

**Gestdem 2018/0811 – Annex I**





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ANDRUS ANSIP

VICE-PRESIDENT OF THE EUROPEAN COMMISSION

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

Personal data

  
 Professor of Intellectual Property Law  
Director of CIPIL, University of Cambridge  
Professor of Digital Economy, University of Cardiff  
Principal Lecturer in Investigative Journalism  
De Montfort University, LeicesterE-mail: Dear  and dear 

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,

Personal data

  
Andrus Ansip

**From:** [REDACTED] (CNECT)  
**Sent:** 27 September 2016 16:36  
**To:** [REDACTED]  
[REDACTED] CNECT CAD; CNECT I2; [REDACTED] (CAB-ANSIP)  
**Subject:** Ares(2016)4864623 : Tax on the use of snippets in search results from search engines [REDACTED] 26/08/2016]

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

**Categories:** Follow-up

Dear [REDACTED],

Thank you for your email dating from the 26<sup>th</sup> of August 2016.

First of all, please let me stress that the European Commission cannot give legal advice on specific and individual cases.

That being said, I understand from your email that you have created a new website with a specific search engine (free of charge) which allows potential investors to quickly find information on investments in Europe. Your database includes news articles on investments in Europe, and your search engine activity involves hyperlinks ("deeplinks") to other websites. You mention that those links are displayed by a title "*that indicates the content of the underlying article*" and you further mention that you "*do not use 'citation' nor (...) 'framing' and (...) 'pictures' in order to respect copyright*", but paraphrases. You are worried about the consequences that the European Commission's (EC) copyright legislative proposals could have on your website/search engine activity. According to the information that you have gathered, the EC proposals consist indeed, of a "*tax on the use of snippets in 'search results' from search engines*".

First of all, you will find complete and up-to-date information about the current legislative proposals adopted by the Commission on the 14<sup>th</sup> of September 2016, at this link: [Modernisation of EU Copyright rules](#). I notably recommend you to have a look at the [Questions and Answers](#) and also at the Impact Assessment on the modernisation of EU copyright rules, available [here](#) (see "Rights in Publications" p.155).

Regarding your question, it should be noted that as of today, press publications are already protected by the copyright of their authors. Making available or reproducing parts of them may already be a copyright relevant act or not, depending on the criteria set out by the European Court of Justice (CJEU) in its case law. The new right for publishers will not change that. It will have no impact on the question whether and to what extent using snippets/hyperlinking is copyright relevant under EU law. Regarding your concerns, I specifically refer you to the explanations on p.162 and p.169 of the Impact Assessment.

I therefore recommend you to examine the legality of your service in the light of the existing copyright legal framework along with the CJEU case law regarding the making available right- hyperlinking/framing (ex. [Svensson](#), [Best Water](#), [GS Media](#)) and the reproduction right (ex. [Infopaq I-II](#), [Meltwater](#)).

I hope you find this response helpful.

Yours sincerely,

Personal data

[REDACTED]  
Legal Officer



**European Commission**  
DGCONNECT  
UNIT I2 – Copyright

Avenue de Beaulieu 25 [REDACTED]  
B-1060 Brussels/Belgium  
[REDACTED]

The views expressed in this e-mail are my own and may not,  
under any circumstances, be interpreted as stating an official  
position of the European Commission.

under third party consultation

....

**From:** [REDACTED]  
**Sent:** 26 August 2016 16:46  
**To:** CAB ANSIP WEB

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

With kind regards,

[REDACTED]

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ANDRUS ANSIP  
VICE-PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, 05. 10. 2016  
Ares (2016)

Personal data

[REDACTED]  
[REDACTED]  
Allied for Startups

E-mail: [REDACTED]

Dear [REDACTED],

I would like to thank you for your open letter of 13 September 2016 on behalf of Allied for Startups, in which you express some concerns about the copyright legislative proposals adopted by the Commission on 14 September, particularly, the proposal on the introduction of a new press publishers' related right.

One of the main goals 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. Accordingly, one of the Commission's objectives pursued with the recent legislative proposals is to introduce fairer rules of the game for a better functioning market place. Against this background, a new related right for press publishers, like the one existing for content producers involved in other creative sectors, is needed in order to recognise the organisational and economic contribution of press publishers and protect their investment in high quality press content, which is important for a pluralistic society and the democratic debate.

I can assure you that the introduction of this new right has been carefully analysed as part of the Commission's internal decision-making process, and is backed by the required impact assessment work. Following this work, a proportionate and targeted approach has been chosen.

The new right will only cover digital uses of press publications across EU. Press publications are already protected by the copyright of their author. The new right will not change it. However, the new right will provide press publishers with clearer rules. It should make it easier for them to conclude licence agreements and explore new business models with service providers. For these reasons, we expect this proposal - along with the legal certainty it will create - to have positive effects for all stakeholders.

/.../

I would like to thank you for your contribution in this important debate which we shall take duly into account.

As you also have highlighted, we believe that it is important to strive for the development of a balanced copyright modernisation while ensuring and fostering a creative and innovative economy.

Yours sincerely,

A grey rectangular box redacting the signature of Andrus Ansip.

Andrus ANSIP

Personal data



## EUROPEAN COMMISSION

Cabinet of Commissioner Günther H. Oettinger  
Head of Cabinet

Brussels, 21 10. 2016  
AH/mp Ares(2015)s-6321083

[redacted] as  
[redacted] al  
Asociación de Editores de Diarios Españoles  
[redacted] ia.  
[redacted] id  
Spain

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De: [redacted] as,

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I would like to thank you for your letter of 6 September 2016, addressed to Commissioner Oettinger, who asked me to reply on his behalf.

In your letter, you underline the support of your association for the proposal of a Directive on the Digital Single Market, adopted by the Commission on 14 September 2016, regarding the introduction at EU level of new related rights for press publishers. You also express some concerns regarding the details and elements of the Commission's proposal in this regard and in other areas of the proposal, such as on exceptions to copyright and related rights.

The Commission understands the difficulties faced by press publishers when seeking to monetise and control the distribution of their content in the digital environment. The Commission has addressed such difficulties through a balanced approach, without going beyond what is necessary to achieve our objective, in order to ensure the viability of an independent and high quality press which is critical for a pluralistic society and the democratic debate.

Similarly, our approach to exceptions strikes the right balance between the interests and needs of all interested parties, including press publishers and citizens. When we have proposed new exceptions to copyright, the role of rightholders and those who invest in the publication of copyright-protected content has been duly considered by the Commission.

The discussions with the Council and the European Parliament on these proposals have just started. I count on your support and look forward to a constructive exchange with you in order to ensure their swift adoption and implementation for the benefit of creative industries and consumers.

Yours sincerely,

[redacted signature]

Personal data

Commission européenne/Europese Commissie 1049 Bruxelles/Brussel, BELGIQUE/BELGIË [redacted] 11  
[redacted] 177

Personal data



GÜNTHER H. OETTINGER  
MEMBER OF THE EUROPEAN COMMISSION

Doc 5

Brussels, 21. 12. 2016  
AH/mp Ares(2016)s- 7030592

Personal data

Sehr geehrter Herr [REDACTED]

haben Sie vielen Dank für Ihr Schreiben vom 14. Oktober 2016 in welchem Sie Fragen zu dem Vorschlag der Europäischen Kommission für ein neues verwandtes Schutzrecht für Presseverleger aufwerfen, auf die ich im Folgenden gerne eingehen möchte.

Aus unserer Sicht wird das von der Europäischen Kommission vorgeschlagene verwandte Schutzrecht die organisatorischen und wirtschaftlichen Beiträge der Verleger von Presseinhalten anerkennen und diesbezügliche Anreize schaffen, so wie es derzeit schon der Fall für andere Sektoren der Kreativindustrie ist (Film- und Tonträgerproduzenten, Sende- und Rundfunkunternehmen). Das neue verwandte Schutzrecht soll es Presseverlegern insbesondere erleichtern, ihre Inhalte für die Online-Nutzung durch Dritte zu lizenzieren, was angesichts der Herausforderungen des digitalen Sektors von zunehmender Wichtigkeit ist. Ferner soll das neue verwandte Schutzrecht es Presseverlegern ermöglichen, effektiv gegen die Verletzung ihrer Rechte online vorzugehen, indem es Ihnen den Nachweis der Rechteinhaberschaft erleichtert. Wir glauben, dass dieser Vorschlag auch für die Diensteanbieter nützlich sein kann, die Verlagsinhalte über das Internet vertreiben, einschließlich kleiner Unternehmen und Start-ups. Das neue verwandte Schutzrecht wird einen einheitlichen Schutz auf europäischer Ebene für die Verwendung von Nachrichteninhalten schaffen und damit mehr Rechtssicherheit und fairere Marktbedingungen zum Vorteil aller hervorbringen.

Da Sie die bestehenden Initiativen in Deutschland und Spanien ansprechen, möchte ich auf einige Unterschiede mit der vorgeschlagenen Regelung auf europäischer Ebene verweisen. Während Übereinstimmung hinsichtlich der Konstatierung von Problemen mit der Verwertung von Presseinhalten über das Internet besteht, beinhaltet das von der Kommission vorgeschlagene Konzept keine Zahlungsverpflichtung für die Nutzung von Presseveröffentlichungen. Vielmehr gibt es Presseverlegern die freie Entscheidung über die Bedingungen für die digitale Nutzung ihrer Inhalte und fördert somit flexible Geschäftsmodelle. Der Vorschlag schreibt darüber hinaus keine kollektive Rechtswahrnehmung vor, sondern ermöglicht es Presseverlegern und Plattformen frei miteinander zu verhandeln. Wir sind der Auffassung, dass es wichtig ist, eine ausgewogene Modernisierung des Urheberrechts anzustreben und dass der von der Kommission vorgeschlagene Ansatz aufgrund des europaweiten Anwendungsbereichs einen wirksameren Schutz als voneinander abweichende nationale Rechtsvorschriften ermöglicht.

Mit freundlichen Grüßen

Personal data

GÜNTHER H. OETTINGER  
MITGLIED DER EUROPÄISCHEN KOMMISSION

Brüssel, 21. 12. 2016  
AH/mp Ares(2016)s- 7029371

Personal data

Sehr geehrter 

haben Sie vielen Dank für Ihr Schreiben vom 28. September 2016 mit dem Sie mich über Ihre Entscheidung zur Aussetzung der Wahrnehmung ihrer Rechte durch die VG Media angesichts der erheblichen Schwierigkeiten bei der Durchsetzung des deutschen Leistungsschutzrechts in der Vergangenheit informieren.

Ich möchte Ihnen versichern, dass mir die Lage der Presseverleger in Deutschland sowie die mit dem deutschen Leistungsschutzrecht aufgetretenen rechtlichen Probleme bekannt sind und wir die Entwicklungen, einschließlich der diversen Rechtsstreitigkeiten, aufmerksam und genau verfolgen. Wir haben die in Deutschland gemachten Erfahrungen selbstverständlich auch bei der Gestaltung des von uns am 14. September 2016 angenommenen Vorschlags für ein verwandtes Schutzrecht für die Verleger von Presseinhalten auf europäischer Ebene eingehend geprüft und einfließen lassen.

Aus unserer Sicht wird das von der Europäischen Kommission vorgeschlagene verwandte Schutzrecht die organisatorischen und wirtschaftlichen Beiträge der Verleger von Presseinhalten anerkennen und diesbezüglich Anreize schaffen, so wie es derzeit schon für andere Sektoren der Kreativindustrie der Fall ist, namentlich im Hinblick auf Film- und Tonträgerproduzenten sowie Sende- und Rundfunkunternehmen. Insbesondere soll das neue verwandte Schutzrecht es Presseverlegern erleichtern, ihre Inhalte für die Online-Nutzung durch Dritte zu lizenzieren, was angesichts der Herausforderungen im digitalen Bereich von zunehmender Wichtigkeit ist. Ferner soll das neue verwandte Schutzrecht es Presseverlegern ermöglichen, effektiv gegen online auftretende Verletzungen ihrer Rechte vorzugehen, indem es Ihnen den Nachweis der Rechteinhaberschaft erleichtert.

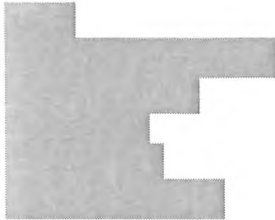
Dabei stimme ich vollkommen mit Ihnen darin überein, dass es von entscheidender Bedeutung ist, auf europäischer Ebene eine Lösung zu finden, welche die auf nationaler Ebene aufgetretenen Probleme vermeidet. Konkret unterscheidet sich das von uns auf europäischer Ebene vorgeschlagene verwandte Schutzrecht von dem in Deutschland verfolgten Ansatz dadurch, dass der Kommissionsvorschlag ein breiteres und allgemeineres Konzept verfolgt. Wir sind der Auffassung, dass eine Maßnahme auf europäischer Ebene Presseverlegern einen stärkeren und einheitlichen Schutz über alle Mitgliedstaaten hinweg bieten wird und sich dies letztendlich in einer stärkeren Verhandlungsposition für Presseverleger niederschlagen wird.

Mit freundlichen Grüßen und allen guten Wünschen für 2017!

Personal data

Brussels,  
AH/mp Ares(2016)s- 7030592

Personal data



Sehr geehrter ,

haben Sie vielen Dank für Ihr Schreiben vom 14. Oktober 2016 in welchem Sie Fragen zu dem Vorschlag der Europäischen Kommission für ein neues verwandtes Schutzrecht für Presseverleger aufwerfen, auf die ich im Folgenden gerne eingehen möchte.

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Da Sie die bestehenden Initiativen in Deutschland und Spanien ansprechen, möchte ich auf einige Unterschiede mit der vorgeschlagenen Regelung auf europäischer Ebene verweisen. Während Übereinstimmung hinsichtlich der Konstatierung von Problemen mit der Verwertung von Presseinhalten über das Internet besteht, beinhaltet das von der Kommission vorgeschlagene Konzept keine Zahlungsverpflichtung für die Nutzung von Presseveröffentlichungen. Vielmehr gibt es Presseverlegern die freie Entscheidung über die Bedingungen für die digitale Nutzung ihrer Inhalte und fördert somit flexible Geschäftsmodelle. Der Vorschlag schreibt darüber hinaus keine kollektive Rechtswahrnehmung vor, sondern ermöglicht es Presseverlegern und Plattformen frei miteinander zu verhandeln. Wir sind der Auffassung, dass es wichtig ist, eine ausgewogene Modernisierung des Urheberrechts anzustreben und dass der von der Kommission vorgeschlagene Ansatz aufgrund des europaweiten Anwendungsbereichs einen wirksameren Schutz als voneinander abweichende nationale Rechtsvorschriften ermöglicht.

Mit freundlichen Grüßen

**EUROPEAN COMMISSION**

Directorate-General for Communications Networks, Content and Technology

Media Policy  
DirectorBrussels,  
CONNECT/I2/VD/hz (2016) 126241

Personal data

By email: Dear ,

Thank you for your mail dated 14 November 2016 in which you express certain concerns about Articles 11 and 13 of the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market as adopted by the Commission on 14 September 2016. As Commissioner Guenther Oettinger changed portfolio's responsibility as of 1 January 2017, Vice President Ansip asked me to reply on his behalf.

Article 11 of the Proposal provides publishers of press publications with a related right concerning the digital use of their press publications. The Commission considers that the introduction of this right is a proportionate and targeted response to the challenges faced by the press publishing industry in the digital environment, which has been based on a careful analysis backed by the required impact assessment (link: <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules> ). At the same time the Commission's proposal will not change the scope of what is protected by copyright under EU law and as a consequence, it will not require users of press publications, including start-ups, to conclude agreements with publishers in cases where they are not already required to do so on the basis of the rights of authors of press publications such as journalists, photographers, etc. This is made clear in particular in recitals 33 and 34 of the proposal (link: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593> )

Article 13 of the proposed directive (Use of protected content by information society service providers storing and giving access to large amount of works and other subject matters uploaded by their users) establishes an obligation on service providers which store and provide access to large amounts of copyright protected content to put in place measures, such as content identification technologies, to allow rightholders to determine better the conditions for the use of their content. As outlined in the impact assessment, these services are targeted because they have become important sources of access to protected content online and in view of their role in giving access to the public to such content. By granting rights holders more control over the conditions under which their content is used by such services, the proposal notably aims at incentivising right holders to make more content available online, increasing thereby consumer choice.

I would also like to draw your attention on Recital 38 of the proposal which makes clear that the new obligations will neither change established safe harbour provisions under the

conditions of Article 14. The proposed directive also requires that these services put in place complaints and redress mechanisms in case users raise disputes over the application of the measures provided for in Article 13.

Yours Sincerely,

‘e-Signed’  
Giuseppe Abbamonte

Contact:

Personal data


[Redacted contact information]

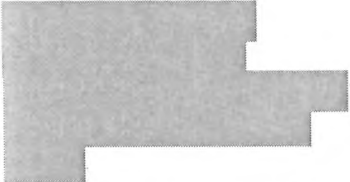


## EUROPEAN COMMISSION

Cabinet of Commissioner Günther H. Oettinger  
Member of the CabinetBruksela, dnia 18. 01. 2017  
AH/mp Ares(2016)s- 7836845

Personal data

E-mail: 

  
dziękuję za pismo z dnia 6 września 2016 r. skierowane do komisarz Elżbiety Bieńkowskiej, która poprosiła mnie o udzielenie odpowiedzi w jej imieniu. Na wstępie pragnąłbym przeprosić za zwłokę w odpowiedzi. W swoim piśmie przedstawił Pan stanowisko Izby Wydawców Prasy w odniesieniu do nowelizacji prawa autorskiego, w szczególności w zakresie przyznania wydawcom praw pokrewnych, eksploracji tekstów i danych (TDM) i technicznych środków ochrony (TPM).

Przedstawiona przez Komisję strategia jednolitego rynku cyfrowego ma na celu przede wszystkim zapewnienie szerokiej dostępności treści kreatywnych w całej UE przy jednoczesnym zapewnieniu uprawnionym z tytułu praw autorskich nieprzerwanie wysokiego poziomu ochrony przysługujących im praw w otoczeniu cyfrowym. W tym kontekście w dniu 14 września 2016 r. – czyli wkrótce po otrzymaniu Pańskiego pisma – Komisja przyjęła, jak Panu wiadomo, pakiet wniosków ustawodawczych zmierzających do modernizacji prawa autorskiego (<https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>)

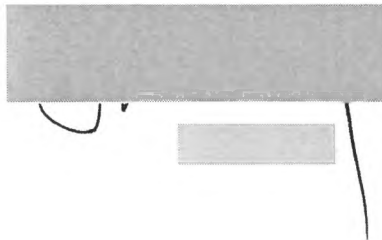
Zdaniem Komisji proponowane w tym pakiecie prawo pokrewne przysługujące wydawcom prasowym, które jest podobne do istniejącego prawa pokrewnego przysługującego producentom filmowym, muzycznym i nadawczym, o którym słusznie wspomina Pan w swoim piśmie, uwzględni wkład organizacyjny i ekonomiczny wydawców prasowych i wzmocni ich pozycję w otoczeniu cyfrowym. Inwestycje w wysokiej jakości treści prasowe stanowią jeden z filarów pluralistycznego społeczeństwa, stanowiąc podstawę debaty demokratycznej. Na podstawie dokładnej analizy przeprowadzonej w ramach wewnętrznego procesu decyzyjnego Komisji i oceny skutków zdecydowaliśmy się na przyjęcie proporcjonalnego i ukierunkowanego podejścia w tej dziedzinie. Proponowane prawo pokrewne obejmuje jedynie korzystanie z publikacji prasowych w formie cyfrowej, ponieważ stwierdzono, że trudności odnotowywane przez branżę wydawniczą wiązały się głównie z tym sektorem.

Wnioski ustawodawcze zawierają także nowy wyjątek zmierzający do ułatwienia stosowania TDM, co ma na celu wsparcie badań naukowych w Europie. Zastosowaliśmy w tym zakresie zrównoważone podejście, ustanawiając organizacje naukowe prowadzące badania w interesie publicznym (np. uniwersytety i instytuty naukowe) beneficjentem nowego wyjątku. To właśnie te podmioty w największym stopniu dotknięte są niepewnością prawa związaną ze

stosowaniem technologii TDM. Organizacje badawcze będą mogły korzystać z tego wyjątku również w ramach projektów badawczych, które w efekcie końcowym mogą mieć cel komercyjny, np. w kontekście partnerstw publiczno-prywatnych. Uważamy, że jest to potrzebne w celu odzwierciedlenia realiów działania w zakresie badań naukowych i innowacji, które w nasilającym się stopniu mają charakter transgraniczny i interdyscyplinarny, a nierzadko prowadzone są we współpracy z partnerami z sektora prywatnego. Pragnę Pana zapewnić, że Komisja przedstawiła te wnioski, starając się zachować równowagę interesów wszystkich zainteresowanych stron.

Ochrona środków technologicznych ma w prawie unijnym niezmiennie podstawowe znaczenie. Uściślając, wnioski ustawodawcze zmierzają do utrzymania tej ochrony, zapewniając jednocześnie, by stosowanie środków technologicznych nie uniemożliwiało korzystania z nowych wyjątków i ograniczeń, które – w przeciwieństwie do wyjątków i ograniczeń przewidzianych w dyrektywie 2001/29/WE – są szczególnie istotne w otoczeniu internetowym. W ujęciu ogólnym wnioski ustawodawcze utrzymują stosowanie art. 6 ust. 4 akapit pierwszy dyrektywy 2001/29/WE, którego przepis oferuje naszym zdaniem posiadaczom praw wystarczające gwarancje w odniesieniu do działań przewidzianych w reformie prawa autorskiego i który z tego względu będzie nadal oferować silną ochronę prawną w odniesieniu do środków technologicznych.

Chciałbym Panu podziękować za skontaktowanie się z nami w celu przedstawienia stanowiska polskiej Izby Wydawców Prasy. Mam nadzieję, że możemy liczyć na dalsze wsparcie z Państwa strony.



Personal data

**EUROPEAN COMMISSION**

Directorate-General for Communications Networks, Content and Technology

Director-General

Brussels,  
CONNECT/I2/JDM/hz (2017) 1772462Personal data  
  
Email: **Subject: Proposal for a Directive on copyright in the Digital Single Market**

I would like to thank you for your e-mail of 3 March 2017, addressed to Vice-President Ansip, who asked me to reply on his behalf. In your e-mail, you refer to the introduction of a new related right for press publishers for the digital use of their press publications under Article 11 of the proposal for a Directive on copyright in the Digital Single Market<sup>1</sup>.

As the Commission referred in its reply to similar questions raised by other Honorable Members (written questions E-007431/2016 and E-000837/2017), the introduction of such a related right does not introduce a tax for the commercial use of press publications.

The Commission's proposal does not impose any payment for the use of press publications. The exclusive nature of the proposed right would give all press publishers the freedom to authorise or prohibit and to decide on the conditions for the digital use of their press publications, according to their own business models.

As clarified in recital 33 of the proposed Directive, the protection granted to press publishers “does not extend to acts of hyperlinking which do not constitute communication to the public”. Therefore, the proposal will not affect the way users share news or use hyperlinks.

I appreciate that you have contacted Vice-President Ansip to communicate the concerns of your constituency and I look forward to continuing this dialogue with you and your office.

Yours sincerely,

(e-signed)  
Roberto Viola

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Contact:


<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593. 14 September 2016.



**From:** [REDACTED]  
**Sent:** Friday, June 02, 2017 12:54 PM  
**To:** [REDACTED]  
[REDACTED]  
[REDACTED]

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**Subject:** RE: Letter to Mr. Andrus Ansip

Dear [REDACTED],

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I would like to thank [REDACTED] on behalf of Mr Ansip for the meeting and the follow-up letter and assure you that we take good note of the points that were discussed and raised in the letter.

Kind regards

[REDACTED]  
[REDACTED]  
Assistant to the Cabinet Members Mr Jörgen Gren and Mr Maximilian Strotmann  
Tel. + [REDACTED]  
[REDACTED]

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European  
Commission

[@Ansip\\_EU](#) | [#DigitalSingleMarket](#) | [Blog & announcements](#) by Vice-President Ansip

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**From:** [REDACTED]  
**Sent:** Wednesday, May 31, 2017 10:39 AM  
**To:** ANSIP Andrus (CAB-ANSIP)  
**Cc:** [REDACTED] (CAB-ANSIP); [REDACTED] (CAB-ANSIP); [REDACTED] (CNECT); [REDACTED]  
**Subject:** Letter to Mr. Andrus Ansip

Dear Mr. Ansip,

Attached, please find this letter from [REDACTED].

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Best regards,  
Ingrid



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ANDRUS ANSIP  
VICE-PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, 20. 12. 2017  
Ares(2017)



Copyright for Creativity

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Dear 

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I would like to thank you on behalf of President Juncker for the open letter addressed to the participants of the Competitiveness Council on 30 November 2017.

We appreciate your constructive comments and take good note of the concerns that you and the signatories have raised, and hope for a continued fruitful cooperation.

Yours sincerely,

Personal data



Andrus ANSIP

*Professor Lionel Bently  
Herchel Smith Professor of Intellectual Property*

Copyright Policy Directorate  
Intellectual Property Office  
Concept House  
Cardiff Road  
Newport  
South Wales  
NP10 8QQ

[copyright.policy@ipo.gov.uk](mailto:copyright.policy@ipo.gov.uk)

5 December 2016

Dear Baroness Neville-Rolfe, Dear Ms Lynch,

**Call For Views: Modernising the European Copyright Framework**

We, the undersigned group of thirty seven professors and leading scholars of Intellectual Property, Information Law and Digital Economy, are responding to the IPO's request for views in relation to the above. Although many of us have comments on various elements in the proposed package, this response is limited to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled '**Protection of press publications concerning digital uses.**'

The proposed right is apparently intended to offer press publishers three benefits: (i) to increase returns on their investments; (ii) to simplify licensing; (iii) to render enforcement easier. The evidence supporting the first proposition, that the new right will increase returns, is speculative, based upon wishful-thinking and is contradicted by experience with similar initiatives in Germany and Spain (which have yielded no licences or payments). As regards (ii) and (iii), the proposal fails to consider alternative strategies to reduce the supposed impediments to licensing and enforcement. As a result, we believe the proposed right is unnecessary, undesirable, would introduce an unacceptable level of uncertainty and be unlikely to achieve anything apart from adding to the complexity and cost of operating in the copyright environment. We elaborate these objections over the following paragraphs, and in an appendix explain the very considerable concerns we have over the definition of 'press publication' in Article 1 of the Proposed Directive.

