analysis** that are fundamental elements of any **democracy**, as well as a vital contribution to promoting well-informed and engaged citizenship.

Copyright underpins the investment and innovation **essential for growth and jobs**. It is therefore of vital importance that any future proposals regarding the EU copyright framework are based on full knowledge of the potential impact on jobs and growth in the European publishing sector as well as the effect on the provision of a diverse range of professional press offerings for EU citizens. The newspaper and magazine sectors in Europe employ the highest number of journalists of any media sector, creating jobs for almost 1 million people in local communities and generating around 76 billion Euros annually. This is in addition to driving employment in related sectors such as advertising, distribution and printing.

The current copyright framework has allowed for innovations in the European press publishing sector, which have enabled consumers to enjoy press content on all platforms: when, where and how they want. Publishers **need to be able to continue delivering their readers quality, professional content on both print and digital platforms** and meet the evolving demands of consumers. We would ask EU decision makers to reflect on the following key concerns of press publishers before taking any decisions on the future of the EU copyright framework:

### 1. Digitisation has increased the need for effective copyright protection for press publishers, whose rights must be recognised alongside other content producers' rights

Press publishers need to be able to rely on copyright protection to continue investing in quality content and ensure the sustainable delivery of the high-value, quality, professional content they produce for Europe's consumers and businesses. Copyright reform should confirm **that press publishers can also benefit from exclusive rights, just like the rights that broadcasters, phonogram and film producers have long held** under the EU Information Society ("InfoSoc") Directive 2001/29/EC.

Given the huge investment and resources required to produce professional press content, it is only natural that press publishers should enjoy the same rights as producers from other creative industries, as regards **reproduction and communication to the public (as set out in Articles 2 and 3 of the InfoSoc Directive)**. It was not originally considered necessary to directly acknowledge these rights for press publishers in the InfoSoc Directive, because the press was previously a paper-only product (and not subject to the mass reproduction and communication to the public that is the reality of today's digital landscape). The very different environment that press publishers operate in today now requires a clarification in the law at EU level. This is essential in order to create a level playing field with broadcasters, phonogram and film producers at EU-level and so press publishers across the EU have the legal framework to enable

development of new licences and new sources of revenue. Such a right would also be without prejudice to authors' rights.

Moreover, this clarification is necessary to ensure that press publishers throughout the EU will have the legal certainty to be able to confidently assert their rights and therefore be able to e.g., seek remedies when there is unauthorised use of their content, or have the possibility to be remunerated for authorised use. To give just one example, the recent ruling by the Court of Justice of the European Union case concerning Hewlett Packard and Reprobel (C-572/13), which concerns reprography schemes in Belgium, further illustrates the need to clarify the InfoSoc Directive. The Court held that publishers are not considered to be 'rightholders' under the relevant provisions of the Information Society Directive, and are therefore not considered to suffer harm and be entitled to compensation.

## **2. Publishers have agreements with libraries and archives to provide off premises access to digital content and must be able to continue to make such agreements**

All across Europe, press publishers are involved in agreements with libraries, including for e-lending, which enable them to fulfil their mission in a digitised society. It would be wholly inappropriate to legislate and enforce statutory licences by means of an exception to the benefit of libraries and to the detriment of the publishers' core business i.e. publishing content both in print and digitally.

Intervention by EU legislation allowing digital newspapers and magazines to become immediately and widely available for free by libraries and off-premises, in competition with publishers, will inevitably undermine business models and legitimate sales. **If people can access and read a digital publication on a device away from library premises there is no reason for readers to even consider paying for it.**

It is of utmost importance that the existing exceptions, which allow libraries and other institutions to make available works contained in their collections (and not subject to licence terms) to individual members of the public for research or private study, remain for use within the premises of the libraries and archives (Article 5(3)n). **Any e-lending or off-premises consultation must continue to require a licence.**

Likewise, any policy initiative extending exhaustion of the distribution right from print to digital would represent a catastrophe for the press. There cannot be a re-sale right for "second hand" electronic copies of publications. For instance, why would anyone buy the original of a digital magazine when they can get it the next day in perfect condition at a fraction of the price?

