

## Second Roundtable Commissioner Oettinger with Publishers

### Wednesday, 9 March 2016 (BERL – meeting room TBC, 17:30-18:45)

#### I. Scene setter

*List of participants /CVs and company descriptions (see attachments for more details).*

*N.B. Since the meeting was called at very short notice, we are working together with the associations to see who will be attending precisely. The format of the meeting will be three people per each of the six associations below (hence a maximum of 18 people around the table). One person from the association's secretariats and two from member publishing companies. The names of attendants are not yet available at the moment, but we will keep on informing the Cabinet as we get confirmations.*

#### Participants from the publishers:

We have invited the six publishers' associations mentioned below (EPC, ENPA, EMMA, NME, FEP, and STM). EPC, ENPA, EMMA and NME represents news publishers and they already attended the previous roundtable organised on the 25 January. FEP and STM represent respectively "books" publishers and "scientific" publishers. You have been meeting them regularly on other copyright issues, but they have not been active part of the discussion on a new "publishers' right" so far (they have not been asking for it).

- EPC (European Publishers Council)
- ENPA (European Newspaper Publishers)
- EMMA (European Magazine Publishers)
- NME (News Media Europe)
- STM (International Association of Scientific, Technical and Medical Publishers)
- FEP (Federation of European Publishers)

*For DG CONNECT: To be decided. Will likely include Claire Bury, Gerard de Graaf,*

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For the Cabinet: Michael Hager, Anna Herold

*Estimated duration: 1h 15 min*

#### Objectives:

- The objective of this roundtable is to follow up on the roundtable meeting held on 25 January where news publishers took a common position requesting the Commission to consider the adoption of a new *neighbouring right* for publishers in EU copyright rules. This time it has been decided to include also representatives from publishers

other than "news publishers" ("books" and "scientific" publishers). thus it would be important to understand their position (mindful of the fact that a legislative intervention beyond the news publishing sector may not be appropriate/would face stronger resistance from other stakeholders).

- You could explain to the participants that the Commission is taking their concerns seriously and you may want to consider indicating that, as a next step, a public consultation is likely to be launched in the coming weeks (note however that we have not made any public announcement yet - the public consultation is expected to last 12 weeks, i.e. until end-June).
- As you are aware, publishers are currently not identified among rightholders in the EU copyright rules (they usually licence the use of their products by means of the rights transferred to them by the authors). Including them in the list of neighbouring rightholders would therefore be a big step for EU copyright and something highly controversial. As an example of the political difficulties around this topic, the European Parliament discussed the issue in the context of the so-called "Reda report" (July 2015). Proposals from the EPP to request or examine new publishers' rights did not gain a majority and were voted down in that context. The Commission has taken up the debate in the 9 December 2016 Communication "Towards a modern, more European copyright", which indicates that the Commission will look at the issue of "news aggregators" including as regards a possible intervention "on rights in general". Partly as a reaction to the Communication, in a letter of December 2014, 80 MEPs from the main political groups (except EPP) expressed concerns as to a possible intervention in this area and took the position that no "ancillary right" should be proposed.

### **Their Position:**

**Press publishers.** Over the last few months the position of press publishers has evolved from an original request for an ancillary right for snippets (similar to the national solutions attempted in Germany and Spain – see the background) to a request for a full neighbouring right (i.e. the request that publishers are added to the list of neighbouring rightholders in the EU copyright directives, alongside other creative industries which already enjoy this status: broadcasters, record companies, film producers). This request was backed by the four main umbrella associations of news publishers EPC, EMMA, ENM and ENPA at the roundtable with you on 25 January 2016.

As a background for their position, news publishers point to the difficulties they face when seeking to monetise online uses of their content, in particular by online platforms (such as news aggregators) that link to press articles freely available online and/or use excerpts ("snippets") of articles without acquiring licences from the right owners. In addition, news publishers have reported problems when seeking to protect their products against piracy on the basis of the enforcement of (the underlying) authors' rights. They have mentioned national cases where courts have asked them to prove the entire chain of rights (i.e. that they have acquired the rights for various writers, photographers and other authors) before being granted the required relief.

Finally, publishers (in this case the request comes also from publishers beyond the news publishers, including book publishers) argue that a solution at EU level (a neighbouring right

or else) is necessary to stabilise their position as regards the payments of compensation for the "reprography" exception following the recent "Reprobel" CJEU's judgment (see background). In this judgement the Court noted that publishers do not qualify as right owners under EU law and ruled that, on the basis of EU law, they cannot therefore be granted a share of the private copying or reprography levies alongside authors. We are still analysing the concrete implications of this decision.