We hope the UK Government will feel able to oppose the Commission's proposal.

## Unnecessary

We understand and are sympathetic to the concerns that have prompted the proposed Article and which are set out in recital 31. We value a plural press and recognise its vital contribution to democracy. Like the Commission, we are concerned by the decline in revenues from advertising and subscription and the failure of many print newspapers to locate profitable business models in the digital environment (*Impact Assessment*, p. 156, p. 160). However, we are surprised by the lack of analysis of the causes of the declines in the period for what data has been gathered (see *Impact Assessment*, Vol 3, pp. 175-6, Annex 13) and find unconvincing the implication that the proposed new right would have made any difference to these figures. In considering these claims, the UKIPO will find much useful material collated by Dr Richard Danbury, as part of an AHRC funded project on copyright and news, at <http://www.cipil.law.cam.ac.uk/projects/copyright-and-news-project-2014-16>

Recital 31 of the proposal states 'In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.' The *Explanatory Memorandum* (p. 3) and *Impact Assessment* (p. 160) also refer to facilitation of licensing and enforcement. The idea is that the grant of a new right might save press publishers from having to take and keep records of assignments and prove them in enforcement proceedings that are commenced against infringers.

However, if the real problems facing press publishers relate to licensing and enforcement, the best answer is surely to focus on licensing and enforcement rather than to create new rights. More specifically, the goal of simplifying enforcement might be achieved by a much simpler and proportionate strategy: the amendment of Article 5 of the EC Enforcement Directive, to create a presumption that a press publisher is entitled to bring proceedings to enforce the copyright in any article or other item appearing in a journal of which it is the identified publisher. This would be a presumption that a defendant could rebut by showing that the material used was in the public domain or licensed by the author. The Commission nowhere considers this option.

Moreover, it is worth noting that the Commission in its *Impact Assessment* is wrong to assume that European press publisher have no right 'of their own,' and thus that it is necessary to locate a solution to remedy different licensing practices in relation to underlying rights (*Impact Assessment*, p. 161). In so doing, the Commission completely overlooks the existence of the database right under Directive 96/9/EC, which already ensures publishers have rights that protect their investments. According to Hugh Jones, Charles

Clark “always referred to the database right which ensued as a rare example of a specific publishers' right.” Although many commentators harbour doubts about the desirability of this right, it seems clear that as a matter of positive law, the Directive gives the maker of a collection of literary or other works, including press publishers, rights including the right to prevent systematic extraction or reutilisation of insubstantial parts (Art 7(5)). There is a single EU definition of the holder of the database right, namely, the ‘maker’, so that it is clear that press publishers are the relevant rightholder of the *sui generis* database right in their publications. Given that one of the alleged advantages of the Proposed press publishers’ right is that it operates at EU level, it is remarkable that the Commission nowhere addresses in what way or for what reason the existing publishers’ right is ineffective to achieve that aim.

### **Undesirable: Costs Associated with Any New Right**

At no point in the *Explanatory Memorandum* or *Impact Assessment* are costs mentioned, but the introduction of any new intellectual property right is accompanied by costs. The most obvious of these are costs to those who wish to exploit material over which multiple rights might exist. These costs are those involved in identifying and negotiating licences from all rightholders (obtaining permission from only some will not suffice). Multiple rights are associated with clogging and opportunistic behaviour (hold outs) – what Michael Heller called ‘the gridlock economy’. Moreover, even were the new right regarded, as the Proposal supposes, as a simplifying measure (simplifying the variations in rules and practices of assigning rights in works and other subject matter contained in press publications), there are nevertheless transaction costs involved in modifying agreements and standard forms to ensure they encompass licences of the new rights. In addition, the Proposal will create costs associated with huge uncertainties, particularly in respect of the field of application, that the right creates. These costs will need to be incurred by the very many operators who have no interest in the right, but fall within the broad definition of press publication (see appendix to this letter), who will need henceforth to amend even open-access licences and Creative Commons licences to permit reuses.

The proposal is that the right lasts for 20 years from publication (*Impact Assessment*, p 162). It appears that the right will apply to press publications already in existence, though the relevant date is not as yet determined: Art 18(2). Although it is difficult to see an incentive-based justification for applying the right to existing ‘press publications’, and it is unexplained why harmonization of a right recognised in one Member state (Germany) where it lasts for 1 year should require a twenty year term, the key point is that such a lengthy duration means the social costs associated with the proposed experiment will be unnecessarily high.

In particular, if enacted but found to be wrong-headed, it may take 20 years before such rights can be eliminated.

### **Uncertainty of Subject Matter**

The definition of the subject matter of the new right is extremely poorly drafted. Details of the doubts and uncertainties associated with the definition are explained in the appendix to this letter. While the definition of 'press publication' would include a print newspaper such as *The Sunday Times*, it seems eminently arguable that the definition would include *The Garden* magazine (a monthly publication of the Royal Horticultural Society), a football fanzine (or match-day programme), an auction catalogue (e.g. from Sotheby's), the *IPKat* blog, the *Cambridge Law Journal*, a multi-edition cases and materials book, a Research Centre website, *Who's Who*, *The Oxford Dictionary of National Biography*, *The Time Out Guide to London Restaurants* or the *Rough Guide to Peru*.

One might ask whether there is any need to, or desire for, or public benefit from granting additional rights to publishers of such collections. Moreover, one might wonder whether this is the 'press' referred to in recital 31 as making a fundamental contribution to public debate. Most importantly, the effect of the breadth of Article 11 is to impose unnecessary transaction costs on those wanting to reproduce and make available items. There will apparently be a need not only to obtain permission from the copyright owner in the item (usually the author) but from the publisher. Often, with blogs and websites, it will not be clear who the publisher is. In contrast to the Commission's *Impact Assessment*, which frequently claims that the new right will 'enhance legal certainty', we suggest that the opposite is the case.

### **Unlikely to Be Effective**

It is unclear how, as currently worded, the proposed right will enhance press publishers' ability to recoup their investments (*Explanatory Memorandum*, p. 3). Article 11 proposes that publishers of press publications benefit from the rights in Articles 2 and 3(2) of Directive 2001/29/EC for the digital use of their press publications. Recital 33 states that 'this protection does not extend to acts of hyperlinking which do not constitute communication to the public.' Article 11(3) indicates that Article 5-8 of Directive 2001/29/EC also apply, and recital 34 indicates that the rights granted to press publishers should have the same scope as the 'rights provided for' in Directive 2001/29/EC, and specifically refers to the exception for quotation.

Given the definitional problems explained in the appendix, it is not all that clear when the two rights (reproduction and making available) will bite. A press publication is 'a fixation of a collection of works...under a single title.' The reproduction right will apply to the reproduction of the totality (eg a whole newspaper) but might also apply to 'a part' (Art 2 Information Society Directive). Prior experience with the typographical arrangement right under UK law suggests that difficulties may surround the identification of what counts as 'a part' of a publication: *NLA v. Marks and Spencer* [2003] 1 AC 551. It is certainly not evident that a part of a 'press publication', understood as a collection, will include any single article or photograph.

Even if the new right were understood to relate to any individual article in a press publication, in general, these are rights that press publishers already possess, either because they employ journalists or because of assignments (or other exclusive grants in those countries that do not allow outright transfers of copyright). Given that the press publishers already possess the rights, a question remains as to how far there is a concrete benefit in creating an additional right. In so far as news aggregators are involved in providing hyperlinks and quotation of sections from particular newspaper articles, the Proposed provision adds nothing of substance new to the armoury of the press publishers.

It is very difficult to take seriously the suggestion that the new right will increase revenues by 'suppressing piracy' (*Impact Assessment*, p. 167, fn 514). No definition of 'piracy' is offered, nor any explanation of the efforts made to suppress piracy using the many existing tools available and why those tools and existing rights might have failed; focusing on why they have fallen short might indicate where sensible reforms should be targeted. Nor has any evidence been offered that reducing piracy would increase sales of newspapers from legitimate sources or increased subscriptions or licensing fees. No verifiable data has been presented to substantiate the purported analysis.

Indeed, data that is available suggests completely the contrary. As is accepted by the Commission (*Impact Assessment*, pp. 159-160) similar initiatives in Germany and Spain have proved ineffective. (See also the contributions of Professors Xalabarder and Gruenberger to a conference on the topic in April 2016 in Amsterdam, [at http://resources.law.cam.ac.uk/cipil/documents/potential\\_legal\\_responses\\_complete\\_transcript.pdf](http://resources.law.cam.ac.uk/cipil/documents/potential_legal_responses_complete_transcript.pdf)). The *Impact Assessment* (pp. 166-7) suggests that the legal certainty offered by the right being European may confer greater bargaining power, but it is far from clear that that is what doomed the existing German and Spanish initiatives. Nor has any evidence been offered to support the proposition in situations where the transactional rules on ownership are common (as in the United States where ownership of copyright is governed by Federal law. Section 201 of the 1976 Act) there is any less 'piracy' or more effective 'licensing.'

## Other Uncertainties

While the proposed right will not add usefully to the rights of the press publishers, it is limited in a manner that adds a level of uncertainty. More specifically, it applies only to 'digital use' (Art 11(1)). It needs to be further clarified whether this technology-specific limitation refers to all uses in digital form (which might include for example the OCR and searching activities at issue in the *Infopaq* case) or is limited to 'online uses' as recital 31 seems to intend.

A further level of uncertainty is introduced by the carve out from the right relating to the acts of authors. Article 11(2) provides that "Such rights" (meaning presumably the press publishers' rights) "may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated." As the proposed Directive does not confer on authors any right to exploit works that are incorporated in press publications, presumably this is intended as a saving for rights (and freedoms) retained under national law. This, however, is left obscure because the first sentence of Article 11(2) refers to the "rights provided for in Union law to authors and other rightholders."

If the author has retained the freedom to republish the work (under contract or as a matter of national law), the new right leaves that freedom unaffected. This leaves open the possibility that a service that wants to offer a digital reproduction online need only seek the permission of the author of the article. However, this possibility is left to the vagaries of national copyright contract law and individual contract. As a result, the Proposal does nothing to remove the uncertainty than exists at present in clearing rights.

Yet another uncertainty concerns how the new right will relate to existing harmonized EU or unharmonized national rights. Absent clarification, the implication is that press publishers will now benefit from the new right in addition to

- (a) three sets of harmonized rights (i.e. (i) the copyright and (ii) sui generis rights in newspapers and periodicals as databases; (iii) EU authors' rights in individual articles, original photographs, etc. that are granted to authors and transferred (either automatically or by contracts)) and

- (b) a bunch of national rights (e.g. (i) any national related rights (for example, in non-original photographs) conferred on the publisher or others but transferred (either automatically or by contract); (ii) rights granted under national law to the creators of collective works; and (iii) any national rights in typographical arrangement (such as that in the UK)).



Presumably, the German press publishers' right cannot be maintained alongside a harmonized EU press publishers' right, as this would conflict with the harmonization objective. Even operating with the latter assumption, one could hardly regard the addition of the new right as a much needed simplification of the rights-landscape.

## **Conclusion**

We appreciate that the UK position in the Council Working Group has been to some extent undermined by the result of the Referendum of June 23, 2016, and the Government's stated intention to trigger Art 50 TFEU in 2017. However, we are conscious both that the UK may remain in the EU at the date by which the Proposed Directive is to be implemented and/or that the UK's subsequent relations with the EU may well require the UK to approximate its laws with those of the EU. Thus the UK is not only entitled as an existing Member of the Union to participate fully in these legislative discussions, but has a legitimate interest in influencing their outcome. In this respect, it is important that the UK emphasises the importance of a coherent, justified and evidenced-based policy making process for copyright in the interests of society as a whole (authors, content holders, intermediaries, users and consumers).

Yours sincerely,

Tanya Aplin, King's College, London

Lionel Bently, Co-Director of CIPIL, University of Cambridge

Maurizio Borghi, Director of CIPPM, Bournemouth University

Robert Burrell, University of Sheffield

Hazel Carty, University of Manchester

William Cornish, Emeritus, University of Cambridge

Gillian Davies, Queen Mary University of London

Norma Dawson, Queens University, Belfast

Ronan Deazley, Queens University, Belfast

Estelle Derclaye, University of Nottingham

Graeme Dinwoodie, Director of OIPRC, University of Oxford

Graham Dutfield, University of Leeds

Lilian Edwards, University of Strathclyde

Dev Gangjee, University of Oxford

Johanna Gibson, Director of QMIPRI, Queen Mary, University of London

Andrew Griffiths, University of Newcastle  
Jonathan Griffiths, Queen Mary, University of London  
Ian Hargeaves, Cardiff University  
Sir Robin Jacob, Director of IBIL, University College, London  
Phillip Johnson, University of Cardiff  
Henning Grosse-Ruse Khan, University of Cambridge  
Martin Kretschmer, Director of CREATE, University of Glasgow  
David Llewelyn, King's College, London and Singapore Management University  
Margaret Llewelyn, Emeritus, University of Sheffield  
Fiona Macmillan, Birkbeck College, University of London  
Hector MacQueen, University of Edinburgh  
Spyros Maniatis, Director of CCLS, Queen Mary, University of London  
Duncan Matthews, Queen Mary, University of London  
Andrew Murray, London School of Economics  
Aurora Plomer, University of Bristol  
Uma Suthersanen, Queen Mary, University of London  
Paul Torremans, University of Nottingham  
David Vaver, Emeritus, University of Oxford; Osgoode Hall, Toronto, Canada  
Charlotte Waelde, Coventry University  
Ian Walden, Queen Mary, University of London  
Guido Westkamp, Queen Mary, University of London

**Appendix:**  
**The Definition of Press Publication**

Article 2(3) defines a 'press publication' as

'a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.'

The structure of the definition makes it particularly difficult to understand. There are five clauses, each separated by a comma. The second clause seems to constitute an alternative to the first ('which may also include'). The third clause appears as an example ('such as'). The relationship between the clauses is unclear. In addition the various clauses often are in the alternative ('periodical or regularly-updated publication', 'newspaper or a general or special interest magazine', 'news or other topics') and sometimes open ended ('or other topics', 'in any media'), so as not to prescribe any limitation at all. Ultimately the clause creates a subject matter of unacceptably uncertain, and very possibly awesome, breadth. It is not fit for purpose.

We consider each clause in turn.

**1. 'A fixation of a collection of literary works of a journalistic nature'**

The first clause, which one would expect to be critical in defining the subject matter refers to 'a fixation of a collection of literary works of a journalistic nature.'

The phrase 'journalistic nature' appears to suggest that it is the works, rather than the collection, that must be of a journalistic nature. One effect might be to exclude the publication of collections of fixture lists or rail timetables from protection, given that it would be difficult to describe such productions as 'journalistic' (though they might also not be 'literary works', depending on whether an originality component is implicit in the definition). That said, the terms 'journalistic nature' seem poorly selected to limit the subject matter covered, given the well-recognised shifts in the nature of 'journalism' over the last decades. The breadth of the term is illustrated by CJEU decision in Case C-73/07 *Satamedia* (CJEU, Gr Ch), on 'journalistic purposes' in Article 9 of Directive 95/46/EC. There the Court stated at [64] that 'activities ... may be classified as 'journalistic activities' if their object is the disclosure to the public of information, opinions or ideas,

irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for profit-making purposes'. As a consequence, the reference to 'journalistic nature' hardly seems to exclude any literary work, except perhaps those that are purely intended to convey literary enjoyment, such as, perhaps novels and books of poetry.

If instead the journalistic quality in issue relates to the collection, matters seem no more certain. In this respect it is worth recalling that Member States such as the UK have historical experience trying to define the term 'newspaper' (in the UK in the context primarily of taxation of such papers between 1712 and 1854: 10 Anne, c. 19, s. 101; 60 Geo III, c 9, s 1; 6 & 7 Will IV, c. 76). Needless to say the history demonstrates the real difficulty with building a legal regime around a commercial form that perpetually reinvents itself.

The requirement that there be a fixation of the collection raises further difficulties. There is no further definition of 'fixation' but under US law, the requirement of fixation is further elaborated as referring to fixation 'in any tangible medium of expression, now known or later developed.' Section 101 elaborates that a work is 'fixed' in a tangible medium of expression 'when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.' These definitions have, however, raised serious problems of interpretation of their own.

It might be that the 'fixation' requirement is intended to ensure that blogs and websites are excluded from protection. If that is the intention, one might wonder whether the term 'fixation' is the best one to achieve this. Certainly, it is not obvious that a collection created in digital form and arranged on a website is not 'fixed' in the sense that its form is stable enough to be perceived/communicated for more than a transitory period. If the aim is to limit the right to printed publications, that could be achieved through clearer wording. If not (as the later phrase 'published in any media' might imply), it remains unclear what role is intended for the fixation requirement. Another possible aim might be to exclude from protection 'broadcasts' from the scope of protection (given that broadcasts receive protection as related rights). If that is the aim, perhaps that might be achieved through a more explicit carve out.

**2. 'which may also comprise other works or subject matter and constitutes an individual item within a periodical or regularly-updated publication under a single title'**

The second clause appears as an alternative, expanding the subject matter beyond that identified in the first clause. However, it is grammatically unclear, and thus only adds to the confusion and uncertainty as to what is encompassed by the new right.

The first part 'which may also comprise other works or subject matter' appears to be intended to recognise that newspapers and magazines can include other works, such as drawings or photographs, or other 'subject matter', such as not original photographs (and possibly non-original databases). However, the use of the word 'comprise' (as opposed to 'include') implies that the collection might consist only of such other subject matter. As there is no qualification that these other subject matters be of a 'journalistic nature', the impression is given that the right cover (i) collections of literary works of a journalistic nature and (ii) collections of other works and subject matter of any sort.

The phrase 'and constitutes an individual item within a periodical or regularly-updated publication under a single title' also lacks a clear referent, perhaps because of the absence of a comma after 'subject matter.' The better reading seems to be that for the right to exist there must be (i) a periodical or regularly updated publication; (ii) that publication must have a 'single title'. The right then seems to inhere in and 'individual item' within the publication, but only if it is a 'fixation of a collection' of relevant works.

The reference to the item being 'within a periodical or regularly-updated publication under a single title' means it is apt to cover many reference works that are annually or periodically updated, such as the *Time Out Restaurant Guide* or *Who's Who* or indeed the *Oxford Dictionary*. It might even include *Wikipedia*. On the basis that each entry is a literary work, and the publication collects these under a single title, and it is 'regularly-updated', these collections seem to count as press publications. Moreover, as there is no indication as to how often 'regular' implies, the possibility exists that any edition of a textbook, such as Aplin and Davis, *Cases and Materials on Intellectual Property Law*, might be covered.

### **3. 'such as a newspaper or a general or special interest magazine'**

The referent of the third clause appears to be 'a periodical or regularly-updated publication under a single title.' Given that the third clause offers as example it does not in fact impose any limitation on the prior clause. If that were the intention, a word such as 'being' rather than 'such as' would make more sense.

### **4. 'having the purpose of providing information related to news or other topics'**

It is not clear whether this is intended as a qualification to the first clause 'collection of literary works of a journalistic nature' or the reference to 'a periodical or regularly updated publication' or the immediately preceding clause 'such as a newspaper or a general or special interest magazine'. However, the addition of 'other topics' means that, whatever the referent, the clause adds nothing.

Recital 33 seeks to clarify that the definition of press publications does not include academic journals, indicating the publications such as the *Cambridge Law Journal* are not intended to benefit from the new right. The recital states that 'periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications.' (See also *Impact Assessment*, p. 158). However, while recitals can assist interpretation, any implied limitation by reference to 'purpose' directly conflicts with the broad open-ended definition of purpose in the proposed Article, namely, 'having the purpose of providing information related to news or other topics.' This would potentially encompass any publication, including scientific news. The *Cambridge Law Journal*, for example, includes case-notes that are designed to provide information about recent decisions. It is therefore not clear that the drafters have achieved their goal of limiting the subject matter of the proposed right to the sphere where the Commission alleges it is needed.

#### **5. 'published in any media under the initiative, editorial responsibility and control of a service provider'**

The final clause requires 'publication' but seems to allow for publication on the Internet ('in any media'), as well as in hard copy. As mentioned, this sits in tension with the condition that the subject matter comprises 'a fixation.'

It is also unstated where the publication must occur. Must it be in the EU, or an EEA state, or is the right conferred on publications outside the EEA? If so, is there any limitation, e.g. that the country of first publication be one with whom the EU has reciprocal relations? If not, might press publications eg from Iran be protected, even though the articles and works therein are not (Iran not being a member of Berne)?

The clause requires the publishing take place 'under' the initiative, editorial responsibility and control of 'a service provider.' It is not clear why the term 'service provider' is used rather than the more obvious 'publisher' which appears in Article 11(1). The three requirements – initiative, editorial responsibility and control – seem to relate to the collection or publication *in toto*, and thus seem to be met by the *Wikipedia*

Foundation or editors of the *IPKat* blog, as much as by more conventional print publishers. Is this the intended result?



Ref. Ares(2016)3906509 - 25/07/2016



Centre for Intellectual Property and Information Law,  
University of Cambridge

Cardiff School of Journalism, Media and Cultural Studies,  
University of Cardiff

25 July 2016

**Reform of copyright law in the European Union:  
The proposed granting of an EU neighbouring right to publishers.**

Dear President Juncker,  
Dear Vice-President Ansip,  
Dear Commissioner Oettinger,

We are writing to you in relation to the proposal that the Commission may grant an EU neighbouring right to publishers. This idea was raised in the Commission's Communication *Towards a modern, more European copyright framework* (COM (2015) 626 Final, 9<sup>th</sup> December 2015), and in the *Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'* (launched 23<sup>rd</sup> March 2016).

This proposal clearly raises important questions in a wide variety of areas, which need to be considered in detail. As well as issues of European copyright and related laws, these include the impacts of any right on the digital single market, freedom of speech, the healthy functioning of modern democracies, the viability of legacy commercial media institutions, media plurality, the development of and the digital economy and digital social structures, and the efficient functioning of the internet.

Given the significance and complexity of these issues, we would like to draw your attention to a conference Cambridge University's Centre for Intellectual Property and Information Law arranged at IViR, University of Amsterdam, on the 23<sup>rd</sup> April 2016. A recording of the conference can be found at <http://www.cipil.law.cam.ac.uk/seminars-and-events/conference-copyright-related-rights-and-news-eu-assessing-potential-new-laws>. A transcript of this conference is attached.

We are not aware of a fuller debate than that recorded in this transcript. We strongly commend its contents as a significant contribution to the discussion of the advantages





and disadvantages of granting an EU neighbouring right to publishers. We ask that it be directed to the attention of those of your officials dealing with these matters, who are not already aware of it.

We are concerned that at a sensitive time for the EU's economy and its political momentum, wise decisions are taken on these important matters.

Yours sincerely,

[REDACTED], Herchel Smith Professor of Intellectual Property Law, Director of CIPIL, University of Cambridge

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

Personal  
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[REDACTED], Principal lecturer in investigative journalism, De Montfort University, Leicester

**UNIVERSITY OF CAMBRIDGE**

**Copyright, related rights and the news in the EU: Assessing potential new laws**

**Venue:** University of Amsterdam, Agnietenkapel, Oudezijds Voorburgwal  
2290231, 1012 EX Amsterdam, The Netherlands  
**Date:** 23<sup>rd</sup> April 2016

**Session 1:** Why are we here?  
**Speakers:** Professor Ian Hargreaves (Chair)  
Dr Richard Danbury \*  
Professor Dr Jan Hegemann \*  
Mr Matt Rogerson \*  
Mr Andrew J Hughes \*  
Mr Mark Seeley \*

**Session 2:** What went before?  
**Speakers:** Professor Bernt Hugenholtz (Chair)  
Professor Dr Michael Gruenberger (University Bayreuth) \*  
Professor Raquel Xalabarder (Universitat Oberta de Catalunya) \*  
Mr Søren Christian Søborg Andersen (Horten) \*  
Mr Chris Beall (LSKS Law) \*

**Session 3:** Could a new law help?  
**Speakers:** Professor Lionel Bently (Chair)  
Dr Bertin Martens \*  
Professor Bernt Hugenholtz \*  
Marietje Schaake MEP \*

**Session:** Session 4: What else might a law do?  
**Speakers:** Professor Ian Hargreaves (Chair)  
Professor John Naughton  
Mr Agustin Reyna \*  
Mr James Mackenzie \*  
Professor Mireille van Eechoud \*

*The contributors marked with a \* took up the opportunity of checking, and in some cases perfecting their transcribed remarks.*

**Session 1: Why are we here?**

**Speakers:** Professor Ian Hargreaves  
Dr Richard Danbury  
Professor Dr Jan Hegemann  
Mr Matt Rogerson  
Mr Andrew J Hughes  
Mr Mark Seeley

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**Professor Mireille van Eechoud:** Good morning everyone and a warm welcome to this former chapel, one of the, or the earliest, I think, home of the University of Amsterdam back in 1632. There were no cameras back then, not even bicycles, I suspect, so students had to come by horse or probably on foot to hear public debate in the academy. You will have noticed we have cameras here; I've put it on the slides, we've put some signs downstairs. We will be live streaming today and a recording will be made available via university channels in the course of next week. I'm aware that cameras might have a chilling effect on speech, but I do hope today you will just forget they are there and speak freely. If you speak – because we intend to have a lot of discussion with the audience – if you speak please do state your name beforehand. Okay.