## **3. Licensing solutions accommodate text and data mining for scientific research purposes: an exception would put press publishers' businesses at risk**

An exception for Text and Data Mining (TDM) would be a disproportionate response to an issue where licensing solutions are already in place and there is evidently no market failure. It is vital that the licensing solutions available, which include one-click licences, as well as those being further developed are fully taken into account.

Likewise, the extent of the threat posed by an exception to the competitiveness and sustainability of European press publishers must also be taken into account. The press archives – which are of immense commercial value to publishers – would be under threat from parties wishing to gain free access to a full range of copyright protected works, without having to enter into a licensing agreement. This would lead to an unjustified transfer of economic value (e.g., to multinational

technology companies, news aggregators, media monitoring agencies) with publishers losing the ability to manage how their content is used and for which purpose.

A TDM exception covering commercial use would damage both the primary market and secondary markets for the content that could be mined. The ability of publishers to license their content for press review services has long provided a legitimate and essential revenue stream for Europe's newspapers and magazines. Such services could be devastated by a TDM exception. An exception for 'non-commercial use, would also constitute a serious risk for the European press sector, due to the difficulty of sufficiently drawing the line between research and other activities, and between non-commercial and commercial. Any end results of research should not become a substitute for the published content.

In 2014, a [study](#) commissioned by the European Commission concluded that a new exception is not warranted but could harm publishers' incentives to expand their content offerings and result in the appearance of substitute products to those that the publishers might offer.

It is clearly to the mutual benefit of both publishers of content and miners to find licensing solutions which permit researchers to mine works and allow them to do so as seamlessly and easily as possible, while securing publishers' investments in their publications. An exception would not enable TDM on its own, as TDM is not only a legal issue but also a technical issue. Licences are therefore much better suited. Furthermore, publishing houses have to be able to carefully manage the TDM process, in order to prevent massive abuse or loss of their archives.

#### 4. Any reform needs to take into account unauthorised distribution of content and its consequences

Press publishers share concerns about the widespread unauthorised distribution of content free riding on the creators' intellectual efforts. Concerns have been raised for several years at both EU and national level as regards the threat posed to the press sector from "free riding", in particular by news aggregation services, which undermines the ability to create the professional journalism on which a free and democratic society depends.

We appreciate the Commission's commitment to address concerns that certain platforms are denying fair remuneration to right holders and the launch of its 2015 consultation on online platforms.

It is vital that copyright continues to draw the line between reference to content and unauthorised re-use. Aggregators of information and search engines should therefore always get the prior authorisation of publishers before reproducing their content, as upheld by various court decisions (e.g., Infopaq, Copiepresse, Meltwater cases). The courts have also confirmed that there are some circumstances under which provision of a hyperlink leading to a work protected under copyright should be subject to the authorisation of the rightholder, such as where the hyperlink is comprised of or includes text protected as the whole or part of a copyright work, and where links would allow the circumvention of restrictions designed to limit access to those works.

In cases such as aggregation by intermediaries where third parties generate revenue and web traffic based on the unauthorised use of publishers' press products, a key aspect of the solution is that press publishers are also recognised as having **exclusive rights, like broadcasters, phonogram and film producers have long held** under the Information Society Directive (as set out in point 1). This would also help to rebalance the relationship with dominant online platforms.



## **5. Flexibility in the current EU copyright framework safeguards Europe's cultural and media diversity and there is no evidence of the need to expand current exceptions**

The on-going EU copyright review has not yet provided clear evidence of the need to introduce any new exceptions and limitations to copyright, to harmonise existing exceptions, or to even make any further exceptions mandatory. The InfoSoc Directive provides the necessary flexibility regarding Europe's cultural diversity and different legal traditions while allowing the press sector to deliver innovative new offerings. The substantial investment of publishers in developing new business models is based on this Directive, which carefully balances rights, exceptions and limitations.