Book publishers and scientific publishers have not formally taken a position in the discussion about the possible introduction of a new publishers' right at EU level yet (they have not asked the Commission to grant such a new right). However, book and scientific publishers are concerned about the consequences of the "Reprobel" CJEU's decision (see above) and they have been asking for a clarification of their role in respect with their ability to keep on receiving compensation for uses of their works under the "reprography" and "private copying exceptions". One important element to be considered is that granting a new publishers' right beyond news publishers may have substantial implications in the area of scientific publishing, both in terms of political resistance from the researchers' constituency and of impact on the open access policy/model. This is an area that will have to be carefully assessed, taking into account the specificities of scientific publishing (researchers are increasingly deciding not to transfer their rights to scientific publishers and they may see a new publishers' right as a disincentive for publishers to opt for open access).

#### **Our Position:**

- The possibility to introduce a neighbouring right for publishers would have a considerable impact on the EU copyright system, which will have to be properly assessed over the coming weeks/months.
- The public consultation that we will be launching in March (*no public announcement has been made yet*) will be an essential step to gather information and stakeholder reactions which will inform our Impact Assessment work. If a political decision is taken to propose legislation to grant publishers a new neighbouring right at EU level, this could be done in the context of the copyright modernisation legislative proposal (under this scenario adoption would be in the autumn – *to be noted, also on this point that we have not made any public announcement as regards a possible delay of the copyright proposal, which so far has been announced for June*)
- The public consultation will cover both news publishers and other publishers. However, without prejudice to final decisions as to possible legislative proposals, it seems important to keep news publishers and other publishers (trade, scientific) separate in the discussion way forward, as their respective situation and requests are different (and an intervention going beyond news publishers would be likely to raise more problems and political resistance).

#### **Line to Take:**

- As indicated at our roundtable on 25 January, we are taking seriously the concerns of the publishing industry. We have taken note of the common position expressed by news publishers at the roundtable who have requested that they should be granted a new neighbouring right in EU copyright legislation.



- We are ready to seriously examine this idea and will be working at this over the coming weeks/months. It is important to be aware of the fact that a new neighbouring would be a major change to the EU copyright and would therefore require proper evidence and consultation. [*You may want to consider informing the meeting participants that we are likely to launch a public consultation on this issue in March – likely to be open for 12 weeks, i.e. until mid-June – please note however that we have not yet made any public announcement on this issue, nor on the impact that this would have on the overall timing of the copyright legislative proposal*]
- We need to better understand the position of book publishers and scientific publishers and the impact that a possible legislative intervention would have in these areas (including on the open access policy in scientific research publishing).
- The Commission has not yet taken any final decision as to whether granting a new publishers right in a future legislative proposal. We need to consult all stakeholders and properly gather evidence before being able to take a final decision.

## II. Speaking points

- Thank you very much for attending this meeting at a very short notice. As you know, this is the follow up to the very useful roundtable meeting we had with the news publishers on the 25 January and of other meetings I have had with the books and scientific publishers on copyright matters.
- As you know, the Commission is committed to make sure that the Digital Single Market is a fair market, where the creative industries can get a fair return of their investments and innovative services can be developed. We have made our objectives clear in the Copyright Communication adopted on the 9 December last year.
- A well-functioning copyright market place is important for Europe's competitiveness, but as far as your sector is concerned, goes far beyond economic considerations. The content that you produce is very important for our societies: it helps our citizens forming their opinions on public issues and making informed decisions; it helps advancing scientific progress; it contributes to our European culture.
- As indicated at our roundtable on 25 January, we are taking seriously the concerns of the publishing industry. We have taken note of the common position expressed by news publishers on that occasion: the request that publishers should be granted a new neighbouring right in EU copyright legislation.
- Today, I have decided to also invite representatives of the book and scientific publishing industry I am aware that different publishing sectors are facing different challenges and opportunities in their transition to the digital environment. The specificities of each publishing sector, news, books, scientific publishing, will have to be taken into account when assessing the need for a possible

legislative intervention, including as regards the impact that such intervention would have on other stakeholders.