So, we are a very diverse group today, which is great, and I guess in the plurality of opinions we might agree maybe on our share. Two things, one is that it's better to be inside than outside if it starts raining later on, and the second is that we all share a deep concern for the sustainability of the press, maybe mostly for quality press. That's because of the important function it plays in our democratic societies. Our Institute of Information Law, we're very grateful to be able to co-host this event. It came about for a number of reasons. I think the primary one is that Professor Lionel Bently of the University of Cambridge and Professor Ian Hargreaves of Cardiff University had a great idea for a project on copyright and news, which is done in the UK primarily by Dr Richard Danbury, sitting in the middle there, who is also the chief architect of today – Lionel Bently is staying at the Institute in the month of April – and we have this recent consultation by the European Commission on the question: do we need additional rights for publishers? So this is why we thought, let's have a conference here on this side of the channel, in Europe, as the English would say, so it is with pleasure, Lionel, I give you the floor for maybe a short few words. Thanks.

**Professor Lionel Bently:** Thank you, Mireille. Thank you all for coming to this and thank you to the people from IViR for graciously hosting the event. It would have been very awkward to host it in Cambridge with me already being here. The timing meant this is really a key question now of European law and probably British views about the future of European law we have to be a little sceptical at how important they're going to be for the moment. So, a very good idea to host the conference. I don't want to delay the proceedings anymore. So, thank you to everybody for coming and to all the speakers for showing up.

**Professor Ian Hargreaves:** Okay. Thank you very much, Lionel. I'm Ian Hargreaves. When, a couple of years ago, Lionel started talking to me about this project and devised the title "Appraising potential legal responses to threats to the production of news in a digital environment" it was pretty clear that Lionel was not a born sub-editor. But nor could we have imagined that at this stage in the evolution of the European Union's and the European Commission's thinking about copyright in general that this subject would have become so prominent. But it has and I am certainly looking forward enormously to the unfolding of views that we are going to experience today. We will start with an introduction from Richard Danbury, who Lionel and I hired to do the hard work on the research project, in the manner to which professors are accustomed, and Richard, like me, but in a slightly different balance and mix, has got both a background in the news media and a background in academia. Therefore he began being well qualified to ask these questions and now he is, I think, pretty formidably well informed about them as well. So, Richard, take us away, please.

**Dr Richard Danbury:** Thank you very much. I'll start with an apology. It's my fault you're here today, so I do apologise that you're here on your Saturday morning rather than elsewhere. I thought it would be useful to speak relatively briefly to try and map out at least where I see the main fault lines in the arguments are. It's a tricky task to do and people will no doubt find fault in what I'm about to say, but it strikes me as vaguely useful to at least set out what the main heads of arguments are for and against the introduction of any news-related copyright or related law.

As Lionel points out, Lionel and Brad Sherman in their book, identifying the philosophical reasons for bringing in a new law is not entirely satisfactory because laws aren't only brought in for philosophical reasons, there are many other reasons why they're brought in. But it is kind of useful, I think, because it helps work out what evidence is likely to be relevant to what argument. All the arguments, obviously, interplay. To use an example, the evidence which we're going to hear about in the third session, the economic evidence, is highly relevant to a question about whether it's necessary to incentivise the production of commercial news, but it's less relevant to arguments about ownership in news, natural rights theories about property in news. So, it's worth setting out at the beginning, I think, what the different arguments are and mapping out some of the fault lines of how they've been fought over in the past couple of years I've been following this subject.

It strikes me there are four; the first is the equality of treatment argument which we've seen come out recently, the second is the free riding argument, the third is the natural rights, or property in news arguments; and the fourth, which I think is probably the most significant behind them all, the incentive argument, the idea that there's a requirement that copyright contribute as an incentive to the production of news which would be under-produced by the market. No doubt people will find fault in those, but those seem to be a relatively decent way of starting this. So, to expand on them in a little more detail. The equality of treatment argument is one we've seen arise since, it strikes me, in November or December last year when the Commission put out a communication. The essential argument is that other forms of content producers are rights holders in

the European scheme of things, phonogram producers, broadcasters, so it makes sense for other content producers to be treated likewise. It appears persuasive on the grounds of the ideas that law should treat likes alike. It's slightly less persuasive because it's not sufficient of itself to bring in a new law. You not only need to look at equality of treatment but you also need to look at the costs: if you treat people equally what might happen to others? It's also not entirely convincing by itself because if one allows in one set of people then other people are going to have a similar claim. It may be that they want to be treated equally too. What may happen in this case is if producers, however they're defined, are granted equality of treatment one wonders what happens, for example, to wire services, do they have an equal case to be treated equally? One of the other quirks of the equality argument, it strikes me, that it may be overbroad, so broadcasters already have a measure of protection under the related rights scheme; one needs to be careful when line drawing so that they don't get over-benefited by being classified as rights holders twice over. None of these are insurmountable; I'm just mapping out some of the problems with it.

The second argument is the free riding argument. This is the idea that online news distributors are taking the valuable content produced by publishers and are illegitimately making money out of this. We'll hear a little bit, I think, from Chris in Session 2 about hot news tort in America, which seems quite narrowly focused on this mischief in an attempt to deal with it. But it's worth pointing out to start with that the free riding argument has its critics. These are on a number of grounds. One of the most substantial is the argument that online news aggregators and their like are actually contributing, they're promoting the news of publishers rather than detracting from it. This is a question which Bertin, who's going to speak in the third session, will be able to help us with economic evidence about whether that is or it isn't the case. There's a second argument that online news aggregation is the creation of a new market; it's something which is valuable in itself so even if there is substitution rather than promotion this is of use and it's a valuable thing to society. So that might be a second argument against free riding being a rationale for a new law. Again, there are other arguments; I won't go through them all in the brief session to start with.

The third question is that there are natural rights; there is property in the news. Raquel, in a paper she wrote, quoted Rupert Murdoch talking about news aggregators thieving news. It's an interesting and difficult question. The observation I would make is that copyright has traditionally treated news in a different way to other forms of content, it seems to me, for reasons connected with how important news is in a democracy. So, again, Raquel, in her paper describes the early versions of the Berne Convention which particularly excluded the news of the day from copyright protection. That's not the case now but characteristics of copyright law such as the idea expression dichotomy seem to me designed to try and treat news slightly differently from other forms of content and I think Bernt in Session 3 will be talking about some of the ways in which copyright is designed to deal with news and the reasons for this. Again, I'm emphasising these aren't conclusive arguments; I'm trying to set some hares running, but it strikes me that that is one of the arguments against the natural rights case.

Finally is the incentive case. The idea here being that copyright is needed because news is a valuable commodity and the news industry are suffering significantly. There's no doubt at all that the news industry are, in Europe and in America, suffering significantly. Figures, wherever we look at the figures, whether it's amount of journalists employed; whether it's titles; whether it's revenue or whether it's profit, there are significant difficulties. One of the questions which people who are interested in copyright raise when I've made this point to them is they say, okay, there are problems with the news industry, why is copyright part of the solution? There may be other things which will be better as part of the solutions; subsidies perhaps, changing charity law, creating trust funds. Those sorts of things might be a better way of dealing with news. There are cogent arguments against some of those but even if one avoids them, there is still the problem for the incentive argument, which one needs to address, is why is copyright part of the solution if the problem is an economic problem of greater scope?

I hope not to have answered any of those questions. I hope just to have posed them and the idea is that by the end of the day some of those questions will have been addressed in a bit more detail. So, I've spoken for long already and I shall stop speaking.

**Professor Ian Hargreaves:** You've spoken admirably just within the intended limit, so that gets us quickly onto Jan Hegemann from Raue, a German legal firm, and Jan has played a significant role in the German and the European debate and among your clients, people you've acted for, I believe, is Axel Springer.

**Professor Dr Jan Hegemann:** Yes, thank you, Ian. In fact, I worked for Axel Springer, which is Germany's biggest newspaper publisher, right from the beginning of the debate on ancillary right or neighbouring right or related right, whatever you call it, for press publishers. That goes back to the year of 2009. We have now seven years since and, as you all know, developments in the digital world are so fast that seven years are a whole generation. When we started the debate, it started with news aggregators, especially Google News and the snippets; Google taking the first sentences of articles, grabbing it, collecting it, presenting it to the public and the media experienced that the public would be sufficiently serviced with Google News and wouldn't even click on the link that leads them to the website of, let's say, Welt.de or 'Bild' or whatsoever. This has an enormous economic impact and I'm sure I'm preaching to the choir, you all know and Richard mentioned it, what economic difficulties publishers face. The revenues from purchasing their newspapers are falling down as the distribution rate is falling down and the development on the websites, which are only based on advertising, is by far not coping what the publishers lose on the printing side. Now we have a development to implement payment barriers which partly works, partly doesn't work, but it doesn't solve the problem. So the idea in Germany was, for all the reasons that you mentioned, equality of treatment. We saw there are ancillary rights for broadcasters, for theatre, for data bank organisers. The idea was to give the publishers an original right that does not depend on a licensing from the authors. You have to keep in mind that a publisher may have employees and typically the publisher will have buy-out with its employees, but he also has about – and for Axel Springer it's true that it's more than 10,000 – people writing on a

freelance basis – and what you get is only a very small right, an exploitation right, but not the right to defend the copyright. What the publishers would need was an original right comparable to that of broadcasters and others.

I don't want to bore you with all the developments in between, but rather bring two developments that are new. The first one is a research that was made just recently and published in Germany only on April 22<sup>nd</sup>. Next Media in Hamburg found out that about 60 percent of the users in the internet would search for news through the search engines, in Germany with a 90 percent market share it's Google. 60 percent of the internet users searched for news through the search machine; they do not go to the website of Spiegel or FAZ or whatsoever. If they find a result they will click on the deep link and the deep link leads you to the article on the second, third, fourth level of the website. The adverts connected with these levels, deep link levels, are of much lesser worth than the ones on the entrance site, so economically this searching for news through the search engine and then being linked to the deep link site results in much less economical impact for the publisher. But Google, I take Google because it's 95 percent, it's a little bit unfair because it's all search engines, but let's take it with Google. Google monetises the work that the publisher, together with his author, has done. It's collecting the news, finding the news, prioritising the news, bring it to the public, bring the news into this very first sentence, which is the core sentence of every article. This is what we claim a creative work, especially if it's connected with the brand, the trust that you set in the news being delivered by 'Der Spiegel', which is a trustworthy source, or by FAZ or, in England, by 'The Times' or whatsoever.

The second development brings us to the copyright level. It's a ruling issued by the Federal Civil Court the day before yesterday. Right now we only have a press release on that, we do not have the full reasoning of the court. It's the ruling in the case Vogel against VG Wort. VG Wort is the collecting society for authors and Mr Vogel is a former patent judge writing articles as a scientist and he claimed against VG Wort years and years ago and ran up the ladder with regards to the participation of the publishers, that's the book publishers, in the so-called reproduction fee, those fees that are paid by the producers of copying machines, computers, blank DVDs, which are collected and then spent through the collecting societies to the authors and the publishers. Following a decision of the European Court, the Federal Court, Civil Court, ruled that the publishers are not any longer more qualified to get money out of these reproduction fees but rather will have to repay what they got in the last couple of years to the authors which will sum up to a three digit million. This causes really a danger of insolvency for small and mid-sized book publishers. Why do I tell you that? I do that because the Federal Court in its press release says, with a half sentence, that this wouldn't apply for press publishers as in Germany they have an ancillary right since 2013. Why that? It's because the ancillary right is an original right coming into existence in the person of the publisher in the moment he accepts an article for publication and this qualifies as a full copyright protection, as a related right, the press publishers to further being part of the system of the reproduction fees. The idea behind it is that the European Court and the Federal Civil Court say full protection is only available if there is a related right, an ancillary right, you

can put it an original right, to media publishers, and that's the basis to do that, what's needed to find a way to monetise your products in the future.

**Professor Ian Hargreaves:** [Inaudible 00:23:27] given you one—

**Professor Dr Jan Hegemann:** Well, I understood I should stop and once I understood I should stop, I stopped.

**Professor Ian Hargreaves:** It is unfair because, of course, that, in the very English game of cricket means 'you're out'.

**Professor Dr Jan Hegemann:** You know we're on the continent; cricket is almost unknown here.

**Professor Ian Hargreaves:** Thank you very much, Jan. Matt Rogerson is Head of Public Policy for 'The Guardian', a very important British news organisation which has had tremendous success in growing its global digital audience, but which is still, I think it would be fair to say, challenged by the business of making that pay, or at least cover its costs. Matt, over to you.

**Mr Matt Rogerson:** Thanks very much, Ian. So, I thought I'd briefly talk about three things. The first is the strategy that 'The Guardian' has pursued in terms of its open strategy; second, how that model is under attack and then, thirdly, how we're looking to diversify that model. So, as Ian says, 'The Guardian' has gone from being a regional, Manchester newspaper to becoming a, I think, seventh or eighth best read national newspaper in the UK, to becoming the second most well read English news brand in the world. We vie with the 'New York Times' for that second place and we're just behind the 'Daily Mail' which you may or may not regard as a newspaper. We've consciously gone through a strategy which has attempted to grow reach and last month I think we achieved, I think, around 135 million unique users reading Guardian content around the world. Two-thirds of the readers of 'The Guardian' come from outside the UK now, so it's gone from being a UK brand into a global news brand. That has huge benefits for 'The Guardian' in terms of advertising. It means that we've set up an office in the US and we're able to access the US advertising market, which is vital for an organisation based on digital advertising. It also means that people like Snowden and whoever it was that leaked the Panama papers want to work with 'The Guardian'. Organisations like the ICIJ want to work with 'The Guardian' because we are a global brand, English-speaking, and we reach millions and millions of people. We've also, through the, kind of, open strategy, where there isn't an obligation to register before reading our content and there certainly isn't a subscription, grown a new revenue stream in the form of digital revenues which have grown incrementally from 37 million in 2010/11 through to 82 million in the last year that's just gone, 2014/15. As I say, that's been partly because of the expansion in the US and Australia, but also because of our relative size we have the ability to reach a lot of people.

But that model is under attack. I think everybody knows that the thin, reasonably large model is under attack from people who have a massive, deep understanding of their audience. I think Google and Facebook clearly are



hoovering up a lot of the advertising revenue that has previously gone to first party publishers. There was a 30 percent growth in digital advertising last year; 1.6 percent of that growth went to everyone but Google and Facebook so everyone but those two platforms is fighting over 1.6 percent growth. That, I think, will only continue. The key trends for that are the shift to mobile is rapid. I think the majority of Guardian content is now consumed both on mobile and away from 'The Guardian' website. We can obviously generate more value from advertising where advertising is displayed on our own website. Where it's displayed on Facebook or Google the possibilities are less and the amount of money you can generate from a mobile impression is still significantly less than a desktop impression, because there's just less space to display an advert. Another challenge is ad blocking, which I think is significant in terms of... Companies like Adblock Plus have made it very easy for consumers to use ad blocking features. In the UK and in Italy 'Three' the mobile network which, if the merge with O2 goes through, will have 40 percent of the mobile market in the UK, they've talked about implementing ad blocking at a network level which would give them huge power over the revenue streams that are available for companies that base their economic model on digital advertising. Then a third area is the shift not only from – we've, kind of, had three phases of social media. We have Google, which is clearly exceptionally dominant; I saw some figures the other day that suggested that on mobile and tablet search Google's share globally is 94 percent of mobile search and given that mobile is the way that everything's going, that's pretty significant. Similarly Facebook, 75 percent of their advertising revenues are derived from mobile. But the first phase of social, if you think of it, is Google and a, kind of, open approach searching for news. The second phase is Facebook where it's semi-open, where you can see that your news has been shared and you can potentially work with Facebook on programmes like instant articles. The third phase is probably platforms like Snapchat, WhatsApp and others where, actually, you can't really see how your news is being shared and the ability to, kind of, work with those companies is less than somebody like a Facebook.

So, those are a number of threats. I think the activity that we're seeing in the Commission at the moment around competition is clearly driving new behaviours from the platforms. I think the Google DNI project that we're seeing is welcome and I think we're going to see some really good partnerships coming out of that process. Google AMP is a really good product which is a new standard. Facebook instant articles, again, I think the pressure from the Commission around competition is also driving them to look to partner more with publishers and potentially feed some revenues back, but those are all voluntary projects at the moment. They're completely in the hands of the platforms. The news publishers are supplicant to the platforms in terms of how those kind of initiatives work in practice.

So, the third area that we're looking at is if our advertising model is under threat, how do we diversify? I think there we've talked very recently about membership, which is where we move to a closer relationship with our most loyal readers and we give them access to content that you wouldn't have if you didn't sign up to 'The Guardian', if you just came to the shop front. Where we work with readers, as we have done over the last few years, on creating new content and working

with them, for them to tell us what sort of content they'd like to see us create. We're also creating higher value content. As well as a big trend in mobile the other trend is in video and 'The Guardian' already produces a lot of video. We don't necessarily monetise that video as well as some other publishers do but certainly we'll be creating more of that and, obviously, if that has more value then there is more incentive for 'The Guardian' to enforce our rights in terms of where we see that content being infringed.

Just to go back, in terms of the opening strategy, I think that was delivered very much on the basis that... not that our content was free, there's always been some kind of exchange in terms of people reading a piece of Guardian content, see an advert or they pay a subscription for the tablet and mobile app. We have rights and we could enforce them if we decided that we wanted to. It's probable, I think, that in doing what they've done over the past decade or so, the caching of articles and the distribution of articles, Google has, you know, it's infringed rights under UK copyright law but it's a conscious decision by 'The Guardian' not to pursue against infringement because they have, kind of, generated this enormous reach. I think what's going on in Europe is publishers wanting to have similar rights; the ability to go after people who infringe copyright in the same way as UK publishers, Irish publishers and Dutch publishers are able to. There's no doubt that wouldn't be a silver bullet and stop the, kind of, undermining of the economic model of news providers but it would at least be another arrow in their armoury.

The bigger questions I have, really, are the digital world doesn't favour one publisher doing things alone. If 'The Guardian' or anybody else was to, you know, try to prevent a large search engine from distributing their content there are 64,999 other publishers in Google News who would backfill and provide their content to consumers. So there is a game of what we British call 'chicken', where the person who goes first has the potential to be made to look a fool and all you have to do, really, is to see 'The Times' has got a subscription model in the UK; it decided that it wanted to be removed from Google's indexes. 'The Times' isn't really a global news brand anymore; it's very much a, kind of, UK-focused news brand. It doesn't have the same reach as 'The Guardian' anymore and that's ultimately because it has decided to, kind of, prevent its distribution more broadly. There are many other issues that I think we are concerned about. Copyright is a vital part of our defence against the undermining of our content but, yes, I don't think it's the complete answer.

**Professor Ian Hargreaves:** Thank you very much. Andrew Hughes is International Director of NLA Media Access but it's important for me to mention that you're speaking today in a personal capacity.

**Mr Andrew Hughes:** Absolutely, thank you for that. Yes, I, kind of, see this as a bit of a... You can go top down on this and I will, and bottom up. It's a bit of a Russian doll problem and I think it's always helpful to start with the biggest picture, which is about the role of news in a healthy, functioning democracy. There's a great quote – and I think quotation comes up as a specific legal issue later – but a great quote from Benjamin Franklin on that which is that, you know, you'd rather have newspapers and no government than government and no newspapers—

**Mr Mark Seeley:** That was actually Jefferson.

**Mr Andrew Hughes:** I'm happy to take correction on that from someone with the appropriate accent. Thank you. I think that's, kind of, underlined really by some of the activity you see newspapers supporting. Not all newspaper activity is good, that's for sure, and we picked up some references to that. But I was in Washington last week and visiting AP and also 'Washington Post' who are proudly clutching a couple of Pulitzer prizes: 'Washington Post', for having created a database of the police shootings of civilians, which is having a direct and positive impact on public policy there; and AP for having invested in creating a story about slavery in the fishing trade in the Pacific and tracing how fish caught using slaves, literally a camp on an island of slave labour, is being fed back through into not just American but other Western restaurants. That kind of activity, I think, is very easy to see as terribly important. What 'The Guardian' have done with Snowden is a classic and more local example of that. So, that's a statement of the bleeding obvious, but it's worth restating, I think, and losing that is what we're talking about and copyright policy has to fit into that view. I think, secondly, on the internet, I'm not the world's expert but I think it's worth thinking about how the two titans of Facebook and Google have achieved the positions they have achieved. First of all, they've both delivered things which are fantastic and easy to use and are free. I use them and a lot of other people use them and a lot of voters of any MEPs who may be in the room use them, and they are wonderful services. What they do, in Google's case, is take everybody else's content and index it and create a utility based on that. In Facebook's case they encourage everybody, including me, to create a lot of content and in doing that they also gather a tremendous amount of very interesting information about the individuals using it and a huge amount of traffic. That makes them phenomenally powerful as an advertising resource.

Now, I think the bit that I debated with Richard slightly more after the first seminar in London was to bear in mind what the business model of news is; it's about gathering enough readers together and selling them something, which is news, and then selling advertising to those readers. The issue for newspapers and the issue that any change to copyright law has to be put in the context of is that their ability to sell that advertising is declining and declining very rapidly, as the charts behind me should illustrate. So, I apologise for using charts, but I thought one picture possibly means less words from me and maybe that's easier for everybody. But you'll see if you look at that, that the amount of money newspapers are getting is coming down very fast. I think there's a second chart as well which gives you advertising against cover price. I think in both of those pictures it's worth looking at the digital lines as well. They are tiny. One of the things that I've found frustrating at times is being told by people, "Oh, we should be allowed to do this because we're sending clicks to your website and these are tremendously valuable and they will change the future of your business". Well, you might believe that, and a number of newspapers might have strategies based on that. I, personally, as a business person, broadly don't believe that to be true and, actually, the fact that they're now running into this brick wall of ad blocking, which is the big new topic in the industry. They think in some segments, particular younger populations in Europe, up to 50 percent are using

ad blockers now. The idea that that traffic on freely supplied content is going to employ the journalists that you need to uncover slavery in the south Pacific or do some of the other great things that news organisations have done is, I think, slightly specious.

I think, going on, why am I here? What do I do for a living? Well, the NLA licenses businesses that copy news content. I think we made a bit of a name for ourselves by taking a web aggregator called Meltwater through the UK courts and losing an issue, unsurprising issue, in the ECJ. But I think what we do, actually, is mostly still about licensing digitally-delivered newspaper print content where there's been relatively small impact. For us web to print ratios are roughly the same as you would see up there. We're very proud of the fact the royalties we send back to publishers generate the equivalent to about 1,500 jobs in journalism so, you know, 'The Guardian' would be receiving like €5 million a year from us and I think that's a good and healthy contribution to what we want to see, which is good journalism. Supporting journalism is our strap line. But journalism is under huge threat. One of the stats from the UK 'Press Gazette' I dug out recently was that 6,000 jobs lost in journalism last year; about half the jobs in journalism have gone since the turn of the century. Last year 14,000 jobs in PR were created. Fabulous. But if you think about where that takes the debate and the democratic argument it's worth thinking about.

The database right is a relatively recent development. From our perspective as a licensing organisation it is helpful. I think some of the confusion... I mean, the business model for a newspaper is to employ a lot of people. I think 'The Guardian' employ, it's getting on to 1,000, something like that. You employ 1,000 people to make and create news for you and then when you get into the courts in Europe, less so in the UK, you aren't recognised as existing at all in copyright here. It's an obvious nonsense that needs to be addressed and it will simplify and streamline licensing. It will put news organisations, who are not dissimilar, particularly in the digital age, from the other publishing organisations that have that protection, it will just create equivalents and I think the problems it's alleged to create are not serious problems. I think, you know, we've looked at complete nonsenses across Europe stemming out of that, particularly the Hewlett Packard case against Reprobel. But I do think I'd echo the points from 'The Guardian', the idea that copyright will change the business model. If you go back to that big picture and think about the power that Google and Facebook are accreting, and we have to think about what the solutions are. I think you're into the world of the least worst here. You either go for state backing, BBC does a fantastic job, BBC and local newspapers in the UK working together, maybe that's a little sticking plaster in the right direction; or you look at some sort of subsidy, effectively, which is what I think the publishers have tried to create with ancillary right in Spain and Germany, rather ineffectively; or you give up and go away. I don't think giving up and going away, because I don't think... You can do that with the steel industry maybe, in the UK, you can't do it with news because news is too important. Thank you.

**Professor Ian Hargreaves:** Thank you very much indeed. The final speaker before we come to discussion around the room, Mark Seeley, who is the Counsel for

Elsevier which is part of an organisation known officially as RELX, very good. Mark.

**Mr Mark Seeley:** Thank you, Ian. So, it may not be totally obvious why I am here, but I think it's important for all publishing industry organisations to think about the problems that have been outlined here because they do affect all publishing sectors. It may be that the news sector is particularly impacted because of the nature of the advertising function in terms of revenue, but there are a lot of similarities in terms of the issues that have been identified by the speakers before me. So, the problems that we're facing in the STM space, in science, technical and medical publishing, I heard a lot of the same echoes, so we are also dealing with questions about brands; about multiple authors; about publishing as a form of communication and networking; about the migration of publishing documents to providing experiences; about integration into different workflows. But I think the more fundamental question that all publishing sectors are facing in the context of the internet is the challenge or the trade-off between visibility and sustainability. So visibility, of course, is very much about publishing. Publishing is about visibility as our authors in the STM space and journalists who are following an important story want their stories to be told and they want their research to be identified and claimed. So visibility is fundamental, of course, to publishing. But in looking at the balance between visibility and sustainability there are some obvious things that can be said about the internet.

So, first of all, the simplest solution with respect to visibility would be, of course, to make all content freely available and accessible on the internet. You'd work with search engines to optimise content visibility and with other awareness services such as the traditional abstracting and indexing services in the STM space. So that would be very simple and that's one side of the pole between visibility and sustainability. In the end, as we've heard, making all content available without payment or remuneration of some kind and in some fashion will make publishing untenable. The publishing business model, no matter what the particular construct, whether you're subscription-based, supply site-based, advertising-supported, it's important to society. Journalism is important from the perspective of an informed and aware society. I would say STM is important from the perspective of research, technology, and medical developments. All are important in maintaining overall quality and innovation in the digital space. Digital content and online digital information is highly innovative in this environment in terms of working on visually impaired accessibility; in terms of working on reference linking in content, linking to data; and content enrichment with taxonomic information. Now, that sounds a little bit boring and scientific but that actually makes the content extremely usable and extremely relevant and very findable.