It is therefore of crucial importance that exceptions should remain applicable only in certain special cases "to avoid interference with normal exploitation of works, or to avoid unreasonable prejudice to the legitimate interest of right holders" (in accordance with the "three step test" enshrined in international treaties and incorporated into EU law). If further exceptions to copyright reduce publishers' possibilities to publish, disseminate and manage their content, Europe's culturally diverse landscape with its free and independent press would be seriously undermined or even irreparably damaged.

Licensing agreements provide the better, faster and more adaptable solutions for rightholders and users alike. Press publishers support the flexibility of the current system, with its specific list of limitations and exceptions, along with a degree of national discretion.

Flexibility is important to ensure that the EU copyright framework matches the needs of individual Member States, whose needs may vary. The current optional nature of exceptions and limitations allows Member States the possibility to exercise their national competence regarding creative and media content which, by its nature, is predominantly of local, regional and national character. There are no indications that more mandatory exceptions and limitations would lead to a better result than the pragmatic approach chosen by the EU, based on optional exceptions and limitations, combined with the development of practical solutions on a case-by-case basis to enhance harmonisation when required and appropriate.

Publishers of newspapers and magazines are strongly opposed to the introduction of an "open norm" or "fair use" provision, which is totally unacceptable in the context of the EU copyright framework which already provides for a comprehensive list of exceptions and limitations to copyright. Furthermore, widely differing interpretations of this "open norm" would inevitably create legal uncertainty.

## **6. Readers benefit from portability and cross border dissemination of press content**

More people are enjoying press content today than ever before, on all available platforms. Once purchased, digital content is portable across borders. Furthermore, readers can access press websites in the vast majority of cases from outside the country of the provider, both from within the EU and from third countries. We note that the current copyright framework is not an obstacle to EU-wide licences.

In this context, it should also be noted that rightholders depend on the possibility to buy and sell licences for particular national markets. This means that, for example, an innovative digital offer can be rolled out and tested in a small market or that a small press title in a minority language can afford licences e.g. for pictures used in that title. Often EU-wide licences might not be affordable for publishers and thus should not be made mandatory. We support market led solutions, which offer choice and diversity for consumers and businesses in the digital environment.

**New EU proposals in this area should not be made unless a thorough market analysis has been conducted demonstrating the necessity** for particular action. In respect of the legal framework for copyright, the EU should continue to pursue a pragmatic approach, respecting the principles of proportionality and subsidiarity, in line with better regulation policy.

## 7. Respect for freedom to contract in the press sector

Respect for the freedom to contract and to negotiate are of fundamental importance for European press publishers. Competence for discussions concerning contracts and remuneration lies at national level, reflecting the different legal systems and practices, not at EU level.

Any EU action in the field of copyright contract law would be unacceptable for press publishers, as it would contravene the principle of subsidiarity, failing to respect national legislation already in place in the different sub-categories of contract law and in the different sectors, and would not respect the freedom to contract. It would therefore be wholly inappropriate for any follow up to the ongoing study examining remuneration - commissioned by the European Commission - to involve EU action.

***EMMA**, the European Magazine Media Association, is the unique and complete representation of Europe's magazine media, which is today enjoyed by millions of consumers on various platforms, encompassing both paper and digital formats. EMMA represents 15,000 publishing houses, publishing 50,000 magazine titles across Europe in print and digital. See [www.magazinemedi.eu](http://www.magazinemedi.eu)*

***ENPA** is an international non-profit organisation representing publishers of newspapers and news media on all platforms. ENPA represents over 5,200 national, regional and local newspaper titles, published in many EU Member States, plus Norway, Switzerland and Serbia. More information at: [www.enpa.be](http://www.enpa.be)*

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## ANDRUS ANSIP

VICE-PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, 04.02.2016  
Ares(2016)

Mr Arsenio ESCOLAR  
Chairman  
Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)  
E-mail: [REDACTED]

Dear Mr Escolar,

Thank you, and the co-signatories, for your letter of 4 December 2015, in which you express some concerns of members of your association, as well as of publishers from other European countries, about ongoing discussions on the role of news aggregators in the distribution of content.