- The results of the public consultation on platforms already gave us some indications of the importance of the discussion.
- At the same time, it is clear that a new neighbouring right for publishers would be a considerable change in EU copyright law, which requires specific consultation and evidence gathering before the Commission can take any decision as to the possible way forward.
- We need in particular to assess the impact that such a change would have on different publishing sectors, taking into account the effects on the other rightholders, on authors, researchers, journalists, but also on service providers.
- I count on your continued cooperation – as well as on that of other stakeholders – to make sure that we base our decision on the best possible evidence.

Author: [REDACTED] (CONNECT F.5 – Copyright), [REDACTED]

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## IV. Background

### 1. Q/A note presented at the meeting with SG and Cabinets Juncker, Ansip and Oettinger on 25 February 2016

#### *What is a neighbouring right?*

A neighbouring right is a right similar to a copyright although in certain cases the level of protection granted by a neighbouring right can be lower than the protection granted by copyright. Different from copyright, neighbouring rights do not reward an original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort which may also include a participation in the creative process. The EU framework grants neighbouring rights to performers, film producers, record producers and broadcasting organisation. Rights enjoyed by neighbouring rightholders under EU law generally include (except in specific cases) the exclusive rights of reproduction, distribution, and communication to the public/making available). EU law also grants a "sui generis" rights (more limited than a neighbouring right) to the makers of non-original databases (to reward the cases of a substantial financial or time investment)<sup>1</sup>.

Neighbouring rights usually have a shorter protection term than copyright (in most cases 50 years) and their "national treatment" (i.e. the obligation to protect neighbouring right holders from third countries) is more limited. At international level, protection is granted (to different extent) to performers, phonogram producers and broadcasting organisation (in the 1961 Rome Convention, the TRIPs Agreement, the 1996 WIPO Performances and Phonograms Treaty and the 2012 Beijing Treaty).

#### *What is a publisher?*

A new neighbouring right for publishers would require defining the term 'publisher'. The term publisher is not defined in EU copyright law. A definition could either be based on the activity of the relevant persons or on their products.<sup>2</sup> It should be noted that the activities of publishers continuously develop, particularly in view of the use of new technologies. For example, their products might increasingly contain not only text but also audiovisual elements.

The term publisher can be used to refer to press publishers (including magazines), book publishers, publishers of scientific publications and music publishers (these are the companies that publish musical works, promote and manage the works of composers and song writers).

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<sup>1</sup> A "sui generis" right also exists for the protection of the makers of semiconductors under the specific directive.

<sup>2</sup> The German Copyright Act defines a press publisher as the producer of a press product. A press product is "*the editorial and technical fixation of journalistic contributions in the context of a collection published periodically on any media under a single title, which, following an assessment of the overall circumstances, can be regarded as predominantly typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions shall include in particular articles and illustrations which serve to provide information, form opinions or entertain.*"

The rest of this note assumes that a possible EU intervention will cover "print" publishers (press, book publishers, and scientific publishers).

***On what basis do publishers currently exploit their products?***

Under current EU law, publishers of press products or books do not have neighbouring rights.

Press publishers licence/enforce rights either on the basis of the rights that authors (e.g. journalists, novelists, writers, photographers) transfer to them contractually and/or (in some Member States) as authors of "collective works" (e.g. ES, PT). In some MS (e.g. UK, NL, IE), a publisher is, in principle, considered the first owner of the copyright of a work made by an employee (e.g. a journalist) in the course of his employment. This state of affairs has allowed publishers to authorise (or prohibit) the making of copies of books/journals and their distribution, and the making available online of books/journal. This also includes the cases where not the whole book/journal is used but also a part of it (e.g. the use of excerpts for a press review).

In some countries publishers have also been granted (by law or by practice) a share in the compensation for certain copyright limitations (notably in the case of levies for private copying/photocopying). Publishers have been put under pressure in this area by the recent "Reprobel" decision of the CJEU (see below).

***What would be the difference between an EU neighbouring right for publishers and the Spanish and German "ancillary rights"?***

Germany and Spain introduced laws granting new rights to press publishers. Both approaches target specifically the online aggregation of small excerpts ('snippets') and are usually defined as "ancillary" rights. Whereas the Spanish law consists of a mere remuneration right (technically the compensation for an exception) for press publishers subject to mandatory collective management, the German law is an exclusive right with a very short term of protection (1 year) and limited scope (only snippets of press products). A neighbouring right for publishers would imply a more fundamental amendment to the EU acquis, granting an exclusive right to press and book publishers for all kinds of exploitations, comparable to the rights of film and music producers (see above "what is a neighbouring right?").