So, the question is how to promote and increase the visibility, the awareness of STM content. I think many publishers struggle with the question of how open we can be. There's a lot of discussion sometimes about a freemium model, so you provide some information freely available as a way of linking, perhaps, to the content, and we've heard some folks talk about that in terms of linking to the fundamental websites and home sites of publishers. So, in the STM space many STM publishers are providing abstracts on a free basis; search engines are given

access to paywalled content in order to drive awareness, visibility and, hopefully, usage. A lot of special purpose content, for example most publishers on the medical space made openly accessible information about the Zika virus in recent months, and previews of articles, low cost rental models, delayed open access, preview open access, all of these models, these freemium models, are things that publishers are doing now. However, most of these methods come with some form of restriction, some terms and conditions, generally having to do with prohibiting further distribution, particularly commercial distribution, for the sustainable reasons noted earlier. In other words, the idea of the freemium model is to promote linkage back to the publisher platform while, at the same time, satisfying some of the obvious needs and desires in terms of visibility and awareness of information that's out there.

In terms of accessibility we also want to facilitate the ability of researchers at institutions that subscribe to our content to be able to easily get access on a 24/7 basis. Researchers are busy people. They often travel and otherwise collaborate. University libraries' information systems also usually operate on a highly flexible 24/7 basis for the same reason. We also hear customer concerns about technical protection measures and digital rights management. People prefer to have access to content without those types of restrictions. But the question is, outside of perhaps the gold open access author pays model, how open can we be with content and accessibility if there are organisations and entities out there that are using, and re-using, the content that we make easily accessible for their own commercial or even non-commercial purposes without authorisation, licence and permission? Now, unlike 'The Guardian' we do actively work on digital copyright enforcement but, as is often commented on, that is pretty much like locking the barn after the horse has bolted. Now, we will continue our efforts to identify the high profile sites that are clearly illicitly trading in published content and we'll do our best to disable such sites, and we do work with search engines and other online services that recognise that they have responsibilities in this area as well. Not all search engines and not all online services that support these services are completely responsible, but many of them are and I think there's more maturity that's happening in this area. But the key issue and the nub of the issue is this: we all share a goal of having a vital online world of content and information and we also want to make content as easily accessible as we can, but entities that take advantage of that ease of access force us and our colleagues in the news publishing industry to consider how open can we be. We recognise the publishers' related right, similar to the related rights we've heard about in film and music, is something I think certainly must be considered in this context, as some countries in the EU already have. I'm sure there are other solutions as well but this is one that we should look at very seriously. Thank you.

**Professor Ian Hargreaves:** Okay. Thank you very much indeed, Mark. Well, I think we've had a decent layout of the first round of issues. Questions, I guess, that arise are the extent to which the situation that news publishers are in can be compared and learned from in terms of the design of copyright law and I think for people who aren't in the news industry probably the puzzling sense that you have thinking about 'The Guardian' or 'The Times' or what Andrew said about NLA, about the extent to which the newspaper publishers themselves can agree that

they want something like this because so far they haven't. But that makes for at least an available and open political question. Has copyright been in any sense the cause of the problem that news faces and, if it has, can some redesign of copyright play a useful part in addressing the problems that have been described, and if that is to be designed and achieved how can it be designed and achieved in a way that has the minimal number of negative side effects if you concede that such side effects are likely to occur depending on what the design is? So, perhaps that's where we've come to. Who would like to raise a point from the floor? Yes. Please say who you are and wait for the microphone to land because the relay depends upon that and let's go as briskly as we can. Thank you.

**Professor Dirk Visser:** My name is Dirk Visser, I'm a Professor of Intellectual Property Law in Lieden and I'm also a practising lawyer in Amsterdam. I would like to make three points which might be relevant. First of all, what is the use of those neighbouring rights that the phonogram producers and the broadcasters actually have? That's a right that came about in the 1960s because of some strange compromise within the context of the Rome Convention. We have had neighbouring right for phonogram producers and broadcasters in the Netherlands only since 1993 and the only thing it has been good for, for them, is getting a share of the levies. It's very important to realise that those neighbouring rights, as an exclusive right, do not serve any purpose whatsoever in those industries. Fighting piracy can be done on the basis of copyright, always could be, and the only thing that the neighbouring rights, as we have had them under the Rome Convention, has led to in most countries that I know, at least in the Netherlands, is that they get a share of the photocopying levy; they get a share of the lending levy; they get a share of the home taping levy and nowadays it's even necessary to get part of the cable distribution levy because after the Luksan decision you can no longer claim remuneration, no longer claim levies on the basis of the copyright. So you have to rely on the neighbouring rights. So, the neighbouring rights have been very important for the levy side of the issue and I think it's very important to separate that particular issue, the [VG Wort? 00:55:16] and Reprobel issue. I think everybody agrees that it's very nice what Mr Martin Vogel initiated and it is very interesting to see that the Reprobel decision was not initiated by the authors but by the people who have to pay the levy. So, in fact, we all agree, for 40 to 50 years, that it is actually reasonable to split those levies 50 percent for the publisher and 50 percent for the author. Very few authors actually have disputed that, apart from Mr Vogel. So that is a very interesting issue. We have a new problem, a Reprobel, VG Wort problem and I think we have to address that.

That is one issue. But I think we clearly have to separate that issue from the parasitic behaviour by Facebook and Google, just to put it very succinctly. That is an issue you're not going to solve by introducing a neighbouring right which is comparable to the copyright, for the simple reason that the copyright cannot solve it either. At this moment, in my opinion, we have a quite different problem, that's a problem that we allow all kinds of hyperlinking. In the Svensson case it suggested that even confusing the public while deep linking to other people's content and putting all kinds of advertising around it is actually allowed under copyright. Most academics seem to agree that that's a good idea; that all kinds

of hyperlinking should be free and you should solve all those issues either through tort law or through secondary liability or whatever. So copyright, in itself, copyright does not suffice at this moment. If the ECJ is going to follow Advocate General Wathelet in saying that even intentional hyperlinking to clearly illegal sources, as is in the GS Media case, if that's not possible to stop that under copyright how will it be possible to stop it under a neighbouring right? I think nobody will think that the neighbouring rights for the publisher should be stronger than the copyright. So, if then the copyright doesn't work then the neighbouring right won't work either.

So, I think we have to solve the levy issue, the Reprobel, VG Wort issue in some way, maybe through a very small change saying it is reasonable to give 50 percent of the levies to publishers; and then there's the other issue how to deal with parasitic behaviour. I would just end by giving this example that I've given in a blog entry I did yesterday on Brave Software. Brave Software is a company in the US which not only blocks advertising but actually replaces it by its own advertising. It's an internet browser where you go on the internet and you go to a website, for instance of a news organisation, and you no longer see the original advertising, they are replaced by advertising by Brave Software. They graciously said that they will in future give a percentage of their new advertising income to the right owners behind the websites that are being used by their browsers. So, we have a problem there that business models are developing which are highly – just to put it extreme – very parasitical, even more parasitical than Google and Facebook, and the way that we interpret current copyright law does not help us in any way. So, if copyright doesn't help us then the neighbouring rights will not help us either, so we'll have to come up either with making copyright itself stronger and make sure – obviously the last point I'm going to make – of course we have to make the pie bigger and not fight about the sharing of the decreasing pie, which is also something that's happening now between those collecting societies who are now claiming on the base of Reprobel, "I want hundreds of millions," and then the smaller publishers will go out of business. So that's [inaudible 00:58:45]. Thank you very much.

**Professor Ian Hargreaves:** Thank you very much. If the panel could save up their responses to some of these points and questions. Yes. Here and then over here. Thank you. Yes. There.

**Q:** Thank you. My name is Christoph Bruch from Helmholtz Association. I have a comment and a question. First of all, for Mr Hegemann, it's concerning the economic situation of the Springer Verlag because you referred to the difficulties. I'm looking at the news of the Springer Verlag on its own website. They increased their turnover in the last year by 8.5 percent and they increased their income, their profit, by ten percent, so it's not that bad. That's first of all. Secondly, I would be interested, you referred to the situation where a search engine displays a snippet and then in many cases you claim the snippet is enough for the reader, for the consumer, and they don't look at the website. Now, if that is the case what would be interesting for me is, is the important thing for the consumer just the snippet and, with other words, is the product of the publisher too big, or is the important issue that the snippet is related to the publisher and therefore gets credibility? I'd be interested in your views on that.



Then I also have a question for Mr Seeley. Now, he's said, basically, the academic publishers may have similar problems as the press publishers claim to have. Now, the academic publishers rely heavily on the work of academia, they don't pay. You don't pay academia. So, I think it's very interesting that in relation to academia you think it's okay to not pay and in relation to the search engine, and you say it's important to get visibility, you want to get paid. I don't understand that.

**Professor Ian Hargreaves:** Thank you for those. Yes. There are two. One and then the other and then we'll [inaudible 01:01:15].

**Q:** My name is Till Kreutzer. I work with iRights in Berlin and I've done a lot of work on the German ancillary copyright in the last year. I've got a question for Jan Hegemann especially. Coming back to the point that Christoph Bruch already made, you suggest that there's kind of a market failure between the search engines and the press publishers online, so I've talked to a lot of economists and a lot of other people concerning the question whether it is good for news publishers or bad for news publishers that they are indexed by search engines and news aggregators and they all say search technologies and content providing online is a symbiotic relationship, right. You suggest that you lose a lot of people; you lose a lot of users and therefore advertising income because there are news aggregators and search engines. I would like to ask you whether you could point me to the proof of that suggestion. Where does that come from? The second question is if that is the case why don't you simply opt out of the system and, you know, tweak your robot text files in order that you won't be found anymore? Thank you.

**Q:** My name is Bertin Martens. I work for the Joint Research Centre of the European Commission in Seville and I am an economist and I work on digital media. I don't want to give the impression that all questions are addressed to Mr Hegemann, but I also have a question for Mr Hegemann, but a very short and simple one. Can you tell me how many newspapers in the Springer group, or in Germany in general, have made use so far of the neighbouring right that now exists for German newspaper publishers and how much additional revenue this has generated for them, if any?

**Professor Ian Hargreaves:** Okay. I would invite all of the panel to address these issues there but I think, Jan, you are up first.

**Professor Dr Jan Hegemann:** Well, I'm a little bit challenged.

**Professor Ian Hargreaves:** I can [inaudible 01:03:50]—

**Professor Dr Jan Hegemann:** No, I need to flip through my notes. Axel Springer's economic situation. Those figures are true but it's also true that those figures of their rising turnover and profits are not stemming from the traditional news business. As you might know, Springer has sold a group of its traditional regional newspapers, such as 'Hamburger Abendblatt' and 'Morgenpost' to the Funke Media Group, just one-and-a-half years ago and Springer has decided some years back to completely restructure its activities and to invest almost more

than a billion into internet or digital-based companies that have not much or nothing to do with the traditional publishers' business. The publishing side of the business today is 'Die Welt', 'Bild', and so on, and the 'Bild' is profitable; 'Die Welt' is not, as you know. But Springer has understood that they will not be able to keep on their traditional content, journalist-driven content business without backing it with activities that are far away from the classical journalism such as Immonet or others – there are more than 300 companies now in the Springer world, digital businesses that are not basically bound to journalism. Having said that, Springer sticks to journalism and it's a part of the self-understanding of a newspaper publisher that he will be part of an open society with as many products and as many competing journalist products as possible because this is a fundamental issue for every open society. It would not be a good development if we turned down the number of competing publications and end up with companies that might have a tradition in journalism but do their business now in many other businesses, but not in journalism.

When it comes to the snippets, yes, how does a journalist write his article? He puts the core information, or the core opinion if it comes to a commentary, into the first sentence, just to attract the interest of the reader and that's an art in itself, as every journalist knows. The snippets typically are the first sentence. So, if you go to Google News you will have the core news of the day being connected with a trustworthy source, let's say, 'The Guardian' or, let's say, 'Spiegel' or so, within this very first sentence. This is very deeply into the German struggles. We are going on how many words should it be? The German ancillary right we have now implemented in 2013 says that single words are free and we are now struggling in the law courts whether single words, a group of single words, is six words or 12 words. That's really crazy. I'm not very happy with what was the outcome of the 2013 law because this has caused a lot of struggle and we will end up with decision of the Federal Civil Court in maybe five years.

That leads me – excuse me, please – to the third question. You asked whether or not Springer has already made use of this ancillary right. The answer is yes and no. How can you make use of the ancillary right? It's a little bit a pity because we will have a presentation, as I understand, on the German ancillary right in the next session. But, in fact, some of the German publishers, including Springer, have put it in a collection society in VG Media. VG Media has set up a tariff to remunerate the use of the ancillary right. This tariff has gone, which is mandatory, through arbitration at the German Patent Office, and the arbitrators found that the ancillary right is applicable; that a tariff can be set up, but that the tariff of VG Media, was by far too high. Now we are in the course of the civil court proceedings a claim against Google, Mr Nolte knows that is already pending at the Berlin County Court, and it will for sure go up to the High Court and it will for sure go up to the Civil Federal Court and I will be able to answer your question in the course of what will be a guess, five years, maybe.

**Professor Ian Hargreaves:** Okay. We've only got three or four minutes left. Mark, you were specifically asked—

**Professor Dr Jan Hegemann:** I'm sorry to miss one question.

**Professor Ian Hargreaves:** —you were specifically asked whether it's fair to make a comparison between academic publishing, where you get the academics as a so-called free resource, and journalism where that's not the case.

**Mr Mark Seeley:** Right. It's very true, of course, that academics write for a number of reasons and, of course, are usually employed by institutions and universities. So the dynamics are different from freelancers. But I would point out that Elsevier and other STM publishers do contribute quite a bit towards scientific societies, on whose behalf we publish. We contribute to editors and, of course, we contribute in the overall systems and investments we make to make that content better; to ensure that peer review is done consistently and the like. So, it's again, it's all about quality but, of course, the economics are a bit different in different sectors.

**Professor Ian Hargreaves:** Okay. Could I just invite Matt, Richard, and Andrew, in that order, if there's anything you would like briefly to say around the questions. I think Reprobel and all that might come up later, but that's not to discourage you from having a crack at that line of questioning if you feel like it.

**Mr Matt Rogerson:** Thank goodness I can leave Reprobel to others. It think the point about advertising, it being a symbiotic relationship, it does feel that we're, kind of, at a tipping point where the amount of data that's being generated, and that the likes of Google and Facebook have, is encouraging advertisers to shift more and more away from first party publishers. Advertisers like 'The Guardian' have benefited from a good relationship with advertisers and I think the faith in Google and Facebook is becoming all-consuming now and you get huge brands like Reckitt Benckiser doing \$1.8 billion contracts with Facebook, so they're just spending all their advertising money on the platform rather than on the publisher. So, it does feel like something is changing there. Then, the second area, as I've already mentioned, the, kind of, open social and search platforms like Google and Facebook, if consumers are moving more to closed, kind of, chat platforms like WhatsApp and others, and we know that they are, you know, WhatsApp now has more users than Facebook – Mark Zuckerberg made a very good bet in buying WhatsApp – there's a big question about how news publishers will monetise content at all through those kind of chat apps. The biggest challenge is how do you maintain a connection between a reader of news which has a high value to society with the brand, because the way that news brands, I think, are going to diversify is by marketing experiences and products based on the brand and faith in the brand and trust and the connection to the brand. So, I think there's a whole bunch of knotty problems which copyright is part of, but there's a bigger issue in play.

**Professor Ian Hargreaves:** Okay. Richard.

**Dr Richard Danbury:** Very briefly, in relation to the American company which is substituting its advertising for somebody else. There was a Danish case about five or six years ago, which Soren may speak about after lunch, where they did exactly the same thing, called Aid Online and the Danes used Danish copyright law to prevent that happening, but it strikes me it's more of a free riding sort of

situation that someone is taking a product and making a different business off the end of it.

**Professor Ian Hargreaves:** Andrew.

**Mr Andrew Hughes:** Yes, just two points, really. One was about, you know, why do the newspapers actually engage online if it's not good for them? I think the real issue is the terms of engagement there and the power relationship between the two and I'd refer you back to the earlier comment about the game of 'chicken', if you don't and your competitors do, your brand is not promoted. But you can't negotiate when you're even a newspaper as big and powerful as 'The Guardian', the negotiation with Google is not a negotiation between free and equal partners and there is a competition law issue there which the European Commission has begun to address. But fundamentally it's swimming against the tide of the network effect. I think the other one is the suggestion that publishers aren't having a time, with the quotation of one particular publishers reported accounts flies in the face of reason. You know, news publishing never was that profitable and is in serious decline and the employment figures demonstrate that. Thank you.

**Mr Mark Seeley:** One final comment to Dirk. So, from an American perspective, of course, I find the idea of mandatory rights and levies odd. You know, I tend to come from a perspective of everything should be negotiated; everything should be voluntary; everything should take into account differences in value and differences in sector. But on the other hand, you know, I do wonder, when there is no appropriate remuneration for a particular use which is either lawful or somehow tolerated, then perhaps the levy and collective rights is the main alternative. So, don't discount levies entirely. They're important. I'd also say that one of the things I'm not sure that a neighbouring right will help in enforcement, but I suspect it will and I think that the difference we see in the enforcement environment now, as opposed to the late 1990s when the idea of the treaties and the InfoSoc Directive was done, is that the scale of infringement and the scale of activity is so huge now that it's not a few take-downs that we're talking about, it's hundreds of thousands and millions, and I would hope that some changes in the law would help in that score as well.

**Dr Ian Hargreaves:** It's not only scale, is it, it's pace? When you get news tied up with user-generated stuff that is used as news it's a very, very complicated ecology and a very, very fast ecology that you're talking about. Anyway, I think that's been a good start. Thank you very much. It's time for a cup of tea now and stretch your legs and back here in 20 minutes. Thank you.

[End of recording of session 1]

## **Session 2: What went before?**

**Speakers:** Professor Bernt Hugenholtz  
Professor Michael Gruenberger (University Bayreuth)  
Professor Raquel Xalabarder (Universitat Oberta de Catalunya)  
Mr Søren Christian Søborg Andersen (Horten)  
Mr Chris Beall (LSKS Law)

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**Professor Bernt Hugenholtz:** Good morning. Thank you for coming back from the coffee break or tea break. It's always difficult to do that but we have a very, very full programme, as you have already surely seen, and the next panel for you is already waiting and it's in front of you. As already mentioned earlier, and as you surely know, several member states in the EU and also countries outside of Europe have in recent years experimented with various possible legal solutions to the core problem that we are addressing today; the news aggregation issue, and before considering a possible harmonised European approach which apparently the European Commission wants us to consider, it is important to look at these national experiments and to see what they have brought us, what they have taught us, what we can learn from them, what we cannot learn from them, and that's why we have this panel here for your this morning. We have experts from various countries where such experimentation has taken place. We have a great panel for you.

From left to right, from Germany, the country of the Leistungsschutzrecht that was already mentioned in the first panel, Professor Michael Grünberger for Bayreuth University, chair of civil commercial and technology law at Bayreuth. Next to him, Professor Raquel Xalabarder from the Open University of Catalunya, Universitat Oberta de Catalunya, where she also has the chair of intellectual property and she will of course talk about the Spanish Google remuneration rights. To her left, to your right, is Søren Christian Søborg Andersen who is an attorney at the Danish law firm of Horten who will tell us about Danish experiences with copyright related cases on news aggregation and then from the United States we have to the far right of you Chris Beall who is a trial attorney at the US law firm LSKS and he will talk about American experiences with news protection. All our speakers are duly instructed not to exceed ten minutes and I will be a fair but strict enforcer of that.

I guess according to the programme our first panellist will be Michael, so I invite you to come. You have a few slides. Then it's better you come up here. The slide's already up.

**Professor Michael Gruenberger:** Thank you very much. I only have a very limited amount of time, so I would like to get through a few slides. I hope they will be helpful for you to better understand the issues. We're discussing the German copyright amendment from 2013 that introduced the related right for press publishers, [Leistungsschutzrecht für Presseverleger]. I want to focus on three issues. First, what's protected? That is the objection of protection. Second, what's the scope of protection? And, third, what were the law's consequences? Let's go to issue number one: the object of protection. The materials distributed include both, the German original and an English translation of the amendment. You will notice in Section 87f(2) the description of the press product. That's the object of protection. There are five elements that are of relevance here. The first and the second element I'll discuss in a little bit of detail in a second. Number three is pretty self-explanatory. We need a collection published periodically so a single book will not suffice, but newspapers, weekly magazines, even regular publications on the internet

such as blogs will meet that prerequisite. Number five is a little bit tricky because it's a little vague. The collection has to be predominantly typical for the publishing business. The translation you have in your material is not completely accurate, in my opinion. The law actually tries to encompass both, what's going on in the traditional publishing business but also new ways of disseminating published materials.

Let's have a look at the journalistic contributions. A few remarks are in order here. The journalistic contributions may be protected by copyright or a related right. Thus, the press publisher's right is completely independent from any IP rights in the journalistic contributions. However, the law has two safeguards; First, one you might already know from the Rome Treaty and from the WPPT Treaty. Both treaties stipulate that related rights should not in any way impede the exercise of author's rights. Nobody knows exactly what this is supposed to mean in the context with authors' copyright in the journalistic contribution and the press publishers' right. Quite interesting is the provision in Section 87h: The author is entitled to have a share of the press publisher's revenue. This is problematic from the European Union law point of view. Remember the Svensson decision and the clear statement that the author's right of communication to the public has been fully harmonised. Well, Germany has created an additional public communication remuneration right not granted in the InfoSoc-Directive, thus conflicting with the directive's full-harmonization approach.

What is a journalistic contribution? We have a legal definition. However, it's not a very helpful definition at all. First, any media type and any kind of information is covered. There's some debate about the breath of this requirement, but the majority of commentators agree that any media type and any kind of information might be a journalistic contribution. Thus, the subject matter is quite broad. Interestingly, the contribution has to be fixed. More accurately, it has to be technically fixed. That's analogous to the phonogram producer's right in Section 85 German Copyright Act. The fixation requirement is important. However, nobody knows exactly what kind of fixation is meant: It certainly cannot cover printed fixations only, but can the HTML code really be the relevant object here? Only the first fixation is protected. Furthermore, it must also be an editorial fixation. There must be a minimum requirement with regard to content selection and/or arrangement. Some minimum element of a creative selection must be present, a mere technical arrangement will not suffice. The core object of protection, as you can see in the preparatory materials, is the press publisher's commercial, organisational and technical activity. That's analogous to the description of the right of phonogram producers in German doctrine and jurisprudence.

What's the new related right's scope? This is set forth in Section 87(f). The press publisher has an exclusive right to make the press product publically available. Please note, the right owner has been granted the making available right only. Jan Hegemann earlier said that if publishers would enjoy the same rights as the press publishers, they would be entitled to share the copyright levy. That's actually not correct, because the press publishers don't have the reproduction right and that's the prerequisite to share the copyright levy with authors. So, no reproduction right, no distribution right, no communication to the public right in the broad sense and no equitable remuneration as we know it from the Rental and Lending Rights Directive. The right is limited to the making available right as we know it from article 3(2) InfoSoc Directive and this right is even further limited. One has to read Section 87(f) together with Section 87(g) to distil the proper scope. This legislative solution is less than perfect. Section 87(g) limits the right against those exploitive acts performed by commercial providers of search engines – like

Google Search, Bing etc – or by “commercial providers of services which process the content accordingly”. Remember Jan Hegemann’s presentation earlier where he stated that an obvious candidate for this kind of intermediaries might be Google News. Well, it’s not that obvious. Another apparently obvious candidate might be a service like Flipboard. Or maybe even Facebook. Nevertheless, I have put question marks on the slide. The reason for that can be found in the preparatory materials leading up to the amendment. Based on these materials the exclusive right should only protect against those intermediaries and services “that work like search engines”. What’s the defining feature of a search engine? The user puts in a search query. Services that don’t work like search engines are services that present the content based on their own selection. Such intermediaries should not be addressed by the press publisher’s right. Thus, it could very well be argued that Google News does not work like a search engine because there’s no search query. Flipboard does not work like a search engine, because it makes its own selections. I’m not completely sure if this argument will carry the day, but what we thought for sure will be covered by the press publisher’s right, might not be so clear after all.

What about hyperlinking? We’ve already discussed it in the first session. Following German case law, surface and deep links are beyond the scope of the making available right. Recently, the discussions centred around framing and embedding. You might be aware of the controversial approaches to this issue in the Best Water cases by the Federal Court of Justice on one side and the CJEU on the other side with regard to the scope of the right to communicate the work to the public. However, the German Federal Court of Justice held again and again, that any form of hyperlinking does not infringe the making available right as set forth in Sec. 19a Copyright Act. What about snippets? Are snippets individual words or the smallest of text excerpts as mentioned in Sec. 87(g)? The demarcation is highly contested. The slide shows you a number of possible answers to that problem. Most importantly, the Arbitration Board of the Deutsches Patent- und Markenamt (German Patent and Trademark Office) suggested that the use of seven words might be allowed, whereas the use of eight words might be too much, thus infringing the press publisher’s right. Anyway, there is a considerable amount of legal uncertainty in this area. What about thumbnails? Thumbnails are not included in the wording of Sec. 87(g). There’s case law in Germany that basically implemented a fair use approach through contract law with the help of the legal doctrine of implied consent. Does this doctrine apply here as well? Or has its scope been narrowed down to text excerpts only, excluding pictures? Or has the legislature completely overruled this approach by introducing the press publisher’s right? These questions have not been answered yet. There’s an additional problem waiting to be solved: Has the CJEU’s interpretation of the public communication right in *Svensson* any consequences to solve the use of thumbnails in search engines? It could be argued that this use does not make the work available to a new public either. If that is the case, the use of thumbnails does not infringe the press publisher’s making available right after all.