The main goal of the Commission's Digital Single Market Strategy is to achieve a wide availability of creative content across the EU, while making sure that EU copyright rules continue to provide a high level of protection for right holders in the digital environment.

Against this background, the Commission adopted on 9 December 2015 the Communication "Towards a modern, more European copyright framework". The Communication clarifies that the Commission will consider whether any action specific to news aggregators is needed, including intervening on rights. A decision in this regard has not been made yet.

I should like to thank you for AEEPP's contributions to this debate, which we shall take duly into account as we proceed, together with Member States, the Parliament and other stakeholders, with the development of a balanced copyright modernisation initiative.

Yours sincerely,

[REDACTED]  
Andrus ANSIP

GÜNTHER H. OETTINGER  
MEMBER OF THE EUROPEAN COMMISSION

Brussels, 13. 07. 2016  
AH/mp Ares (2016) s3585958

Mr David Chavern  
President and Chief Executive Officer  
Newspaper Association of America



Dear Mr Chavern, *welcome New President!*

I would like to thank you for your letter of 29 April 2016 in which you express your support for a publishers' copyright protection under European Union law and refer to the right which is currently afforded to publishers in the United States.

I appreciate that you have contacted us to communicate your position based on your national experience which indeed may provide us some interesting insights within the context of the public consultation.

In your letter you underline that with the significant investments required to support investigative journalism, the ability for publishers to reap financial benefits through license fee and other revenue source is essential. You also express your concern, with the growing of digital distribution, about the importance of allowing publishers to enter into licensing agreement with licensees and to more efficiently enforce its rights.

The Commission is well aware of this issue as it is reflected in its Communication of 9 December 2015<sup>1</sup> and in the public consultation which notably refer to the concerns publishers are facing in the digital environment in term of licensing and enforcement.

So far, the Commission is still considering whether any specific action is needed including granting a new right to publishers. In the meantime, we can assure you that your concerns about publishers are seriously considered and again, we warmly thank you for having shared your national experience.

Yours sincerely,



<sup>1</sup> See at [http://europa.eu/rapid/press-release\\_IP-15-6261\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6261_en.htm) (COM(2015)626 final, p.9)

## ANDRUS ANSIP

VICE-PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, 07 09. 2016  
JG/kl - Ares (2016)

Professor Lionel BENTLY  
Herchel Smith Professor of Intellectual Property Law  
Director of CIPIL, University of Cambridge

Professor [REDACTED]  
Professor of Digital Economy, University of Cardiff

Dr [REDACTED]  
Principal Lecturer in Investigative Journalism  
De Montfort University, Leicester

E-mail: [REDACTED]

Dear Professor Bently, dear Professor [REDACTED] and dear [REDACTED],

Thank you for your e-mail of 25 July 2016 regarding the proposed granting of an EU neighbouring right to publishers in the context of copyright law reform.

I can confirm that the questions you raise in your letter are being carefully analysed in the Commission's internal decision-making process, supported by the required impact assessment work. The Commission expects to adopt legislative proposals for the modernisation of the EU copyright rules later in September.

Your comments and your reference to the conference held on 23 April in this regard are really appreciated and useful. Since this conference focused on this important EU publisher right's issue, officials from the Directorate General for Communications Networks, Content & Technology (DG CONNECT) attended it.

Again, I would like to thank you and your respective universities for your contributions to this debate and I look forward to continuing this dialogue with you.

Yours sincerely,

[REDACTED]  
Andrus Ansip