***How is the relationship between authors and publishers evolving in the platform economy?***

Authors have been experimenting with alternative publishing models both in the press and in the book business. These experiments have not led to a substitution of the traditional publishing model though, and often involve professional publishers. In the press business, many journalists have started own blogs. With a few exceptions of well-known journalists, these blogs often serve as complementary publications linked to the publishers' websites. Typically, these blogs are closely linked to the brand of specific publishers and benefit from the readership the latter attracts. In the book business some authors have been testing self-publishing models, often as a way to gain reputation before joining a publisher. However, self-publishing has not emerged as a mainstream publication channel.



### ***Why are press publishers asking for an own right now?***

The origin is the difficulties press publishers face when seeking to monetise online uses of their content, in particular by online platforms (such as news aggregators) that link to press articles freely available online and/or use excerpts ("snippets") of articles without acquiring licences from the right owners. At the same time, due to the dominant positions of these platforms, many publishers depend on the web traffic generated by them. In addition, (some) press publishers have reported problems protecting their products against piracy on the basis of the enforcement of (the underlying) authors' rights. They have mentioned national cases where courts have asked them to prove the entire chain of rights (i.e. that they have acquired the rights for various writers, photographers and other authors) before being granted the required relief.

Over the last few months the position of press publishers has evolved from an original request for an ancillary right for snippets (similar to the national solutions attempted in Germany and Spain) to a request for a full neighbouring right. The use of the press online is rapidly evolving and it seems they have concluded that they need to take a much more forward looking position. The request is backed by the four main umbrella associations EPC, EMMA, ENM and ENPA.

Moreover, publishers (including book publishers) argue that the introduction of a specific neighbouring right is necessary given the recent "Reprobel" judgment of the CJEU<sup>3</sup>. The Court noted that publishers do not qualify as right owners under EU law and ruled that, on the basis of EU law, they cannot therefore be granted a share of the private copying or reprography levies alongside authors. We are still analysing the concrete implications of this decision.

### ***Are book publishers asking for an own right too?***

We are not aware of a formal position from book publishers yet (nor of scientific publishers). So far they had not asked for a publishers' right although, as noted above, the "Reprobel" decision affects them too and they have been asking for a clarification of their role in this respect. One important element to be considered is that granting a new publishers' right may have substantial implications in the area of scientific publishing, both in terms of political resistance from the researchers' constituency and of impact on the open access policy/model. This is an area that will have to be carefully assessed, taking into account the specificities of scientific publishing (researchers are increasingly deciding not to transfer their rights to scientific publishers and they may see a new publishers' right as a disincentive for publishers to opt for open access).

### ***What would be the impact of a publishers neighbouring right for other right owners (journalists, writers, photographers)?***

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<sup>3</sup> C-572/13 of 12 November 2015- Hewlett-Packard Belgium vs Reprobel.

Our preliminary impression (pending the necessary legal and economic assessments) is that it may have an effect on the sharing of the licence fees and of levies (and similar compensation mechanisms for exceptions). It will also have an effect (again to be assessed) on those rights that currently exist at national level (see above). As for licence fees (and assuming that the authors of the underlying works would continue to transfer their rights to the publishers), the licence concluded between a publisher and a user will be now for two sets of rights. As a result, the licence fee may increase or the sharing of the fee between publishers and authors may change. A new neighbouring right may also have as a consequence that levies or compensation for other exceptions will have to be shared amongst more rightholders (this may, at least in theory, lead to an increase in levies).

***Would the proposal to introduce a publishers' neighbouring right have an impact on the hyperlinking discussion?***

A neighbouring right for publishers would not alter the notion of 'communication to the public' as defined in the EU acquis and case law. Therefore, introducing a neighbouring right for publishers would not impact on the ability of internet users to set or use hyperlinks. A neighbouring right would only grant a status to press publishers comparable to the status of other right owners, e.g. film or music producers.

***What would be the impact of a neighbouring right for commercial users such as online platforms?***

Concerning licence fees, an additional right for press publishers could strengthen their bargaining position in negotiations with users. However, this may not substantially change the relationships between publishers and distributors in a dominant position, as the latter could still insist on low tariffs or licences for free.<sup>4</sup> More generally, an own neighbouring right could lead to more legal certainty for publishers and thus serve as an incentive for product innovation in press publishing. Press publishers point out that they are starting to experiment with new business models/modes of distributions (for example social network licences - e.g. Facebook Instant Article, apps based services, etc)<sup>5</sup> and they consider that a neighbouring right would substantially support their transition into the digital environment.