What are the consequences of the press publisher’s right? It had explicitly aimed to provide the press publishers with a means to share Google’s revenue.. What happened? First, Google started with requiring press publishers for an explicit opt-in for listing content on Google News. Secondly, the main German press publisher took over VG Media, the collecting society, and transferred to it their exclusive rights. VG Media proposed royalty rates, eventually claiming six percent of the search engines’ total revenue before taxes and it applied for a settlement proposal to be issued by the Arbitration Board at the German Patent and Trademark Office. In the third step Google went a step ahead and required an explicit second opt-in in writing from those publishers who had transferred

their rights to VG Media if they want their content to be used in Google News. Additionally, Google required their written consent regarding snippets and thumbnails, if they want that content to be presented on any Google service. The publishers instructed the VG Media to give that consent. Afterwards they filed a complaint with the Bundeskartellamt and then they filed a law suit at the Landgericht Berlin (Regional Court) against Google, both times complaining about presumed abuse of a dominant market position by Google. I will focus on this problem.

The Federal Competition Authority issued its decision last September and it made very clear that an exclusive right is but an instrument to monetise content on the marketplace. The right does not guarantee the success of this enterprise. Neither does competition law compel a service platform to change its otherwise legal business model. Furthermore, both of Google's opt-in requests were justified. They are necessary means to avoid liability caused by the considerable uncertainty of the scope of the press publisher's right. What did the Regional Court in Berlin say? We don't have the verdict in writing yet, only the press release from February is available. However, the Regional Court basically shared the Competition Authority's point of view. The equilibrium between the press publishers and Google's services would be harmed if Google were forced to pay even though it decides not to use the press publisher's content.

A few final remarks: The ancillary right in Germany has been a complete regulatory failure. It promised way more than it could ever deliver. Eventually, it re-created, with regard to Google, exactly the same de-facto situation as before, however, with substantially higher transaction costs. The ancillary right – and this is a point regulators really should look into, particularly with regard to Google – is also responsible for possible competitive disadvantages of other search engines. Finally, copyright law needs technology and media sensitive access rules. The German press publisher's right as an exclusive right does not meet that standard. Thank you very much

**Professor Bernt Hugenholtz:** Thank you very much, Michael, also for presenting all this [inaudible 00:14:48] incredible speed [inaudible 00:14:52] with all his Germany experience. I now challenge Raquel—

**Professor Raquel Xalabarder:** ...to do the same! Thank you. Thanks to the organisers for inviting me. It's always nice to be in Amsterdam despite the weather! I've been told to do the Chronicle from Spain. Back home in Barcelona, today is a sunny day of Sant Jordi and we celebrate love and literature and we give each other books and roses. So, if you allow me, I'm going to call my presentation "the chronicle of a death foretold". It's not going to be as magic as Garbriel Gacia Marquez's work but it's still a death foretold that I'm going to tell you about.

The Spanish amendment of the quotation exception came as a surprise. The Spanish Ministry of Culture had been working on a bill to amend the Copyright Act on a few specific topics that needed urgent action. Over a year and after several drafts (which had been assessed by different bodies, as mandated by law, before the bill is introduced into parliament) none of them had included this provision. That provision appeared at the very last moment, when the government approved the bill to be introduced into parliament. Maybe because it was done fast and unexpectedly, the provision is poorly drafted. That's the very first problem. We know what it wants to say (the minister of culture said it the very next day -he basically said: "... aggregators are making money. News publishers are



losing money. We want one to pay the other ") but that's not what the enacted provision says and you'll see why.

There was also another big problem: a problem of timing. The day before the government was passing this bill (including the surprise provision), the Court of Justice of the EU had ruled on *Svensson*. Accordingly, if linking to freely available contents is not an act of making available, it's not an act of communication to the public, then there's no reason to introduce a limitation that allows communication to the public through linking.

It doesn't say too much about the Spanish parliament but the bill went through the whole parliamentary proceeding (in two chambers) intact. There were several amendments to delete it and to amend it (i.e., to make the collective management non-compulsory or to delete the remuneration). But nothing happened. We all saw it was poorly drafted and that it was going to crash but the provision left the parliament as it had entered. None of the political parties wanted to pick up a fight with the press, I guess?.

So, what is it? It consists of two limitations "disguised" under the quotation provision: One limitation authorises the making available to the public by providers of aggregation services of "news" contents available online (notice that I put "news" in brackets because it covers far beyond news), subject to an equitable compensation which is unwaivable and is mandatorily managed by collecting societies. The second limitation applies to search engines (for the making available of the same contents and for free) but I think we're not so interested in this one.

Here's the text in English, forgive me for the multiple colours but I thought it could make it easier to explain.

So, the statutory limitation allows the providers of digital services of contents aggregation (in short, aggregators) to link to contents ... what contents? Take a look at the blue part: *contents, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment* This goes far beyond news! Any Twitters, any Feedly RSS, any blog providing links to contents available online ... may qualify as an aggregator under this broad language.

The limitation authorizes "the making available to the public" (not the reproduction) "of non-significant fragments". Excuse me? If there is any act of exploitation clearly involved in the provision of links and aggregation services it's precisely an act of reproduction, not of making available online, right? And if there is an act of making available to the public at all (despite the CJEU in *Svensson* said no) it is of the whole work linked, certainly not "of non-significant fragments". Furthermore, even if we try hard to make some sense out of the statutory language and we assume that what the provision is authorizing is not the making available of the whole linked article, but only of the fragments (the title and snippets) shown as a result from the search and to activate the link –notice that *Svensson* didn't address this issue- then we could be discussing whether it was necessary at all (since it might be exempted as a quotation already), whether it was sufficient (since it would require to also cover the reproduction) and whether the compensation is justified at all (since it is only authorising the making available of "non-significant fragments") ...no compensation would be justified if it's not significant! Even the press publishers, in the previous panel, were saying that the title and the beginning of the article is where the "information" is; the title and few opening lines are indeed a significant part. In short, so poorly drafted that it fails to achieve the intended goal.

Let's go to the red part now. This statutory authorization is subject to compulsory "equitable compensation"; compensation, not remuneration; to compensate for the damage caused. It is unwaivable, not inalienable; does this mean that the authors could be transferring this compensation?, maybe not so after *Reprobel*? But look: we're not talking about authors here, we're only talking about "publishers or, as applicable, other rights owners". The author is out of the loop. Despite being a limitation to author's rights, it clearly benefits publishers, not authors. The compensation will be only effective through collective management. Compulsory collective management makes sense if it's an unwaivable remuneration right (so that only the collecting societies can manage it) But, was it necessary? Compulsory collective management and unwaivable remunerations/compensations are usually justified when the market doesn't allow for this kind of licensing; but here there was no market failure! In fact, the Spanish authority on competition and markets (CNMC) issued a second report, after the bill was introduced in the parliament, to specifically evaluate this provision and said that no market failure had been proved to introduce this limitation and that it will have anti-competitive effects.

On top of all of these disgraces, now look at the green part. "Contents" subject to this limitation includes all kind of works, not only news, not only printed news, but also music, documentaries and audiovisual recordings. However, photographs are expressly excluded. Don't ask me why! And notice (look at the green part) that it is not clear whether it's saying that the making available to the public of photographs, as in "posting photographs" needs an authorisation? Or that the making available as in "linking" to photographs available online? It should be the later, of course, but look at the clumsy language!

In short, that's what happens when you do things fast and the night before and then no-one cares to make it better.

The second limitation, for search engines, refers to the same contents as above; It even refers to "isolated words"(I guess we copied it from the Germans?). There's no compensation for this limitation, but it's subject to three conditions (the green ones): one of them says "without its own commercial purpose". Does anybody know what this means?.

This provision is dangerous for several reasons. It is dangerous for what it says. Because of its clumsy language, It may end up applied all over the internet (which works on the basis of linking to contents), basically generating a system of cross-subsidised agents: every blogger/linker is going to be a debtor and a creditor of this compensation. Because of its broad scope, it may apply beyond news, but also beyond Spain because of the non-discrimination principle on the basis of nationality within the European Union. This means that not only Spanish newspapers could benefit from the statutory compensation but also other EU newspapers, as long as the aggregation is done in Spain? How are we going to assess this? ... on the basis of the top level domain name .es? on the basis of where are located the users of the aggregation service? on the basis of the contents being in Spanish language?

It is also dangerous for what it does not say! Who is going to pay for it? It could be the providers of the aggregation service? It could be the providers of the hosting or access services? Could it be the government on the State budget?

And, last but not least, it is dangerous for what it implies! Basically two:

- what will happen with all the other licensing or all the other aggregation and all the other search engines, that are not covered by the limitation? Does it mean, interpreting a *contrario*, that they will need a licence from the owner of the linked contents? such a conclusion would be contrary to *Svensson* and to the interpretation done by the Court of Justice of the EU

- And what about linking to unlawful contents? Will it be authorised by this limitation? It doesn't say "lawfully posted contents". Is linking to unlawful contents going to be authorized and compensated ? ..., and compensated according to the damage caused? The limitation may turn into an unintended laundering machine for linking to unlawful contents!

It's an ancillary right, disguised as a limitation, and imposed on all publishers, which may not be always beneficial to them . (a group of news publishers opposed that provision from the very beginning) At the end, as the minister implied: we're going to subsidise one industry with another.

So, what happens now? Nothing. Business goes on as usual, as if it had never been enacted. Google News closed the Spanish news web a month after the provision was enacted. According to the available data, no major effects in traffic (maybe three percent loss, maybe nine percent loss –depending on sources)? Maybe the Spanish people don't read newspapers online? Maybe they don't search for news? Maybe they just go to the newspaper website they like, they prefer to be fed the news and don't care about what other newspapers may have to say? Or maybe it's just that news can still be searched through the general search engines and through other (non .es) news aggregation sites.

Menéame which is the big news aggregator in Spanish is basically doing the same. They know they risk being sued but neither the publishers nor CEDRO (the CMO for press publishers which should be licensing it) are doing anything in that sense (not even negotiating a license for it).

As I told you: the chronicle of a death foretold!

The only hope is that if any measure is adopted at EU level, it doesn't go the Spanish way.

**Professor Bernt Hugenholtz:** Okay. That's the German and the Spanish experience. It's now for Søren Christian to tell us about what happened in Denmark.

**Mr Søren Christian Søborg Andersen:** Hello. I'm Søren Christian. I also am very pleased to have been invited to come here today giving me an opportunity to visit Amsterdam for the first time actually and I find it very confusing but I managed to find my way here and I hope you will enjoy what I have to say.

I come to you fresh from the battlefield. Denmark has been disproportionately well represented in recent European copyright litigation, not least of course as a result of not one but two references to the European Court of Justice in *Infopaq* which was a case that I was very intimately involved with, *Infopaq* at the time being my client. I'm going to tell you a little bit about four Danish cases that I actually think say a lot about what we are all thinking about in the context of this seminar and it's quite interesting actually to see how the litigation in Denmark has developed over the years because it brings together a lot of

the issues that people are coming to this debate with. I'm not going to start therefore with Infopaq because that's a relatively recent case. I'm going to take you back to 1987 where this of course is before the Internet but nonetheless there was a Danish service called [Online Avisen? 00:30:37] which translates directly into online newspapers. What Online Avisen was doing was basically to write resumes of newspaper articles and provide those resumes to clients. Today we would think, I hope, that that's a relatively uncontroversial service, not infringing anybody's rights if you're doing it that way, but 1987 the Danish Association of Newspaper Dailies actually sued Online Avisen and argued not in the first instance copyright infringement but a breach of fair dealings. Okay. So, what the newspapers were saying in the eighties was that essentially this service was freeriding on the efforts that the news providers had undertaken and this case went to the Danish Supreme Court and the Danish Supreme Court rather emphatically said no, this is not a breach of fair dealings. You are in fact allowed to provide this service, notwithstanding that of course it is based on the efforts of somebody else. So, since the eighties, Danish law has said very clearly in principle as a business model this is allowed. Okay. So that's a very important point of departure from a Danish context and may be a discussion which is still outstanding in other countries and it's important to remember of course that fair dealings, which is essentially a branch of competition law, is not harmonised on a European Union level, so we can have different approaches here and not least keep the ECJ out of it.

Some time went by and the internet arrived and it didn't take long of course after the advent of the internet before Denmark also experienced news aggregation services much like the ones we know today, and one of the early entries on the Danish market was Newsbooster and the battle between the Danish Association of Newspaper Dailies and Newsbooster resulted in a ruling which is in the handouts that you have been provided with today. In that case, the newspapers won. They were actually able to injunct the Newsbooster service, not on the basis of copyright infringement but, as I would assume is interesting to a lot of you, on the basis of database rights. However, this ruling is from 2003, so it entirely predates the Fixtures rulings from the ECJ and, in my opinion, the Newsbooster case isn't really worth anything today because it doesn't apply the fixtures criteria from the ECJ and there was no evidence whatsoever in those proceedings concerning whether in fact an online newspaper service is a database in the sense of the directive. So, don't look to Newsbooster for conclusive finding on that front. Also, bear in mind that the Newsbooster ruling was actually... or Newsbooster actually went bankrupt during the proceedings and the estate, the administrator decided not to contest the case any further, so essentially what we ended up with was a summary judgment and we all know the value of those kinds of rulings.

Three years later, there was a third Danish case which I also had the privilege of working on called Ofir, the Ofir case, which was not such a news media case but a very interesting example of a national court actually, in my opinion, applying the fixtures criteria correctly. The case was between a Danish real estate broker, or actually the biggest Danish real estate broker, and a portal service called Ofir and what Ofir did was that it actually aggregated all of the real estate brokers' listings online in its own portal. Now, again this raises issues of freeriding concerns and also of course database rights and the case came to court and was very heavily litigated and full evidence and the court found that the real estate broker did not have database rights in their online listings because, essentially, it is a spinoff of their main business which is to sell real estate and they had not provided evidence of a substantial investment in the accumulation of information as such, and the Danish court said explicitly in the reasoning that it is the purpose of the database directive

to provide protection for that specific investment and there was no evidence to that since then we have not seen any attempts in Denmark from newspapers or other media to invoke database rights.

Infopaq accordingly was not about database rights. It was actually about a technical procedure involving scanning of prints. Infopaq was originally a traditional resume writing news service and what they wanted to do was to rationalise some of their processes and introduce less man hour demanding aspects and one way they thought they could do it, again it was before the dawn of the internet as such, was to simply scan print copies of newspapers and identify keywords in doing so, rather than having to read every page of every newspaper to identify the keywords. When the Danish Association of Newspapers was aware that Infopaq was going to do this and we decided to pre-emptively sue the Newspaper Association and apply for declaratory judgment, not knowing that this would result in two references to the ECJ and almost ten years of litigation but I'm sure you are well aware of what happened in the ECJ and they essentially decided at the first round to answer some questions that we actually didn't ask, so we had to go back with seven more questions to focus on the technical process that was actually the issue in the matter and I am glad to say that I think we won on that point. Thank you.

**Professor Bernt Hugenholtz:** Thank, Søren. Our last speaker and [inaudible 00:29:17] from the United States. I'm sure the US has its share of similar problems without probably the issue of a neighbouring right being part of the discussion. I give you the floor.

**Mr Chris Beall:** Thank you, and I may also not only be one of the few Americans in the room. I'm one of the few former journalists in the room. Before being a lawyer, I was a newspaper reporter. When I was a newspaper reporter in Las Vegas, Nevada, I was enraged whenever the radio station or the TV station would pick up the newspaper and read on the air the story that I had written the night before that delivered the news that I thought was interesting. The concept of being enraged and wanting some reparation around that feeling is in some ways where copyright law emanates from; the feeling or notion that the author has some right to control the use of his expression. In the US, as an ink-stained wretch, I had no reparation. My words were not owned by me. They were owned by the newspaper. The newspaper... this is the work for hire doctrine in the US, the newspaper didn't feel a need to go after the TV or radio stations that were broadcasting the words that I had written because they felt no threat. The concept of a misappropriation tort or the hot news tort doctrine in the US was such that... is such that there was no need for the newspaper to go after the TV station because the TV station wasn't obtaining sufficient revenue off of the exploitation of the newspaper's content that it was a threat to the newspaper. I mention all of this because that paradigm of ripping and reading... is what we used to call it... ripping and reading the content from the newspaper and disseminating it through a different medium is exactly what Google does. It's exactly what the aggregators do and it is the paradigm that it was okay for TV stations and radio stations to do this that led to, I think, some sense that aggregators were not harming news organisations, that there was no enough of a damage to the business model to use the words that there was a need to pursue legal action. And as a result, I think, Google and other news aggregators got a foothold, a precipice to hold onto and, lo and behold, we learned that the medium of digital aggregation was much more powerful than TV or radio ever was and I think there is room for debate about whether or not digital aggregation is replacing newspapers.

The slides shown about the decline in revenue and the decline in advertising for print news organisations are dramatic. They are similar in the US. An interesting question is the extent to which dollars for advertising have been replaced by dimes or pennies for digital impressions. Ultimately, the same decline that has occurred in the UK in terms of employment of news organisations has occurred in the US and, interestingly, the same increase in employment for PR, as news organisations have gone down, PR organisations have gone up. I was asked by Richard to speak a little bit about the hot news doctrine in the US. It emanates from a case, this will be the earliest citation we've heard today, from 1918, *INS versus AP*, the Associated Press, a client of mine. I did not represent them in 1918. The circumstances, if you don't know of the case, are interesting and they speak to the fundamentals of the concept of a hot news tort, and it is that the Associated Press would have reports and they would put the reports in the window of the Associated Press's office in Manhattan, and William Randolph Hearst, he of the robber baron Hurst Mansion out in California, had a news service called INS International News Service and he had folks go to the window of the Associated Press and read the AP's reports. Mr Hearst's wires were faster than the AP's wires for reasons that I don't understand and the news got to the west coast faster than it got on the INS's wires than it got to the AP. This is classic freeriding. This is taking the work of someone else and disseminating it and causing others to pay for someone else's work. It went to the US Supreme Court. The US Supreme Court held that this was indeed freeriding and it was not proper. Interestingly, this was a tort claim in the US. We would consider it a common law claim. It was not a copyright claim. It was not a federal copyright claim and this is an important distinction in the US experience. It wasn't a copyright claim because it was about facts and in the US approach facts are not copyrightable. They are not owned in the free expression context facts are free to be used by anyone. In any event, the US Supreme Court held that this was a tort claim for misappropriation taking the labour of someone else.

Fast forward a hundred years to today when the kind of freeriding that occurs is for example *Fly on the Wall* case. *Flyonthewall* is an organisation that aggregates the stock recommendations of various stock brokerages that buy, sell or hold recommendation of Merrill Lynch or others. The court held in the *Fly on the Wall* case that what *Flyonthewall* was doing of disseminating the buy, hold or sell recommendation was what news organisations do and it was news that Merrill Lynch recommended to sell AEG stock and that as a results of its news collection effort, *Flyonthewall* which otherwise looked to the stock brokerages as an aggregator, was in fact a news organisation and entitled to disseminate and therefore not barred by the concept of freeriding. It was not freeriding because it was merely disseminating facts, not expression. Contrast that decision to the *AP versus Meltwater* case in which *Meltwater* was doing something very similar. It was aggregating AP's content. The court held in that case very much in line with *INS versus AP* that *Meltwater* was indeed freeriding. That there was an improper exploitation of the labour that AP had put into generating the information that *Meltwater* was disseminating.

In between those cases in an interesting case involving *Bloomberg News* which was recording, interesting, the stock recommendation, the stock performance reports by *Swatch*. *Swatch* is not a listed stock in the US and therefore not subject to SEC's, Securities and Exchange Commission, regulations around disclosure and it would have closed calls with stock analysts. *Bloomberg* was such that it was able to get someone who was part of those closed calls to record the calls and provide the recording to *Bloomberg*. *Bloomberg* then disseminated the recording of the calls that *Swatch* was having with analysts. *Swatch* sues. *Swatch* says copyright and... I'm sorry, doesn't say

copyright because Swatch doesn't own the content in the expression but does say hot news, misappropriation of the value, freeriding on our effort. The US second circuit finds that that was first a fair use and second not freeriding because there was value in what Bloomberg supposedly was doing by providing the actual words and the actual sound of the recording. That there was value in the inflection, value in the tone of voice and that Swatch didn't own that and that therefore Bloomberg was providing news information through that dissemination. Ultimately, and so Bloomberg was held not liable in that context for disseminating the content of those stock analyst calls, I don't think there's a sort of sum it up kind of conclusion around this except to say that the American experience is one where the intersection of the hot news doctrine and copyright law and in the US experience the fair use concept has made it tremendously unpredictable to advise clients about what the outcome will be, whether your client is a news aggregator or a news generator and as a result of that uncertainty, it's what was suggested before the US experiences. We don't go to court. We negotiate licences. We negotiate.

**Professor Bernt Hugenholtz:** Thank you, panellists, for four very different portraits of legal developments in different jurisdictions, but there is sort of a common thread here. A lot of what we're hearing is not really working, at least not from the prospective of news publishers in need of some help. I have a specific question to both of our first speakers, Michael on Germany and Raquel on Spain. You both concluded that these new instruments were not effective, different instruments, an exclusive right approach and a remuneration right, but you also criticised the drafting of your national texts. My question to both Michael and Raquel is could a better drafted version of your national legislation have helped? Would that have led to an income stream from Google but in particular to the news publishers in need of support? Michael?

**Professor Michael Gruenberger:** Well, it depends what you call a better version. It would have been possible. The first draft introduced to the German Bundestag was more specific and particularly the exception with regard to individual words or smallest of text excerpts was not found in the first draft. However, that prompted the question if we're going too far in designing exclusive rights and precluding others from the use of this kind of information. The public debate centred around the issue if the original proposal would make it too difficult to share this information even in cases when such sharing is perfectly reasonable and economically viable. The problem with the bad wording, at least in the German case, is the result of a compromise trying to balance exclusive rights on the one side and the necessity of access rules to favour the usage and competition on the other side. What the result might tell you is that compromising in creating a new ancillary right might not lead to desirable results at all. It might not please any side. Moreover, it hasn't had any considerable effect on Google's business. Google had enough market power to get the consent. The downside of this regulation, however, is that it stopped a lot of small services. That's something regulators really need to consider. We try to target Google with either exclusive rights or with remuneration rights, but in the end, and that's my understanding of the Spanish law, we target European service providers, possible competitors to Google, thus making it harder for European businesses to successfully enter this market. It is quite ironic that we discuss an ancillary right at the same time we're investigating on the European level the service practices of Google. I caution not to strengthen Google's dominant market power through badly designed IP laws, thus making the competition authorities' job even harder.

**Professor Bernt Hugenholtz:** Now, that's a very important point. Raquel?

**Professor Raquel Xalabarder:** If it had been better drafted (and specifically referred to news aggregation), probably the effects might have been not as bad as I anticipated, still it looks like Google was not affected. Google simply closed the Google news site and went on with its business. Instead, such a provision puts a Damocles sword on top of the small aggregators and blog sites which fear that maybe one day the newspapers will come and ask for the compensation. On the other hand, even with a better drafting, I don't think that this is a good provision for newspapers... be careful what you wish for! With such a limitation, they will not be allowed to negotiate the linking price for each newspaper (as they can now do under the "press-clipping" limitation), or prevent aggregation of their contents. In principle, they should not be allowed to use robot exclusion protocols to prevent indexing and linking because it's a mandatory limitation. So, even with a better drafting, the result would have been the same or worse..

**Professor Bernt Hugenholtz:** So, does the law say that the newspaper publishers cannot technically prevent searching?

**Professor Raquel Xalabarder:** Yes. Well, it doesn't expressly say so but it is designed as a mandatory statutory licence, it means that they are forced to let aggregators link to their contents, subject to compensation. The irony is that newspapers were complaining about Google making money but they have not been using any robot exclusion protocols either! I am afraid that it looked like a good idea that night, but they ended up with something that's not in their best interest (of the news publishers).

**Professor Michael Gruenberger:** As Jan Hegemann said earlier, first discussions started in 2009 and the final act was passed in 2013. We had four years of intense discussion and legal debate. The result is puzzling: If legislation is enacted very fast, as it was the case in Spain, the result most likely will not be admirable. If we take our time, the result might not be very much better either.

**Professor Bernt Hugenholtz:** Okay. I will give you the floor in a second. Okay? I am sure you have a repost but first I have a question along the same line to other panellists here. Chris, you told us about the good old hot news doctrine, almost 100 years old now, and of course we've heard similar arguments and also attempts to implement similar doctrines of misappropriation here in Europe, a fact that Bjorg [Fissal? 00:56:42] already mentioned freeriding as possibly subject to unfair competition claims. Some countries it will work, in others it won't. My question to you is, probably saw this one coming, has the hot news doctrine been applied to Google in the US?

**Mr Chris Beall:** The answer is no and the reason is in large measure a function of what I mentioned at the end. What happened is that Google and Yahoo both entered into negotiations with major news organisations and they engaged in... it resulted in licences that were not compulsory but did result in revenue coming to the news organisations. The trouble has been that the news organisations' revenue from those licence arrangement has not kept pace with the decline in advertising. There is an interesting for the economists in the room question as to whether or not the news organisations' declining revenue has been caused by news aggregators. I think the focus from Google would vehemently dispute that there is a cause and effect relationship but in any event the answer to your question is Google has never been charged... no claim has ever been brought against Google as a result of a hot news theory and in large measure it's because they negotiated licences.



**Professor Bernt Hugenholtz:** On what basis did they negotiate the licences if their use applies... if hot news is dubious? Was it a purely voluntary arrangement?

**Mr Chris Beall:** We tell you that if there are four lawyers and you ask four lawyers for a copyright opinion about fair use, you will get five opinions and the reason... and that uncertainty is the reason why the news organisations and Google reached a negotiated agreement because they couldn't predict what the outcome would be and the businesses are much more likely to want predictability as opposed to outright ultimate victory. Ten years of litigation is just not what a business can live with. It wanted a revenue stream that they could count on.

**Professor Bernt Hugenholtz:** Okay. Thank you for this first round of discussion. I'm sure that everyone in the audience is aching to contribute and ask questions. Professor Hegemann already was aching visibly.

**Q:** It's just one remark. I'm perfectly in line with what Michael Grunberger said that the German legislator could have done much better than he did. It was a four years discussion and it's the perfect example, if you look deeply into it, on lobbying, on counter lobbying, on making compromises and then that was when I intervened, yes, we did a long discussion but most of the things of one very, very important thing that causes all these problems now came into the law just in the last minute. These are the single words, the groups of single words that is excepted from the right. That shows how difficult that is. That was a last minute decision and it reminds me or I see very similar to what happened in Spain.

**Professor Bernt Hugenholtz:** Okay. Other questions. I see a few hands there in the back. Yes, over there in the back.

**Q.** Hi.

**Professor Bernt Hugenholtz:** You already have a mic. Okay. Please state your name.

**Q.** [Duvena? 01:00:23] from [Inaudible 01:00:23] the consumer organisation. I have a question for Raquel in relation to the Spanish law which actually quite intrigued me and this... [inaudible 01:00:33] the character of equitable compensation. So, how this would work or could be applied in practice? What are the elements that will be necessary to assess that there is a harm and then to quantify the necessary compensation? Any views on that?

**Professor Raquel Xalabarder:** Well, in the report issued by the Spanish authority on markets and competition, it said precisely that the government passed this provision without any evidence that there is a problem in the market, a damage that needs to be compensated; and the truth be told, no evidence has ever been produced by the government in that sense, not even through the year of parliamentary proceedings. So, your question was how will the harm be assessed to quantify the compensation? The collecting societies must establish their fees according to the criteria regulated in a Ministerial Order. One of these factors is the revenues generated by the user / exploiter of the copyrighted work. So, who knows? ... if we start looking at the money that some aggregators are making ... the sky is the limit! But, as I said, it is an "equitable compensation" ... so your question is the very hard one: how will the damage be evaluated?

**Q.** [Niko Ferris? 01:02:28] from Oxera Economics. About the Spanish case, leaving aside the question of whether the law was well drafted, to some extent it worked in the sense that it had an effect that Google news pulled out of the market. Do you think there is any other scenario in which the law might have had a different effect? I mean given that the aggregators always had freedom to just stop the service, under what circumstances could you have seen a different result in which the aggregator actually changes their business practice?

**Professor Raquel Xalabarder:** Well, I disagree with your premise, I think that the provision did not have the effect that they expected at all.

**Q.** No, no, no. I'm not saying that. I was—

**Professor Raquel Xalabarder:** I mean they didn't expect the Google news to close down.

**Q.** Of course but it wasn't... the aggregator wasn't indifferent to the new law. They did have a reaction. So, what other reaction could there possibly have been given that they were always free to just stop the service?

**Professor Raquel Xalabarder:** Given that? I'm sorry.

**Q.** They were always free to just say we are going to shut down.

**Professor Raquel Xalabarder:** Well, my guess is that they expected, - naïvely if you want- that it would force Google to sit at the table and get the publishers more leverage (in front of Google) to dictate the terms for a compensation... which didn't happen.

**Q.** So, do you—

**Professor Raquel Xalabarder:** Well, it didn't happen on the terms of the law. It's also true that a few months after, there was a major Google agreement which involved El Pais and other big European news publishers (you may know more about it than me) ... the digital news initiative? to provide for research funds for journalism and digital technologies After that, El Pais (which was the big newspaper behind the Spanish government provision) seems to have lost all interest in enforcing it

**Q.** But not in connection to news aggregation.

**Professor Raquel Xalabarder:** yes, not in connection with that. So, any effects that this limitation aimed at achieving ,it didn't do so.

**Q.** Okay. I'll stop here but where I'm going is that if we have that evidence from Spain and the other evidence that's somewhat different but also points to a similar direction from Germany, I'm struggling to think of how can anything... how can any provision achieve the intended effect of generating that revenue—

**Professor Bernt Hugenholtz:** That's of course a key question for this whole conference.

**Professor Raquel Xalabarder:** Yes.

**Q.** Given that any aggregator can—

**Professor Raquel Xalabarder:** And maybe the answer is not within the copyright law. Maybe we should be looking somewhere else? ... As Richard was saying this morning, there are very many issues here at stake. Copyright may be one of them. But maybe copyright is not the best tool for this matter

**Professor Bernt Hugenholtz:** Maybe, yes. Søren has something to add.

**Mr Søren Christian Søborg Andersen:** Yes. I actually do have a comment touching on that specifically because I want to bring back what Dirk was saying in the earlier session and of course it's fascinating to hear the experiences from Germany and from Spain but I would like to point out as Dirk did earlier, because I also had the privilege of representing quite a lot of broadcasters and they have, and have had for decades, an ancillary right and I can tell you that they're hurting too. You know, so they blame YouTube which is essentially also Google but they're also... their business is declining because the behaviour of their consumers is changing. Okay. So, I propose to you that if the intended result is to generate more revenue for news publishers, the example of the broadcasters tell you that the way to achieve it is not to introduce a new ancillary right. You have to find something else.

**Professor Bernt Hugenholtz:** That's a very interesting point. We have two questions in the room. [Til Koratsa? 01:06:37].

**Q.** One remark to the so-called law, of the German law, with regard to the tiniest excerpts. Would they exempt it in the last stage of the procedures? And that is no coincidence that we have this thing which is so hard to handle. It represents and proves the internal struggle within the government, the German government, because there were two parties in the coalition who had to agree on that and the one party, the liberals, were totally opposed to the ancillary copyright in the broader sense, completely, and the conservatives, they wanted it. So, it was a compromise to say we simply leave the question open whether the linking and snippeting in search engines of a common kind of nowadays is covered by this right or not, so let the courts rule it out and we might say this is the worst decision they could ever take, right.

**Professor Bernt Hugenholtz:** Comment over there or question.

**Q:** [Kristoff Pohen? 01: 07:57] [Inaudible 01:07:58] Association. I have a short question for Michael Grunberger concerning the pricing. What I have not understand as of now is what is actually the key criteria for finding the pricing? Are we trying to value the content that is offered by the publishers or are we trying to value the amount of input that is provided by the publishers to the search engine when they generate income?

**Professor Bernt Hugenholtz:** Michael?

**Professor Michael Gruenberger:** That is a tough question. Let's imagine that Germany had introduced a levy like the Spanish regulation. Then it would have been the collecting society's job to propose a levy. On what basis? German publishers argued that Google was using their content as a crucial part of attracting revenue and they claimed their share in that revenue. We're entering platform economics here and that's a territory I'm not very familiar with, and I should be more careful with what I'm saying than I most likely will be. However, in platform economics there are several key factors in place and the one factor

that we have been discussing here is users' attention. That's basically what the user pays for accessing services. It's the user's attention that several key players in the market compete for. The market participants try to increase user attention by using products – content – that is attractive to users and by making this content easily accessible. There are quite a few players that want to provide content but don't create their own content. They link to third parties' content. They "share" content and it's clear that they provide their service by using other parties' content. Content has to be produced by someone and has to be paid for by someone. I think we all can agree on that.

If there's a levy, how do we establish its correct price? Usually, in copyright negotiations it's basically the right holder who estimates its value and claims a price for the license. If somebody's willing to pay that price, the market has worked. However, we continuously deal with market failures in copyright law. One example is scientific libraries and scientific journals: a complete market failure when it comes to digital subscription based models. limitations and exceptions. The *TU-Darmstadt* case demonstrates that effective exceptions and limitations can be instrumentalized to remedy this market failure by strengthening the user's bargaining power against the publishers forcing them to provide a value added service to libraries that goes beyond the mere scope of the exception. That won't work with a pure levy system. What price should the collecting society ask for? What price should the Arbitration Board at the DPMA in Munich propose to the parties? The German VG Media originally claimed a share of 11 percent of Google's total revenue. Eventually they diminished their claim to six percent. That was too high for the Arbitration Board. Moreover, it's fairly sweeping claim and it lacks any clear assessment about the publisher's actual input and the relevance to Google's users. We simply do not know the price. Hence, the good effect of the American solution is that it forces parties to negotiate. The European copyright system is centred around the permanent injunction. Thus, there's always a possible threat of sunk costs for the user. The injunction can and should stop business models. There are some situations though, where this result is not economically sensitive. Maybe we should take a lesson from the European patent with unitary effect, where injunctive relief is but an opportunity and, moreover, is designed as an equitable relief. If we change the remedy system we would give the parties more space to freely negotiate the copyright licences. That's something we should enquire.

**Professor Bernt Hugenholtz:** That's another valuable insight. I have one more... no, now three hands. There goes first. And we also have only give minutes left, by the way.

**Q.** I will be very, very brief. I just want to add yet another example of something that does not work. That is the database right connected to the Innoweb case. You might be familiar with the Innoweb case. It's a Dutch case about a website, a [method? 01:12:33] search engine for websites which they sell second hand cars. In that case, the European Court of Justice was much stricter than in the Svensson case and ruled that in fact it's a parasitic business model and that it's contrary to the database right. So, the owners of second hand car websites now have the right to forbid this method search engine and we're talking about Google here. Of course, I also love to blame everything on Google and say that Google is always the bad guy and that Google is the source of all the problems but here we're talking about a very small method search engine which apparently has a lot of added value which is quite easy to understand because people don't have to visit seven different Dutch second hand car websites. It can just go to one website called [Hospitale? 01:13:16] where they can search all those websites. So, what happened, this one particular website won the case and then it did, as I understand, it did itself it did exercise the right, so you cannot find that particular second hand car website anymore on

Hospitale but you can find all the others because apparently all the other second hand car websites in the Netherlands agreed that it was actually a good thing to be more visible, not just through Google but also through this very small method search engine called Hospitale. So, apparently also in this situation, if there is some kind of method search engine which has really added value in the sense that consumers like it, it's a good thing.

Just one more example and I'm a bit more involved in it so I have to be careful, we have in the Netherlands a radio portal called Nederland.FM. The radio portal has just 40 links to websites which have radio stations on and a lot of advertising and initially a Dutch court ruled that that's actually an infringement of copyright. It was pre-Svensson that hyperlinking was an infringement of copyright. Based on that, a deal was made. A percentage was paid to the collecting society. It was no problem. Problem solved. Then came Svensson along and all of a sudden there was no reason for payment anymore, at least not to the individual authors but there is an arrangement between the radio portal and radio stations. The radio stations have a [pre-roll? 01:14:36] preceding every broadcast available through the radio portal, so they've made money out of that also. So, they also have a nice deal. In that position, the radio stations which are in the same position as a news publisher have concluded the deal just on contract laws.

**Professor Bernt Hugenholtz:** Okay.

**Q.** But the individual authors don't get anything. That's a bit of a pity.

**Professor Bernt Hugenholtz:** It's a bit more than a bit of a pity. I think, yes, we have three or four minutes left. We have two hands. Yes, you're first. Andrew.

**Q.** Andrew Hughes, NLA Media Access. I think everybody wants a free market solution and a negotiated solution but the problem is the market isn't free because there is a great imbalance of power in the market and therefore you end up looking for solutions and the solutions will tend to be clumsy solutions. You know, we've had levies in most European countries, not in the UK, for years. That's a pretty clumsy solution. I think we're talking here about a big gap in the funding of news and as the Spanish minister says, the aggregators are making money. They should give some to the news players. They're trying to achieve that. It's always going to be clumsy. I think you have to decide whether you want to address that gap or not and I think being gleeful that the gap hasn't been addressed by the clumsy solutions doesn't really take you very far forward.

**Professor Bernt Hugenholtz:** But there's a valid question here, of course, raised by many now, I think. Why aren't the newspaper publishers in Europe doing this negotiating with Google? They have portrayed themselves as very small compared to Google. Of course they are at the individual level but if you collectively would look at them, I actually remember that some of these are part of very large media companies that are—

**Q.** [Inaudible 01:16:26]. I tried once. They refused to negotiate. They just refused to talk about [inaudible 01:16:34].

**Professor Bernt Hugenholtz:** They, Google, you mean?

**Q.** Google, yes, and—

**Professor Bernt Hugenholtz:** But apparently they are talking to newspaper publishers in the US, so I was just wondering.

**Q:** It's a difference of power, I think.

**Q:** [Inaudible 01:16:43] collective negotiation or individual. Individual of course happens. Collectively, there are rules about competition which make them nervous about working together and they have very different strategies. Financial Times I used to work for, [Paywall? 01:16:56], Guardian, chasing traffic. They're all confused about the future. I think most people should be confused about the future. We can't see it. It's tough to see but you do need to decide whether you want to address the news deficit and then you need to decide how to do it and I think being happy that solutions aren't working isn't really a very mature response to that issue.

**Professor Bernt Hugenholtz:** I don't think anyone's said they're happy.

**Q:** I detected a degree of happiness that the German and Spanish publishers' attempts are failing and I don't think that's a very mature response to the situation.

**Professor Bernt Hugenholtz:** Raquel, do you want to respond?

**Professor Raquel Xalabarder:** Just let me add one comment. As I see it, Google doesn't want to talk about licensing copyright and this is the only thing the newspapers want to talk about! Google says: let's split revenues, but let's not talk about copyright. Of course, if you need to obtain a copyright license then you start at a different bargaining position; While the newspapers don't want Google to dictate the terms (on how to split revenues) if they can license copyright, they are in a stronger bargaining position than Google because they have the exclusive right... But now, in Spain, they don't even have that! They only have a right to be compensated. So, I really think they miscalculated what they wanted ... and needed!

**Professor Bernt Hugenholtz:** Okay, quick last question but really very short.

**Q:** I'll be very quick. Just to the point of pricing that someone made, we've [inaudible 01:18:23] similar question in the context of TV distribution which is a very similar economics and in commercial context what you do there is you compare how much money would be at stake on each side of the deal, so how much revenue the platform would lose if the, say in this case, a linking didn't happen and also how much the publishers would lose, and if the two are more or less similar, you can agree on some sort of zero point that nobody pays, [pays the other? 01:18:51]. If it's very imbalanced then the negotiation might go in the other direction. The regulations, when there are regulations about this or some sort of arbitrator outcome, sometimes they try to mimic that. Sometimes it's quite different. We can speak afterwards. In the particular case of Spain, I forgot to mention in my first question, there's a study by Susan [Athey? 01:19:11] from the States that looked at what happened to the major Spanish publishers after the shutdown of Google News. She found that for the... all the segments that used to be Google News users, there was as significant drop in their usage of the major publishers. So, it seems that at least for the major publishers there was significant loss for the affected segment which was a very small segment of the overall users. So, it was just a blip but for that particular segment. On the other hand, the big question would be what was the loss for Google? If that was very small, then that would suggest that they didn't have much of a stake in this.

**Professor Bernt Hugenholtz:** Okay. Final round very quick final word for each of our four panellists. Max one minute. Michael, you first.

**Professor Michael Gruenberger:** First, I think it is a lawyer's task to examine solutions that have been proposed and to evaluate them if they work and if they don't work. Should we arrive at the conclusion that neither the exclusive rights approach nor the levy solution will work, I consider it our task to advise policy makers about that outcome. I think that's an important and valuable part. Second, it is quite important to remember that so far we've discussed models introduced on a national level. I would argue against the prevalent opinion that member states are more or less free to introduce ancillary and neighbouring rights as they please. It could very well be argued, that Art. 2 InfoSoc-Directive prevents any reproduction right for right holders not mentioned. It might not be a coincidence that the German press publisher's rights only covers the communication to the public. This is an area that has only be fully harmonized for author's rights but not for other right holders, as the CJEU held in *C-More Entertainment*. Thus, it might be more difficult to introduce neighbouring rights within member states only.

**Professor Bernt Hugenholtz:** Raquel? One minute.

**Professor Raquel Xalabarder:** The Spanish solution didn't work because it didn't achieve what the press publishers wanted: to strengthen their bargaining position in front of Google. Google just closed down, instead of sitting at the table! But, if we're going to look at it from a copyright perspective, we should make sure that it is the authors who get the remuneration, not the publishers. As the Spanish law stands now, authors are not going to get anything, so if it was really a matter of copyright enforcement, we would be talking about a completely different ballgame here. In short, if the news publishers have some sort of freeriding concern against what Google is doing, that should be fought in another area, not within copyright, maybe in unfair competition but not copyright because we're distorting it.

**Professor Bernt Hugenholtz:** Søren?

**Mr Søren Christian Søborg Andersen:** Thank you. I already talked about broadcasters and their experiences in prevailing on the basis of their exclusive rights and I would also just like to point out because I'm unluckily not able to offer the solution, the silver bullet here but I would like to point out that we are at a point in time where copyright as I see it has never been stronger, in part as a result of Infopaq one. So, I also think it's interesting to hear today that copyright holders who were able to enforce their copyright if they wanted to choose not to do it vis-à-vis Google and I think that's an important aspect of what Michael was talking about earlier about the competition concerns that could also potentially come out of introducing new regulation to the benefit of news publishers and from a public policy perspective, I think that I agree that's very important to have taken into consideration.

**Professor Bernt Hugenholtz:** Chris, final remark. What would you advise the Europeans?

**Mr Chris Beall:** I would not advise the Europeans. I would suggest that thinking about it from the public policy question of is the public served by the diminution of employment among news organisations. There's an interesting question and it was brought to the fore by the fact that we still have investigative journalism going on. The Panama papers was an effort

by journalists to collect news that wasn't really under the auspices of a single news organisation and I'm interested in the extent to which the public is still receiving information that it needs to govern itself. They're not receiving it all the time from news organisations. They're receiving it from other sources and that may not be a bad thing. I'm interested in thinking about whether or not the ultimate public good is over the generation of new information and how do we achieve that. Whether it's through an ancillary right, I'm not convinced.

**Professor Bernt Hugenholtz:** Okay. Thank you all. Thank you our panellists in particular for very interesting, diverse contribution and you have deserved not rights but chocolates from The Netherlands and here it is.

[End of recording of session 2]



### **Session 3: Could a new law help?**

**Speakers:** Professor Lionel Bently  
Dr Bertin Martens  
Professor Bernt Hugenholtz  
Marietje Schaake MEP

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**Professor Lionel Bently:** So this morning we reviewed the situation in the newspaper industry and the difficulties the industry seems to be facing and looked at some thoughts on what might be possible solutions to those difficulties, and then in the second session we reviewed a couple of attempts that have been made in Spain and Germany to provide some kind of copyright based solution to those problems and analysed the difficulties and the problems that those particular attempts had encountered. We're now this afternoon turning to the European proposals and the European interests in this zone, so moving away from national law, and last December the commission issued a communication toward a modern more European copyright framework and in that communication it hinted at the possibility of some work that would be done, perhaps some initiative that would be taken in relation to news aggregators. So the commission noted that member states had attempted to find solutions and that these solutions that member states were proposing carried the risk of more fragmentation in the digital single market so that the European Commission might regard it as necessary to consider whether any actions specific to news aggregators is needed. So at that point any intervention that seemed to be going to occur was targeted specifically at news aggregators and was intended to benefit newspaper press publishers.

In March, rather out of the blue I thought, on the 23<sup>rd</sup> of March the commission issued an additional consultation on neighbouring rights that was examining the role of publishers in the value chain and defining publishers as the publishers of press and other print products and the consultation proposed the possibility of a new neighbouring right for these publishers, it gave us no detail at all as to what that neighbouring right would look like and no detail really on quite what it was hoped it would achieve. The consultation comprises a series of questions about how the absence of such a right affects licensing and enforcement by press and other publishers, and the potential impact of a new neighbouring right, the nature of which we know nothing on authors, press publishers, intermediaries and so forth. And it asked these questions and we're supposed to tell what the impact would be without knowing what on earth the right might itself be, and it asks finally whether there's been any impact from solutions in member states producing new, so called, ancillary rights. So that's where we are, we're in a space where we're being asked to respond about a proposal that we can't really know about. The publishers themselves have issued some documentation that helps fill out, I think, some of the things that they want but without giving much clarity to what it is that's in the commission's mind.

So faced with this really unknowable, unknown proposition we decided to ask a number of speakers to speculate about the benefits and problems that might arise from introducing such a neighbouring right. And the first session this afternoon relates to the possible economic effects, to the question of the relationship between the new neighbouring right and other intellectual property rights, regimes that we already have and to the place of this right in the political process. In the final session we'll look at how

this impacts on consumers, on new entrants to the market, particularly new news aggregators and new businesses of that sort, free speech and also the relationship with broader themes of technology and democracy.

So for the first session we have three speakers, firstly to your left Bertin Martens, who is an economics, he did a PhD in Economics at the Free University of Brussels and he now works for the European Commission's Institute for Prospective Technological Studies in Seville in Spain. But having said that that's where he works he will be speaking on this topic in a personal capacity, he's not representing in any way the commission. After Bertin we will hear from Bernt Hugenholtz, you've already seen him as a chair asking difficult and probing questions of various speakers, he is a Professor of Information Law at the University of Amsterdam and needs really no further introduction to this audience. And then finally we'll have Marietje Schaake and I do apologise, I just can't get my... I've been in the Netherlands now for a little while and it's not getting any better for the Dutch having me here to listen to my horrible pronunciation of these words, so I apologise. Marietje is an MEP in the Dutch Democratic Party, which is part of the ALDE Group, she works on neighbourhood policy on trade and technology and she was involved in the European Parliament's dealings with the TTIP, but she is also the founder of or a founder member of the Digital Agenda Intergroup which includes amongst others, Julia Reda, a well-known figure in the copyright world. So, Bertin...

**Dr Bertin Martens:** Thank you, Lionel. I'm an economist and I work in one of the joint research centres of the European Commission, I don't work in the policy group so whatever I say here should not be interpreted as necessarily reflecting the thinking that's going on in Brussels on the policy side. regarding these neighbouring rights. My job is to look at the empirical evidence regarding potential impacts of such rights. Let me start with a few comments. First of all, it is clear that the newspaper industry is under enormous financial pressure over the last couple of years, and some for many years already, and they are losing subscription revenue from print and trying to compensate through digital advertising and experimenting with pay walls on their websites, some more successful than others. They lost revenue on print versions and they're now trying to compensate at least to some extent, in most cases to only a small extent, with digital ad revenue. I understand that they are trying to find all kinds of ways to increase their revenue, if I were in that industry I would certainly do the same thing.

I'm not so sure though whether the news aggregators are their main enemy or the main competitive pressure on their business models. There are many other sources of pressure on the industry. For one thing there are many more sources of news nowadays than there used to be before the internet age; you have bloggers, you have all kinds of people who produce news on Twitter, on Facebook, on so many places on the internet that if you want to read news you can find it anywhere for free basically. And so the newspaper business model is under a lot of pressure. At the same time we should look at the wider picture rather than just the news aggregator case. This morning we talked a lot about Google News as an aggregator and you could also talk about Yahoo News, that's far less important here in Europe but more important in the US. Apple News is now coming up and we should not forget new kids on the block, new big kids on the block like Facebook, who are rapidly making inroads in the newspaper industry with different approaches compared to Google News, and I think it will be more difficult for the newspaper industry in the future to resist the offers from Facebook than it is to resist the offers from, or the lack of offers from, Google News.

Secondly, somebody this morning in the second session used the word 'ripping' when he referred to the fact that a hundred years ago journalists from Mr Hurst's press group used to walk to the Associated Press windows, look what the latest news was, run back to the office and write down an article. Ripping nowadays is a universal phenomenon in the newspaper industry. A study last year on the French newspaper industry by Julia Cage and some of her researchers from Paris Telecom monitored a number of newspaper websites, 50 or 60 newspapers in France, for a period of time. What they found is that as soon as a new event appears on one newspaper's website, within half an hour or 40 minutes it appears on everybody else's website, which means that they are monitoring each other and as soon as something new appears they take that news event, rewrite it a little bit and then post it on their own website. Ripping in that sense has become a universal phenomenon in the newspaper industry, not because of the aggregators, but in the industry itself.

A third comment I wanted to make is that we spoke a lot about the Spanish and the German case this morning, maybe we should also have a look at the Belgium and the French cases where the newspaper industry came to some sort of an agreement with Google News, maybe not entirely to their satisfaction but at least it generated some revenue and some arrangements that were thought to be beneficial, short of a full licence agreement. The negotiated approach may offer some inroads.

Another comment that I wanted to make is that I'm over the last couple of months very much involved in looking at media platforms. Somebody mentioned the word "platforms" and the economics of platforms here. It's indeed very hard to beat platforms and especially large platforms when it comes to the revenue and the attraction that they offer. There is the risk - and we've seen that in many industries, not only in newspapers - that content providers, the ones who actually publish or produce the content, whether it's digital services, media services or even goods - become a sort of subcontractor to the platform. The platform has a lot of leverage on prices and on the margins they extract from content providers. We see that in the hotel business, in airline bookings, we see that in so many industries and the same is happening to the newspaper industry.

Resisting that pressure from the platforms is a very hard thing to do. I understand that the newspapers want to get a fairer share of the advertising revenue that the platforms get from this business. But as an economist, and I think for most economists, the word "fairness" or the lack of it, unfairness, is a concept we have a hard time to deal with. We know competition and the lack of competition in the market and we have some criteria to deal with that but unfairness, well, is ten percent of the share fair or unfair? The German newspaper publishers want to get six percent and even that is a hard struggle, is that a fair share or not? We don't know, as an economist I leave that to the politicians and to sociologists or whoever but I cannot answer that question.

This brings me to a more economic approach to this newspaper business and news aggregation. There is some empirical evidence already. There are by now, as far as I know, five empirical studies that look into this, some were already mentioned this morning. For Spain we have a study done by Nesta, a UK consultancy company, at the request of some Spanish newspaper publishers who were unhappy with the change in the copyright regime that led to the closing down of Google News in Spain. They saw that it diminished traffic to their website and diminished their ad revenue. The Nesta study confirmed that it had a negative impact on their ad revenue. What the study also showed is that users, rather than going through the Google News aggregator that did not

longer operate in Spain, went back to the old Google Search engine and that way found their newspaper articles. But for me as an economist this is possibly the worst of all possible solutions. Newspapers lose in terms of traffic and ad revenue and consumers lose because it sets them back five years in terms of access to internet services. Five years on the internet is like a century in the off line world. Instead of having everything on your App on your mobile phone you have to go back to search. Search on your mobile phone is a tedious business so you only do that on your iPad or your laptop. This creates a lot of transaction costs for consumers, consumers lose and producers lose and nobody gains from this step backwards. It's a lose-lose situation rather than a win-win situation. The German's solution is not that bad in the sense that Google News still operates there. Despite the law the current situation is still the same as it was before the law.