***What are the next steps?***

As indicated above, the impact of a new neighbouring right for publishers would have to be thoroughly assessed against the background of different national legal systems and the EU acquis. The economic effects, including as regards other stakeholders such as authors, platforms and service providers, will also have to be assessed.

As a first step a public consultation would need to be launched (normal running time is 12 weeks). The results of the consultation would have to be analysed and fed into a formal

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<sup>4</sup> Examples: Google News in Spain and in Germany

<sup>5</sup> Opening Up Instant Articles to all Publishers, 17 February 2016 < <http://media.fb.com/2016/02/17/opening-up-instant-articles/> >

impact assessment. Considerable legal and economic research will need to be undertaken. Making sure that we carry out a solid preparatory work would be key notably to avoid the initiative being challenged on better regulation grounds (something that is increasingly taken into account by stakeholders, Member States and Parliament).

Adopting a proposal on a neighbouring right for publishers jointly with other proposals announced in the December Communication might therefore entail a timing issue which would have to be addressed at political level.

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asymmetry given that platforms have more scale and scope than we have. At the same time, news consumption via platforms increases (11% points for Facebook).

**(De Pers Group Nederlands):**

A new publishers' neighbouring right is necessary also because our *sui generis* neighbouring right is not sufficient. As an example of problems we are facing in the digital environment we were faced with the fact that a metadata search engine scraped our content online and monetised it. A Dutch Court ruled that our database right had been infringed, which the CJEU confirmed.

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**(Schibsted Media Group):**

Our companies have different strategies online, but we have come to the same conclusion: we need a neighbouring right. In my view, a platform could be defined as a service collecting consumer data as a basis for exploiting content. The platform economy will probably be inevitable; the question is whether it will be an open, competitive market.

**(Grupo Heraldo):**

Spain has experienced a serious economic crisis. We need your support.



### **3. Other relevant background information**

#### **A) Press publishers and copyright**

Many newspaper publishers have been vocally asking the Commission to propose modifications to EU copyright law with the objective to grant publishers new harmonised rights at EU level. Publishers are currently not identified as rightholders by EU copyright rules: they licence/enforce rights either on the basis of the rights authors (eg. journalists) transfer to them contractually and/or (in some Member States) as authors of "collective works". Publishers justify their request with the difficulties they face when seeking to monetise online uses of their content, in particular by online platforms (such as news aggregators) that link to press articles freely available online and/or use excerpts ("snippets") of articles without acquiring licences from the right owners. At the same time, due to the dominant positions of these platforms, many publishers depend on the web traffic generated by the platforms.

Different solutions have been advocated:

- A mere compensation or remuneration right (the publisher cannot prevent the online use and only has the right to claim compensation, subject to collective management, the "Spanish" approach).
- A so-called ancillary right (exclusive economic right only related to online exploitation – mainly the use of snippets- with a very short term of protection (possibly one year - the "German" approach). The request for an ancillary right has often been coupled with the request to introduce a collective management of this right by publishers' collecting societies.
- A fully-fledged neighbouring right (exclusive economic right related to copyright for all kinds of uses, offline and online, protected for 50 years after publication). In essence a neighbouring right would grant press publishers an equal status as the one enjoyed by the other neighbouring rightholders in the EU copyright acquis, notably films and music producers and broadcasters.

#### **B) Initiatives in the Member States**

Two Member States (Germany and Spain) have adopted laws to address press publishers' concerns. Both aim at the same result (i.e. payment to press publishers for the use of their works by news aggregators), but follow different approaches:

- Under the Spanish law, news aggregators do not need an authorisation from the relevant right holders to make news snippets available to the public. However, the use is subject to the payment of an equitable compensation to the publishers or authors of the original press articles. This compensation cannot be waived and is subject to mandatory collective management. The exception will not be applicable to images or photographs. For the latter, the exclusive right of the relevant right owners remains.
- Germany has introduced an ancillary right for press publishers, in force since August 2013. The law grants newspaper publishers an exclusive right to allow or prohibit the making available of press products or parts of press products online. The making available is lawful unless carried out by commercial news aggregators such as search engines or social networks. Authors and journalists have a right to participate in a possible remuneration.

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