What we learn from this empirical evidence is that the impact of dropping Google News aggregation is actually negative for newspapers. That leaves a puzzling question for an economist: why would newspapers want to do this, have this change in the law, have this neighbouring right when it doesn't bring them any benefits? What do they expect from it? What they expect of course is a larger share, a fairer share of the ad revenue. Whether they're going to get that way I don't know, we'll have to see what the pending court cases, amongst others in Germany, are going to say in the next couple of years on this.

This brings me to a second aspect that is important from an economic point of view. We should not only look at the revenue side of copyright, the revenue for the owners of rights, for the publishers of newspapers in this case. We should also look at the consumers' side. We should try to strike a balance between those two and see who gains, who loses and how much. I'm a public policy economist and I look at the impact on society as a whole, not only on one group of stakeholders in society. With this increase in transaction costs for consumers, consumers lose out. How much is this worth in terms of consumer welfare compared to producer welfare, additional revenue? So far we have not seen any additional revenue for newspaper producers in Spain and Germany but we do see a loss for consumers in Spain.

Another aspect is that we should look at the innovation side. We talked a lot about Google News, one of the giants in this market, but we forget often that there are dozens of other smaller news aggregators in that market and in the case of Spain, for instance, several of those had to shut down as well. These were small start-up businesses and they simply disappeared from the market because the legal situation did not allow them to continue. There's a lot of innovation that's being struck down through this approach and then we have to think about what do we want to do from a European Digital Single Market perspective? Do we want to promote innovation or do we want to protect existing business models? What is the balance between those two? How can we deal with this? This is a very difficult question to answer.

The question is: what is the question? I have been wondering about this whole morning listening to the first two sessions. What is the problem that we're trying to solve? Clearly for newspapers there is a problem: diminishing revenue. Whether that could be solved through an extension of this neighbouring rights? So far the empirical evidence doesn't seem to point in that direction. I try to be very diplomatic on this, maybe there are other examples where there is evidence but so far we haven't seen any of that evidence. The problem from the consumer's side is that news aggregators give them lots of benefits in

terms of lower transaction costs and if that cannot be supported then yes, there's a problem for consumers as well. Can we address this by other means than copyright and can we address this through a platform approach?

The French and Belgian newspapers launched the idea to work through the Google search function rather than the News aggregation function. This may offer some scope for other ways of solving this, coming to an agreement with the Google Search function and that way getting back into the News aggregator. Obviously newspapers, especially big national newspapers, rank very high in the search ranking and so Google would probably be very sensitive to losing that traffic because it's an important part of their traffic in that country. Of course consumers for newspaper reading are rapidly moving to mobile reading on their mobile phones. Then apps and the aggregator become a key entry gate, but there maybe a few years left for newspapers to try to work their way back in to this through the search engine gate rather than through the news aggregator gates. But time is short because consumers are rapidly shifting ways as we've already seen from some statistics for the US that show more than 60 percent of newspaper reading actually now happens on mobile phones compared to four years ago where this was less than 20 percent. It's very rapidly moving, and I think in Europe maybe we have one or two years delay compared to that but we are also moving in that direction.

What we don't have empirical evidence on, and this I think is a big gap in our knowledge, is a wider view on what the impact of news aggregators or the lack of news aggregators would be on overall societal welfare in terms not only of news producer revenue but also consumer welfare. Some researchers have started working in this direction but there's not really enough empirical evidence for that. In order to do this sort of work properly we would have to work with some of these big news aggregators because they have the data to do this. But these are privately held data by these companies and we as researchers have no access to that.

There was some work done by Microsoft in 2012 on these news aggregation sites in France again that shows that the impact of news aggregators varies by type of newspaper - an important message that we should take into account, and again a message that we've seen in many other media industries. What happens is that let's say the middle of the road, provincial or national newspaper that produces a bit of everything but is not very specialised in anything can lose out from these aggregators. But the more high end newspapers, the quality newspapers or the more long tail newspapers that specialise in a particular topic and people who really want to read that newspaper because they're interested in that topic, they don't lose out, they gain a lot of traffic from these news aggregators. It depends as a newspaper on where you are in that spectrum. We've seen these superstar versus long tail mechanisms in many other media industries. Search engines put a lot of pressure on the middle ground but increased the superstar effect and increase the long tail effect. So for newspapers it's also a question of positioning.

One final comment, if I may, that I would like to make is that a lot of the debate this morning implicitly or explicitly referred to the question: how come we got that far? How come the newspaper industry is under such a lot of pressure? Again, as an economist and looking at the empirical evidence, what we see is that there is an enormous increase in the supply of news, I already referred to that briefly, you can read newspaper articles about current events anywhere on the internet for free. But if you want more specialised background or more deeply researched articles that becomes more difficult and you go

to more specialised sites. But even for this specialised news, thousands, millions of bloggers in the world, thousands of Facebook accounts offer you such a rich insight. But it's of course uncured and a lot of the function of these news aggregators is curation. Many news aggregators not only go to newspapers but also to blog posts, for instance. Personally I find in the areas where I'm interested in looking at specialised aggregation engines that follow the subjects that I do, a lot of the news events come out of these blog posts and out of Facebook accounts, and there's simply an enormous increase of supply, an increase in the production of news and if supply increases and demand remains constant the price goes down.

The value of a news article actually goes down and people are willing to pay less for it because there's such an oversupply of it and we've seen that again in many media industries, we've seen that in music, for instance, where you get Spotify nowadays and you get an offer of 30 million songs - basically all the music in the world you can possibly think of - for six or seven euros a month. For every stream of that song the music producer gets paid a hundredth or a thousandth of a euro cent and so yes, they complain it's very little money but you get streamed millions of times and maybe you can still make some living out of that. The destiny for news industries may be the same. How to make a business model out of that, how to build a business model around that in the long run I don't know the answer, but there's certainly going to be a lot of experimenting around us as we have seen in other industries. The music industry has been struggling for ten years, now they seem to get around to that with a few streaming sites that dominate the business increasingly but somehow make it liveable. Whether the same destiny is waiting for the newspaper industry I would not know but again we've seen that in many online industries. I'll stop there, thank you very much.

**Professor Bernt Hugenholtz:** Ask any reasonably intelligent copyright expert, and we're all at least reasonably intelligent, why news is not copyright subject matter, and the answer will probably be: because there is no copyright in ideas, facts and other bits of information. This is one of the first things we learn when we do a course on copyright. It's the idea expression dichotomy, complex words to express this very simple notion, it's a rule that we don't see in our national laws usually, although it is in the United States Copyright Act, but we do see it increasingly in international agreements, such as TRIPS, and the WIPO Copyright Treaty. And it's also, but in a different form, in the Berne Convention, Article 2(8) reads: "The protection of this convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." That's a reflection of this idea that copyright should not attach to facts, it's actually an instruction to the convention states not to grant such protection.

In other words in copyright all Berne union states are under an obligation not to protect news of the day under copyright. There are a number of reasons for not doing this: ideological, systemic, conceptual. Marietje will speak in the next panel on the ideological argument (freedom of expression and information), and this is a very important one and it also of course relates to exceptions and limitations and to journalistic freedoms. But there are also systemic reasons not to grant copyright to news and one of those I think is sometimes overlooked in this discussion. I think you see it also reflected to a degree in current attempts to introduce some sort of protection. News simply does not have sufficient form to generate creative original works to which copyright can actually attach.

Items of information in other words are too abstract, there are only so many ways to express a news item. Let's give the example of the result of a football match and this

will be a bit painful for our chairman, the example is an Arsenal match. Arsenal - Crystal Palace, 1-1. There are only so many ways that you can express that fact, I just expressed it in one way, here's another way: Arsenal 1, Crystal Palace 1 and then there's a third possibility, although I'm not even sure that's correct English, Crystal Palace draw at Arsenal, 1-1. Choosing between one of these only handful of possible expressions is not a creative choice that can or even should be rewarded by copyright. A related problem is: imagine that there would be some sort of copyright protection what could be the scope of that protection if not a full and very undesirable information monopoly? How could we prove infringing misappropriation of these abstract facts that have no shape? How could we prove that we extracted it from this news producer and not from that? Unless in the very unlikely case of a single news monopoly and single source news producer and those are rare indeed. Of course there is copyright available for the news industry, and we all know that, for the news expressed in original news articles (and that's what the journalists write) and those are rightly and fully copyrightable, but that's not what the discussion is about today.

Introducing a neighbouring right for news publishers, as is now contemplated in the consultation (that came somewhat as a surprise to me and I think to many observers of the IP scene in Brussels) could perhaps solve this originality issue but it would never deal in a satisfactory way with the issues of scope and of evidence that are attached to that. The best I could imagine for this new neighbouring right to be able to do would be a right enforceable against wholesale piracy, just like the existing phonogram right that clearly has inspired it but it would not solve the problem (and I think that was already mentioned by many speakers here, which is at the heart of our discussion) of unauthorised news aggregation. Present laws on neighbouring rights do not provide such protection against unauthorised news aggregation. So why would transforming the existing phonographic right into a publisher's right do the trick? It's difficult to imagine unless it would be totally recrafted.

In fact the only right presently in existence that does somewhat protect against aggregation is the EU's sui generis database right. It is now rather downplayed in this discussion but I remember vividly that protecting the news industry was one of the reasons why the database right was introduced in the 1990s, and it was already controversial then. Reuters was lobbying for it, if I remember correctly.

In fact this whole idea of a neighbouring right is a very old one, it reminds me of discussions at the Dutch ALAI chapter in the 1980's about introducing a neighbouring right for publishers in the Netherlands, but this never led to anything. Probably because publishers in the end concluded that they were already sufficiently protected against third parties on the basis of copyrights transferred from their authors, and that of course is the same even today.

So, again the question arises, why? If we look at the arguments, the very limited number of arguments presented in the consultation, one reason for introducing a neighbouring right for publishers would be the analogy with the phonogram producers and the broadcasters and the film producers. They have it, so why don't we give it to the publishers? The "why not us" argument, the equality argument, I think it was mentioned by Richard in the very first session. I can imagine if I were a publisher I would argue along the same lines and I do recognise, like the previous speaker, all the troubles and problems that the newspaper publishers are currently facing, and they are enormous

and they are a source of concern to everyone. But the why not us argument doesn't really convince me.

I think before arguing along the why not line I think we should first look at the why. What would a neighbouring right really bring to this industry that would be in any way useful to it? As I said earlier and many speakers before me, probably not what the news industry would really want a right to do, that is either prevent or prohibit or make licensable aggregation vis-à-vis news aggregators, such as Google. The Spanish and the German examples are I think rather clear: it's not going to work, all you would have in the end if we would seriously introduce this neighbouring right is we would create yet another layer of rights on top of an already well stacked sandwich of rights, many of which simply have little or no role to play, some of which actually make life in the digital realm even more miserable than it is already today.

Is Reprobel then perhaps a good reason to introduce such a neighbouring right? Reprobel of course has nothing to do with news, it is a totally unrelated discussion, I think, but it definitely plays a role at the political level and it is probably not by accident that this consultation is underway now only a few months after the European court's decision in the case of HP versus Reprobel. For those not in the know, I'm sure you all know the story, but according to this European decision the reprography right levies that exist in Belgium and in many other countries in Europe, most other countries in Europe, belong to the authors and not for 50 percent to the publishers. That's roughly what Reprobel says, I know this is very unnuanced but this is roughly what is being said and this is now under repair clearly by way of this consultation. Is that a good idea? Is it a good idea to introduce a neighbouring right simply to override Reprobel? I can't imagine that that would be sound IP policy. We do not introduce new intellectual property rights simply because the reprography levies are now flowing to the authors (and still partly to the publishers I must add, even in Germany) after this decision. By the way, reprography is an almost dead technology, we're talking about photocopying here. That was an issue indeed of the past but it is an issue that is becoming gradually extinct. Yes there are still millions of euros being made but this is a rapidly decreasing income stream. This cannot be a good reason for introducing a neighbouring right.

On balance, I'm afraid and I have to agree here again with my neighbour on the right side, I'm afraid law's not going to help us very much here, at least not intellectual property law. Again, realising fully the crisis in which news production, news publishing finds itself in and it is very serious, I don't think intellectual property is going to help us out of this crisis. I really think we should not even waste our energy thinking along those lines, it is a common reflex, look at IP law, it's always IP law that is at fault here, but I don't think IP law in any imaginable world is going to help us out of this conundrum. Other business models surely are, that's not my department of course, I'm not competent here but I would obviously look at that. Subsidies, always interesting, I'm from the Netherlands, we love subsidies, I'm all in favour of that. Re-routing money that now goes to public broadcasting to the press, I'm all in favour of that. More taxing of Google and having them pay their taxes in the countries where they're really making money, yes please. But I don't think IP is going to work and again the music industry is indeed a very good example, the music industry too looked at intellectual property in its times of deep crisis, but the solution did not come from there.

**Professor Lionel Bently:** Thank you very much. Marietje.



**Ms Marietje Schaake:** Thank you very much and thank you for including me in this discussion as a non-expert, not in copyright, I have some experience in dealing with the news media but I promise to those of you representing them I will not hold it against you in this discussion. I was looking on Twitter and I couldn't help but notice that today is International Day of Books and Copyright, did you know this? I thought maybe this event was organised as a celebration but at least it made me smile because I think we should really look more broadly than just the means like books but maybe access to content, access to information and perhaps a broader perspective could help inform us at least on the political side too about what is wisdom, and I tend to agree with Professor Hugenholtz here.

But let me share with you some observations from my perspective as a member of the European Parliament who has worked to reform copyright to advance the digital single market, but who looks at the role of government really from the primary question of what problem are we trying to solve? What goals are we trying to advance and certainly not informed by favouring one industry or one sector over another? I simply don't think it's a role of government and policy makers to protect one over the other, in fact I think we need to help foster innovation and focus primarily on preserving principles like fair competition, the respect for fundamental rights, such as freedom of expression and also access to information, we should help innovation flourish.

So the context in which the whole discussion about access to information online, copyright, the future of news but also more broadly takes place now is very much related to the development of a digital single market in Europe. There is at least the promise of a single market but even there a lot still has to be changed in order to harmonise rules to create a more predictable, smooth regulatory environment for anyone frankly to navigate. Whether it's the citizen that wants to access information, whether it is the start-up that wants to roll out a new product or whether it's the big company that seeks to provide its services in Europe. And the discussion about copyright has really been quite paralysed and stagnated for a very long time, it's become very sensitive even though there are those who hope for and push for radical change. Often times these are start-ups that are extremely frustrated by the fragmented regulatory landscape which hinders them from bringing the new movie streaming service from Sweden to consumers in Spain, for example.

But there are also those who want absolutely no change at all and I agree that there has perhaps been too much focus on copyright law and too little consideration of the bigger picture, and we see this very much in the way in which the movie and music industry too have sought to use copyright enforcement and higher punishment as a solution for the threat that they experienced from technological developments. I think some of the publishers at least are going down the same route, pushing for very harsh measures, claiming very high values lost, economic values lost even though I think we could also argue the reverse.

Generally speaking it is easier to stop change in policies than to pave the way in terms of where new policies should go. So I think that in the effective landscape that we operate in common have an advantage because it's much easier for them to block proposals, they've already built networks of access to decision makers etc etc, so I think we've seen this in the discussions about copyright reform taking place as well. But while this whole struggle about whether to have a revolution or an evolution, whether to have drastic or incremental changes going on, technological developments continue and

many of them actually facilitate work arounds the very laws that people are still discussing. So, for example, the fact that so many people are now using virtual private networks to access information in different EU member states is testimony to that and I honestly think that these people don't feel like they are engaging in illegitimate or criminal activity.

And if you look at access to content and who should pay for it, I always find it very interesting that as a Dutch tax payer I cannot look at the evening news that is being streamed when I'm in Belgium because I too have paid for this. So it's not only about whether or not consumers or internet users are paying journalists or media companies enough, it's also I think an experience of consumers who feel like they've paid for content, whether it's a commercial platform like Netflix or public broadcasting like NOS news that they simply cannot access once they cross the border. A border that at least in the promise of what the EU should mean should have no impact on this access to content. So the questions about whether the laws are still legitimate, whether they are creating a fair deal for all stakeholders or whether they're functioning in times of technological developments I think are very much an integral part of this discussion.

Having said that I do think it is absolutely essential that in this rapidly changing environment we very much look at the public interest and the way in which the open character of our societies can be preserved. And I do think, responding briefly to the first speaker, that there has been some very important research into the impact of the use of search engines has on access to information, on creating a tunnel vision, books like, "The Black Box Society" by Frank Pasquale I think are very interesting in this context. So I do believe that this is something policy makers should also very much be aware of. The challenges of journalism are, I think, well known, the question is, can this be solved through copyright law? And I believe we need a much broader discussion for that, I think I could learn more from you today about this question of what is news, what is investigative journalism? You know, what is affected? Anyone could find what is a scoop that perhaps leads to expectation of more recognition but also the reverse, in what way and I don't know if there's journalists in the room as well, but in what way can journalists through social media and the global internet develop brands in a way that they never could before, which then increases the value of the information that they have to offer and perhaps makes them more attractive for sources to contact. So I think there's a whole different kind of dynamic that works many different directions that should be explored and I think that if we look at the need for having pluralist free, diverse media we need to look at both funding, independent media or creating space for independent media that is not subject to the ebbs and flows of the free market but that really has a stand-alone position as part of open societies. But we must also look at facilitating innovation, I think these are both important.

Now looking at what is happening on the European level, it's been briefly mentioned already but it's very interesting to see that there are two members of the European Commission generally responsible for the policies in this space. One, Commissioner Ansip very much leaning towards embracing the opportunities of technological development and the other Commissioner Oettinger very close to the publishers, particularly in Germany. And so what you see is not only that their weighed views of what the new European digital single market should look like are reflected in the proposals that are put forward but they also take on board the existing differences between 28 member states as well as different sectors. And so unfortunately what you often see is that it becomes the lowest common denominator that's presented at the

beginning. It is hardly ever very ambitious the proposals that we see and the little space that might be there often gets pushed back by the different stakeholders that then get involved in the discussion.

So I think we will continue to see a lack of meaningful change in the laws reflected and both the market and technological developments kind of catching up as well, the courts being important spaces for these fights between different interests to be fought out. And I say this without any pride, I wish we could have better European laws sort of embracing the changes that we see and safeguarding the principles that we believe in but I want to be open about the practice that I see day in day out. So, maybe I'll just try to conclude here and hope that today we can also talk a little bit about how innovations in the market of news media can inform us as policy makers. I don't think we should only be pessimistic, I see a lot of interesting initiatives coming from the Netherlands, such as Blendle for example, where contrary to the analogy that more access to more media should bring down the price, I believe I'm paying more per article than I would if I would weigh the size of one article against buying the entire publication. So this notion that there are new models to both create more interesting access to content for consumers and remunerate the publishers and the journalists I think are certainly worth exploring. Yes, let me just end there and I look forward to the discussion.

**Professor Lionel Bently:** Okay, thank you very much. We have just about 35 minutes for discussion, so plenty of time. Do we have any questions for... we have one at the back, right, okay.

**Q.** First I'd like to thank the organisation [inaudible 00:53:36] for this wonderful day because as Bernt himself unfortunately said during the lunch but he was absolutely right, "It's the moment to do this." And it's unbelievable what kind of people you brought together today and I'm really fascinated at hearing all which is said. This being said, I suppose we would think about an intellectual property right for news publishers, I have three short observations. In the first place I think that news publishers is something which is quite different from a neighbouring right for publishers in general, it is somewhere on the border between unfair competition and intellectual property, it would be right to keep an eye on that. And a second remark is even when you're thinking about an intellectual property right you could still look for unorthodox ways to frame it, for example, what would be the duration of such a right? And there I would say that it is not excluded that the news publishers would be very much helped by an exclusive right of a duration of 24 or 36 hours, which would make the weight such an exclusive right places on the freedom of information much lighter. Because as [inaudible 00:55:16] I think once said, the news of today tomorrow is history and still very important from an informational point of view. Then a third very short remark and even more controversial, what about a moral right for the news publishers? I'm sure everyone is shocked, I would be in favour of a very strong moral right of a duration of about a week and most specifically about a paternity right, a right to be mentioned as the source and I would make it strong because I would make it [unwaivable? 00:56:00]. Why, because I think there is a particular interest from society to know the source of a good, reliable and innovative news, and if you maintain that right for a week or for ten days it wouldn't be a problem either. Thank you very much.

**Q.** Yes, Michael [inaudible 00:56:32]. I have a question for Bernt Hugenholtz and I think we partly agree that this enquiry of the commission is due to the fact of the decision in the Reprobel case. However, I think the Reprobel case dealt only with [reprographic?

00:56:46] copyright levy but let's think about other cases like the [inaudible 00:56:51] case where we really go into what can universities, libraries, archives do and then we have exceptions and limitations to the making available right and that's actually quite important. So if... what I think what is now on the political side of the table, particularly with the recent developments in Germany that there will be a great push for publishers in general to pursue such an ancillary right, and I think we as copyright lawyers we should open possible alternatives. One alternative is well, let's open and rephrase the InfoSoc directive here and let's make an amendment that's a possible alternative to that publishers are entitled in revenue sharing with the copyright levies and so on. And then that would all be off the table and I think we really should ventilate that idea because that would be a much better solution for this problem than creating an ancillary right for publishers in general.

**Professor Lionel Bently:** Should we have any more questions or should I... I think that Bernt is definitely [inaudible 00:58:03] second one but you're the obvious person for the first one as well.

**Professor Bernt Hugenholtz:** I can speak on any topic but yes I'd like to respond to both. First to Michael, I totally agree we would take off the pressure a bit of this idea of a new neighbouring right for publishers if we would create that rule in the InfoSoc directive. It's probably a much easier, politically speaking, approach, the question does arise, what kind of rule would that be? And wouldn't that introduce a neighbouring right in the InfoSoc directive because what would otherwise be the basis be for the publishers to get that 50 percent? But okay that's the fine print, I agree with you having the choice between the two I would prefer your model.

Back to [inaudible 00:59:02] : You made a very good observation I think we all agree on, that the argument for some sort of neighbouring right for the industry is a very different one from the argument for having a general neighbouring right for publishers, and by mixing the two into one initiative I think we're confusing arguments. The news industry needs different things here, and interestingly again we have brilliant historic parallels here. There have in the past been many attempts, to introduce some sort of specific protection for the news industry, particularly news bureaus like Reuters and AP. Many of those proposals came with very short term protection schemes of 24 hour or 48 hours, in line with the AP case described in the previous panel by Chris that gave us the hot news doctrine. A very short period of protection would probably be sufficient, which is totally different from what neighbouring rights generally have to offer. Current neighbouring rights have terms of 20 years and upwards, moving towards 50 or even 70 years, so we're talking about very different kind of rights and needs. There are actually several countries in the world that have specific unfair competition laws with very short protection terms, for news producers. I don't think these are ever enforced in the digital realm but we have them and they are yes, certainly an interesting model to look at. They're not neighbouring rights, they're specific rules of unfair competition.

**Professor Lionel Bently:** [Inaudible 01:01:19].

**Ms Marietje Schaake:** Maybe just one additional comment on this notion of exceptions, which is a very lively one where I think often times the public interest gets squeezed by those who seek further reaching realisation of their rights. So I think one thing to keep in mind is that in the interests of harmonisation, which I do believe is very much needed, and then we can argue further about, you know, what kind of laws but that also the

exceptions are harmonised. Because, frankly, while on the one hand open education and international access to information in the public interests are becoming more and more relevant and simply more easily accessible, the exceptions are still very fragmented and leads to all kinds of problems with access to culture, scientific research etc. So we have to think about the full picture when we look at what we should organise EU wide and exceptions hadn't been mentioned but I think are very crucial.

**Professor Lionel Bently:** I just wanted to add something in response to [Antone's? 01:02:30] question, just to reiterate really what Bernt said but add one further comment in relation to his moral right for news publishers. It is the case that the exception for quotation under the Berne Convention under Article 10(1) requires attribution of the source and that derives from the previous version of the Berne Convention where the exception was directed specifically at news reports. And so, effectively, by way of an exception newspapers do have a moral right of attribution, I don't know how strong it is but it's there.

**Q:** I would like once again to draw the comparison with the neighbouring rights for the broadcaster. First of all, of course, the funny thing is why did we get that right in the first place? Most people were involved in getting it here in the 1960s are dead but I have been told that the only reason why this right came about was to give them something where they would be the people who had to pay for the other new neighbouring rights. So it was the performing artists who got their own right and obviously the Phonogram producer got that right because they were the strong lobbyist at the time and especially the public broadcaster at the time were very much against it, especially in the Netherlands as late as the 1990s were against it, and only when they were convinced and was absolutely sure that the Olympic Games would come to Amsterdam in 1992 and that it was necessary for them to have their own neighbouring right at the time were they convinced it was a good idea. So it was a funny reason why we got the neighbouring right for the broadcasters in the first place.

Another interesting thing is that the neighbouring right of the broadcasters does not bring them very much, it brings them a little bit of a share in the private copying levy and it gives them a right to take action against rebroadcasting, retransmission, which is always the live rebroadcasting. So it is the signal piracy actually, it's a very short term of protection, it's about ten seconds protection, it's not even 24 hours, it's only against a live rebroadcasting that it's actually used in some cases. And in fact it's only now the only right they actually need recently in which you do not have in all countries became [apparent? 01:05:03] in the Seymour case. Because in the Seymour case it was about hyperlinking between illegal peer to peer live broadcast of sports games, and there it turns out that it's not actually harmonised into European level and that the Swedes, I think it was the Swedes in the Seymour case do have a separate neighbouring right to protect broadcasters against signal piracy through peer to peer. So in effect that does work, that does serve a purpose and that might give us another reason to come up with a very limited parallel for a very short term of protection. I'm not saying it's a good idea, I'm just drawing the parallel that in essence the neighbouring rights of broadcasting company is very limited in time as well and to that extent it might work. I still favour the proposal by Michael that we should simply have a rule that we should solve Reprobel and leave all the rest to the market place. If you want to do something you can draw the parallel with the broadcasting which remains interesting.

**Q:** [Inaudible 01:06:10] additional discussions when they tried to, of course, to give the broadcasting right to websites, I think it was in the late 1990s there was discussion at the WIPO level, nobody even [knew how? 01:06:19]—

**Professor Bernt Hugenholtz:** That discussion is not over yet, no.

**Q:** It's incredible, anything will be [inaudible 01:06:23]—

**Professor Bernt Hugenholtz:** That's an endless dossier in Geneva, yes.

**Professor Lionel Bently:** So, one of the things about them proposing a new neighbouring right is that when we... people who know something about what neighbouring rights contain know that they all differ. So having a consultation about having a new neighbouring right for publishers just doesn't tell you anything about what the content of the right that's being proposed is, and how can you possibly respond to a consultation when you don't know what the content of the right being proposed is?

**Q:** That goes back to Michael's proposal which [inaudible 01:06:56]—

**Ms Marietje Schaake:** Maybe they're hoping you'll come up with the solution in the consultation by the time you [inaudible 01:06:59].

**Q:** Thanks, [inaudible 01:07:04]. I have, I don't know, I've got lots, just one remark, I guess it's about what Antone proposed that there should be a right of attribution for news publishers or publishers more generally. In the context I think of the news aggregation services the mentioning of the source is not a problem as far as I know, it's obvious where they are linking to so that's a solution in search of a non-problem I guess. I was also thinking when it comes to the question if you would introduce some sort of right with a very short time span how's that going to be enforced and I immediately started thinking, mm, time zones, internets, I'm not sure that, I don't know, but maybe somebody with a more technical background can explain how that would be enforceable.

But my main questions were two, one was to you, Marietje Schaake, because you were involved with the letter by a number of MEPs basically saying to the commission please will you not go forward with talk about this ancillary right? Did you get any feedback from the commission on that right, on that letter or...? I'm not sure whether you hear things but I'm sure you hear a lot of things, but how things operate at the European Parliament in terms of feedback loops between the commission and members of parliament. I just was very curious what kind of response, if any you got, and then the second question is to Bertin Martens. You talked about how it's common in many industries that you see the superstar effect on the long tail and the squeeze in the middle, and today we focus on news publishers and everybody agrees that they're in dire straits. Is the same true across other areas of publishing, I mean book publishing, general publishing? We've heard this morning from STM who are in a totally different dynamic because they rely to a large degree on publicly funded content basically. Because if we talk about a publishers right I'm still struggling to understand why, I can see the position news industry are in, I'm not in favour of a neighbouring right for a lot of reasons but I have even more trouble conceiving of why other publishers would need one. Is there any economic basis for it?

**Ms Marietje Schaake:** Sorry for looking at my phone but I just looked up the answer, which we got, but it basically refers to the consultation and says that after that decisions will be made. So usually what happens is not unlike many other answers that we usually get, they refer to process while we ask about substance, and so just kicking the can down the road a bit still. But I think what you see reflected here also is really a tension within the European Commission on where to go, enormous pressure from the publishing industry to protect them and also pressure from others to ensure that there's a better functioning harmonised European copyrights suited for the digital age. Which is a much broader goal than just asking how our news companies, I don't even want to talk about newspapers much anymore, but how are they going to survive? Which is a very legitimate discussion but I agree that the risk really is to see a nail because all you have is a hammer kind of thing, it just kind of not look broad enough at the problems, like you said, or the non-problems that should be solved, and instead delaying progress in a legal framework which could also in the ultimate case lead to complete lack of trust and legitimacy experienced with regards to some of these laws. While technological developments simply allow for circumvention and then nobody wins if you ask me because then it just becomes kind of a de facto establishment of norms.

**Professor Lionel Bently:** Next we have [inaudible 01:11:28], sorry, Bertin.

**Dr Bertin Martens:** Yes, to answer your question on this squeeze in the distribution, this is indeed a phenomenon that we observe generally all across the internet and all across sectors. The reason why this happened is very simple to understand, what you get with the internet is on the supply side all of a sudden you get a choice between millions of newspaper articles, goods, books, films, music, whatever, so there's an enormous choice, enormous variety. On the other hand you have consumers who look for what they want to find and they use search engines or aggregators or whatever channels to find what they're looking for. You have two types of consumers, two types of search let's say. You have consumers who say get me the hot news of the day and they automatically are led to the superstars, what are the hot articles for today? What are the subjects that are really on today? And you have consumers who say I'm interested in what happened on that particular topic or in a very specific issue and they are the long tail searchers, they're not many of those but since there are millions of articles they will find an article on that. Since consumers are split between these two types of search behaviour what is left out is this big middle ground of things that are of some interest to somebody but do not attract really either the attention of one group or the other and so we see that in music, we see that in film, we see that... I haven't seen any research that has studied this, the newspaper articles yet but I am sure if somebody would do it we will probably find a very similar phenomenon. What stops this movement from happening is compartmentalisation or segmentation of the market, so if people are used to go to one newspaper or two newspapers and they watch only those every day you get only the articles that are on that newspaper. And that's why people go to aggregators because you get an overview of all the newspaper articles anywhere in the world or in your country, in your language or on your subject and that's where if you're more targeted research. So that is the main advantage of these news aggregators from a consumer perspective.

**Ms Marietje Schaake:** No, I just wanted to develop this thought a little bit further and if we look at the interest of access to, you know, pluralist, free independent media I think we need to also highlight the reverse effect. I talk to journalists a lot about how news media are struggling with new technology and also the business models that some of the search

engines and ad based services are using and it is also informing editorial decisions to a huge extent. So there is a constant analysis of which articles are clicked on, gossip articles are much more clicked on than let's say investigative journalism pieces. So I think we need to have a more philosophical discussion about the interplay between quality journalism, access to multiple sources of information, avoiding sort of tunnel vision etc etc, and how new business models and new technologies are influencing both sides, I think it would be too simple of representation to suggest that there's sort of publishers and journalists on one side standing by and looking at how this wave of technology is washing over them. They're constantly business driven decisions and editorial decisions being made also that are informed by these new business models as well.

**Professor Lionel Bently:** [Inaudible 01:15:10], so Martin first, I think.

**Q:** Martin [inaudible 01:15:25], Free University, Amsterdam. Well, actually thank you so much for all the insights we received today, I think it's very clear now which kind of related right we need. Actually the problem with the present approach is that it all focusses on copyright and copyright focusses on what I would call the individual information unit, so one individual work in the sense of one individual article or one individual quotation, one individual snippet. This is wrong because people are not longer willing to pay for this individual snippet, the [effort? 01:16:02] that this is substitutable, there are lots of bloggers, Twitters and so on out there, so nobody will pay for this. But obviously people are willing to pay a lot for content aggregation, this is why the Googles of this world have no difficulty in making lots of money. So it is quite clear that publishers, if they want to develop sustainable business models, must simply behave much more like aggregators and much less like individual information unit producers. This is where the future lies, I think. I mean I'm not an economist myself but listening to what has been said today this I think transpires quite clearly from the whole debate. So if you think about some help for publishers and I'm not sure whether this should be a related right, whether this should have something to do with intellectual property, but if you also think about something in terms of subsidies or something I think the question is, how can you help the publishing sector and perhaps in particular the news publishing sector in Europe to create premium aggregation websites that are so attractive that people do not simply go to the offers of the general search engines or news websites but go to these premium aggregation sites that publishers create themselves? Why should they have difficulty? I mean if it is true what publishers themselves have said this morning they know better about their content, they are closer to their community, they simply know all the things nobody else knows about the content, they even know more than the academic community, for example. So [inaudible 01:17:45] knows more about the academic community than the academic community itself, so let them show that they can create these premium services and I'm sure this would also have an added value for consumers and information welfare in total. So this should be the question and not so much these old fashioned folk who respond in individual work or a snippet or whatever which will never be solved and which it seems will not work anyway. So my question would be, how do we do this?

**Professor Lionel Bently:** We're going to take a number of points and questions, so, do you want to pass it to [inaudible 01:18:19] and we'll...

**Q:** Thank you all for the interesting presentations, Tarlach McGonagall from IViR, I'm not a copyright expert and at the risk of being labelled a mischief maker, I was hoping to ask a



question about the definition of the news. I was wondering whether in relevant debates there's a consensus about at least the approximate meaning of news or are there any definitional aspects that are proving controversial or relevant from the point of view of whether a new law would help, thank you.

**Q:** Thank you, I can agree with a lot of things that were said, especially with Bernt's argument that law itself wouldn't help much to increase the [inaudible 01:19:13] to make the work better for press publishing in the future, I don't think so. That there is the angle of this solution which we can come up with and I do also think that we in our expert filter bubble here all agree on that more or less and that there must be something else to come up with. The problem that I see although is that in the Brussels filter bubble there are a lot of arguments exchanged that definitely not and deliberately not distinguish between all these different aspects, like they don't go into the question whether Repobel is fair or not and whether we need or whether there is a connection between a neighbouring right and this value gap if it is one for the press publishers and so on and so on. It's not a discussion like that on the political level, the discussion is framed totally different and if you go to a conference and listen to Commissioner Oettinger and people like that you will get the impression, and if you're not a very informed observer of this discussion and an expert in these things you will get the impression that a) we need a neighbouring right for publishers because that is essential for media pluralism in the digital world, right? You won't hear an argument that underlines or emphasises that or proves that even but it sounds reasonable, right? Everybody says well, yes, journalism is extremely important, quality journalism even more, right? So you say you need a neighbouring right for that, okay, yes, let's do that, why could anybody oppose that? So that's... and that's exactly the danger that turn out to be the problem in the German discussion and in Spain there was no discussion so I don't know about that obviously, right? But in Germany it was like all the time people were saying this or that, I know it's complex, there is no connection between the income of news aggregators and news publishers because and so on and so on. We all know that but Commissioner Oettinger does not and he prefers not to know and not wanting to know, right, and I think that is exactly what we have to do to make these distinctions, to go into the details and say well, Repobel is not a problem with neighbouring right or not neighbouring right, it's a problem of a simple rule that could be come up with by changing the InfoSoc directive. By the way, German Ministry of Justice says, made such a proposal a week I think after Repobel was published officially to Commissioner Oettinger how to solve this and this has nothing to do with neighbouring rights or ancillary rights. It just says publishers can be entitled to a share and if they are... whether they are that is the decision of the national member states.

**Professor Lionel Bently:** We'll take three more and then I'll let the panel respond to whichever questions they feel like responding to.

**Q:** Yes, I'd just like to ask a question about the political wrappers that go around the products that have been discussed at the event today, you know, do—

**Professor Lionel Bently:** [Inaudible 01:22:51]—

**Q:** Oh, that's—

**Professor Lionel Bently:** —[inaudible 01:22:54] ask a question because we're not going to have time but now we're taking up time [inaudible 01:22:58]—

**Q:** Very, very confusing, my question is this, the outer wrapper, let's just stay with that one, the outer wrapper under which all of the politics and policy proposals are made is that of the digital single market. Can any of the panel make any connection between what is going on and the pursuit of a single digital market?

**Professor Lionel Bently:** So we've got Andrew and then the person behind Andrew and sorry, I've disallowed you just because we're running out of time.

**Q:** Can I just say one thing in defence of publishers? I work for The Guardian and the idea that kind of an individual blogger could have done the Panama paper at all so is ridiculous. An organisation like The Guardian or the Times that did the Lance Armstrong story, it requires teams of journalists and teams of lawyers to go through a story line by line so I think this idea that kind of bloggers on their own can survive and can produce public interest journalism is kind of fantasy.

**Professor Lionel Bently:** So, Andrew [inaudible 01:24:02].

**Q:** I think I just wanted to ask the panel and highlight the fact that creating a connection between looser copyright laws and innovation is utterly ridiculous. I don't see any evidence and I don't think any of you can produce any evidence that relaxing copyright law creates innovation. All it does is encourage people to sit in bedrooms and play with taking other people's content and trying to resell it, that's not innovation and I think we should be clear in our heads about that.

**Q:** My name is John [inaudible 01:24:39], I'm a student of computer science and engineering and I just wanted to add a comment to two earlier speakers regarding the supposed 24, 36 hour right of the publishers and how that could be enforced. And I was thinking along the same lines as an earlier speaker that on the internet it is very hard to prove when something was published because it's very easy to forge something, so yes, you could probably implement this as a law but you would have extreme difficulties enforcing it.

**Dr Bertin Martens:** I choose to answer to Martin, indeed the world would look very different if newspapers could get together and create their own platform on which they would publish their content and try to draw all the consumers together so that consumers could roam around and pick articles from different newspapers on the same platform. However, there's a collective action problem there, how do you get hundreds of newspapers together to work together? So people have tried this in different ways and look at the Huffington Post, for instance, as an example, started from scratch, were not professional journalists but everybody else could write their own piece and bit and there was some sort of editing and curation at the editorial level. But it turned out into a rather successful business model in the end and copies of the Huffington business model have been tried in several places, several countries, some successfully, some not but did not involve, unfortunately the newspaper industries or the newspapers directly, so they were started from scratch.

I think what Facebook is trying to do nowadays is again trying to bring the newspapers together on its own platform, of course, with some sort of negotiation conditions and hope that it works. So this is an alternative I think to the Google News or Apple News approach where you simply aggregate existing things without even asking the

newspaper publishers whether they agree. We will see in the future how that works out, whether that is more successful, I think it has lots of chances but it requires more collaboration and negotiation between the newspaper publishers and Facebook in this case, yes.

**Professor Bernt Hugenholtz:** My final remark concerns the broader issue of grating a neighbouring right to publishers generally. The very real problems of the news publishers are clearly being hijacked by the general publishers and eventually the result is predictable, this general neighbouring right will not happen and then party over. I would be very concerned to be sitting on the panel next to an STM publisher if I were you. These are... would be the beneficiaries of this very same neighbouring right that would help you nothing and would probably help scientific publishers a lot more, and I think politically that would be a very bad idea for everyone. Let's take the example of the STM publisher, I'm not sure he's still in the room—

**Q:** [Inaudible 01:28:23].

**Professor Bernt Hugenholtz:** What?

**Q:** He had to fly back.

**Professor Bernt Hugenholtz:** He had to fly back, sure, okay, then I will attack him vehemently. Imagine this, a neighbouring right for scientific publishers who in the last 20 years have outsourced almost everything, all the editing, all the correction, everything that they used to invest in for making good books it's now being done by us authors, scientific authors. The printing is outsourced, the distribution is outsourced or has become digital, there is hardly any investment left compared to the old days. When even then the arguments for a neighbouring right were fairly weak, today they are almost non-existent. This is not something that applies to the news industry I should say but it does to many other publishers, the argument for a general neighbouring right or a general neighbouring right for publishers is exceptionally weak and if you – news publishers – join forces with them I think this is the end of the story. So I would say and agree with many others here that if we want to do something for the news industry it should be something for the news industry and not for publishers generally.

**Ms Marietje Schaake:** Okay, thank you, I mean first of all should it not have been clear? I think we all have to make sure that there is enough quality journalism to apply the needed check on power, whether it's in the hands of elected officials or private sector or whoever else. But the question is, how do you get there? I think it merits a broader discussion and in political discussions I'm afraid it will always be the case that there are simplified frames, false arguments etc etc and so it's one, up to you to bring scientific research to the discussion and to make sure that you're at least competing with bringing information to decision makers. But it's nothing new, I mean in the whole discussion about copyright for so long we've heard major movie and music industries claiming to seek to protect the arts from the internet, right? I think that was also a terrible simplification, not in the least because the creators are often not the ones who get fairly remunerated by those very same industries that are claiming to speak on their behalf. So this is nothing new but it's important to be aware of how it goes and that's unfortunately very complex discussion often get simplified.

Now, on what does it all have to do with the single digital market? Why does it matter? Why is it relevant for innovation etc etc? One of the opportunities that we're trying to create by removing our necessary barriers is that of scale, so that in a more predictable and harmonised regulatory landscape an audience and a creator, whether it's a journalist and a reader or a musician and a listener nor whatever can more easily connect with the help of technologies and so in order for all kinds of business models to be competitive also globally and for start-ups to scale etc this relatively fast roll out to a large audience helps. That is what we're trying to do and it is through harmonising laws where they may still be chopped in 28 different pieces, which is the case for copyright law and this is just like a structural observation regardless of whether you think there should be neighbouring rights or not, there should be more rights or fewer rights, but factually speaking there are 28 different copyright systems, 28 different sets of exceptions and it simply costs a lot of time and money for people to navigate that space. But we also have to work on all kinds of other aspects of the digital single market in order to create an open and predictable environment with fair competition and consideration of internet users or consumers or whatever you want to call it. I've worked a lot on ensuring there's net neutrality, we've sought to abolish excessive roaming charges so that it's easier for people to go across borders and still use the same services but it also should be addressed through competition law that is applied equally etc, etc. So it's a much broader discussion, I think, than just about copyright at all but in an environment that's more predictable and that is larger it would be easier for all kinds of different services, such as the ones that were sketched like premium services. I don't know if government should even get involved in dictating where the market should go but if there is such a solution which could help a content and audiences get together and benefit from scale through lowering prices etc etc, that could be an opportunity that flourishes better in a digital single market than in a fragmented market. Oh, we're keeping people from coffee, okay, I understand.

Just one more comment then and I'll close but the question was, why does the digital single market even help innovation? If I understand correctly that was another question or what does copyright reform help innovation?

**Ms Marietje Schaake:** Well, I thought there was a gentleman behind here that asked a question—

**Q:** I said why do people associate [inaudible 01:33:59]?

**Ms Marietje Schaake:** Well I think exceptions for example are crucial for remixing just to give you an idea for access to culture, for digitising cultural heritage and making it available to the public and not only in Europe but globally. For scientific cooperation across borders, I think there are actually a lot of ways in which exceptions and more flexible copyright can help innovation but I understand that's a political discussion.

**Professor Lionel Bently:** Okay, thank you to our panellists and to the audience for great questions.

[End of Recording of session 3]

#### **Session 4: What else might a law do?**

**Speakers:** Professor Ian Hargreaves  
Professor John Naughton  
Mr Agustin Reyna  
Mr James Mackenzie  
Professor Mireille van Eechoud

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**Professor Ian Hargreaves:** Okay. Well, welcome to the final session of the afternoon. I think everybody's worked very hard but we've got one more hard working session to go. In this session we want to talk about and discuss the, as it were, wider implications of what we have been talking about in terms of a potential change in copyright law affecting the news industry directly, and to consider some of the wider points, whether those implications are felt to be a good thing, a bad thing, or neutral. We have an excellent panel. I'll introduce them as I invite them to speak and we'll run from your left to the right, starting with John Naughton who is an enormously distinguished academic, as well as being an enormously distinguished journalist. I don't know, John, whether you can claim credit to be the first person to notice the attraction of putting in a book title the names Gutenberg and Zuckerberg but that's where I first saw it and I thought that's a really smart move.

**Professor John Naughton:** It wasn't my idea.

**Professor Ian Hargreaves:** It wasn't your... Falls apart that story, doesn't it, on that basis? Anyway, he did. John, you're going to talk to us about what you think the wider picture is here.

**Professor John Naughton:** Thank you very much. Good afternoon, ladies and gentlemen. I am, to some extent, [inaudible 00:02:04] because I am not a lawyer; I'm an engineer by profession and so a lot of the discussion today seemed very exotic to me. I just want to make a few points. The first is that I think this is all about the public sphere, in the end, and the public sphere is one of the most important things about a liberal democracy. I think we should, as it were, feed one red herring immediately to the nearest available cat and that is the idea much put about by publishers, especially by giant multimedia corporations, that they are great contributors to the public sphere. I speak from [British? 00:02:46] experience, for example, and many of our great media organisations not only don't contribute much to the public sphere but, in my view, they actively pollute it. So to hear them complaining about their role in democracy would make one worried a bit. It's also true, I think, that aggregators are a key tool in managing the abundance of the digital world and the best ones, the ones that I use at any rate, usually aggregate more stuff from user-generated content than they do from traditional publishing organisations. That's one of the reasons why they're so valuable.

Second point, what society needs is truthful, high quality journalism. Newspapers just happen to have been a way of doing that in one particular era. So, in my opinion, when people fret, as indeed they have even today here, about the future of newspapers, they are confusing form with function and it's the function that's really important and that we

have to find business models to support and aggregation is just one part of this story. Third thought, as the discussion went on today, some names of past thinkers came to my mind; one of them was Joe Schumpeter and his view about how capitalism evolves. As you know, Schumpeter's view was that capitalism renews itself in ways of what he called creative destruction. We're all living through one such wave and it's both creative and it's both destructive and it is true that some great things, very valuable things, are being destroyed and it's also true that some very interesting and perhaps potentially very important things are being created. But much of the discussion about this consists of the wailing of incumbents who are now threatened with destruction. Every time I hear a spokesman for a very large multimedia company, for example, before the US Senate, shedding crocodile tears about the way in which this awful internet is doing terrible damage to poor authors living in garrets what it reminds me of is something that one of my heroes, Samuel Johnson, once said, a great 18<sup>th</sup> century British writer and journalist, he said that, "How is it", he said, "The loudest yelps for liberty are heard from the drivers of slaves?" He didn't use the word 'slaves', he used a word that would not be politically correct now, but that was the point and when I hear publishers complaining about what the internet is doing to them what I'm hearing sometimes are the complaints of organisations which are having to get used to the idea that the era of monopoly rents might be coming to an end. So I'm not too upset about it. I also think of Clayton Christensen and his view about the disruptive change because one of the things that is very striking about the news business, in particular, is the way in which the industry, from the beginning, comprehensive misunderstood the significance of the internet. It had nothing to do with news at all. What it had to do with was Craigslist. Back in 1995 Craigslist started as a free advertising, classified advertising sheet in San Francisco. From that moment on the fate of the newspaper industry was sealed because newspapers are value chains; they link together an expensive, unprofitable, and sometimes socially very important function called journalism with something that was very profitable called advertising, especially classified advertising. The problem was that that value chain got dissolved because the web is much better at doing classified advertising than small print in newspapers. What has happened as a result of that is a new kind of capitalism, which is nothing much to do with newspapers. It's now, we would call it surveillance capitalism, it's the way in which Google and Facebook and the internet giants, most of the internet giants, now make their colossal revenues.

Final thought is that it helps sometimes to look at what's happening in our media environment as if it were an ecosystem. What has happened is that a new keystone species arrived in this ecosystem and the originally dominant organisms in it are finding it hard to adjust to this new, huge member of their natural community and that will go on for a while. We see some of the consequences and they're quite painful. Now, another thing that's very interesting for me, as an outsider in this, is to watch the way in which the publishing industry has tried to deal with what it sees as the two 800 pound gorillas that have arrived in their midst. One gorilla is Google and the other is Facebook. In general the approach, especially Europe to Google, has been, "Let's try some aggressive legal action within the EC" possibly, possibly motivated by some very large European conventional publishers. We've seen recently we've seen two particular episodes in this campaign. The first is a very interesting case in point, the right to be forgotten, so-called. Not a good phrase; not an accurate phrase, because it isn't a right to be forgotten, it's a right not to be found by Google. At first it looked like a fantastically energising victory but if you think about what the outcome has been, what it means is that European society has effectively outsourced, to a secretive, huge company, an important legal process which it carries out in complete secrecy. So, effectively what has happened is we have

outsourced to Google the whole business of deciding who's going to be found and who's not in an online world which is an astonishing, an astonishing thing to have happened, but it has happened. The second strand in European response to this particular gorilla is anti-trust legislation. As you know there are two cases; one already in train and one threatened by the European Commission against Google that it has abused its monopoly powers. The jury on that is still out. Then there's the other gorilla which is Facebook. Here we have a different strategy. Essentially it's called appeasement. A few weeks ago Emily Bell came to give a lecture at my university and she talked about the implications of newspapers losing control of their distribution, their channels of distribution to Facebook and what that would mean in the long run. You see it, for example, in the way in which the publishing industry has reluctantly, sometimes grinding its teeth but nevertheless in larger numbers now, saying, "Well, let's sign up to the instant articles system so that Google can distribute our stuff effectively on mobiles and so on". This goes on and it always reminds me of something that Winston Churchill said; he defined appeasement as being nice to a crocodile in the hope that he will eat you last.

Now, the last image that comes to my mind in listening to the reactions of publishers to the internet and to the internet giants is Don Quixote. You remember he spent his time chasing at windmills and when I was listening to the arguments about whether or not a snippet is a snippet and exactly is it seven words or eight words, you know, I began to think about that. There are some people in this discussion, although I hope nobody in this room, who actually thinks that we should do something about hyperlinking. If anybody thinks that the publishing industry will do anything about what has become one of the most fundamental technologies of the whole world then I begin to wonder what these people are smoking. Then we have the German and Spanish experiments and the wonderful accounts of both of them today and again that reminds me of a legal case, funnily enough; it's the legal case that the United States Supreme Court decided on 1<sup>st</sup> May 1946. It's a case in which two chicken farmers, called the Causby boys, in North Carolina, I think, they were distressed because low-flying military aircraft were frightening their chickens causing them to kill themselves by flying into the wall. So they sued the US Government on the basis of a good legal doctrine, because they owned their farm and their property rights said that they owned the rights to everything below their property to the centre of the earth and to the heavens above. The United States Congress had declared that the air space was a public highway and by so doing had engaged in unconstitutional infringement of private property. It was an important case. It went to the US Supreme Court and they took it quickly and they decided against the Causbys. The thing that's very striking about the judgment is that – and the judgment was written by Justice Douglas, I think, and this is what he said, talking about the doctrine of law of property in relation to aerial rights. He said, "This doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognise those private claims to the air space would clog these highways; seriously interfere with their control and development in the public interest and transfer into private ownership that to which only the public has a just claim". Now, from that judgment one sentence leaps out: "Common sense revolts at the idea" and for me, as an engineer, common sense revolts at the idea that you might be able to do something about this using copyright law. Thank you.

**Professor Ian Hargreaves:** Thank you very much, John. Agustin Reyna is Senior Legal Officer at BEUC which speaks for European consumers. What's the consumer perspective on all of this?

**Mr Agustin Reyna:** Thank you very much. I would love to pass my ten minutes to him. Thank you very much for that overview. So, what is the consumer perspective concerning a EU publishers' right? I represent BEUC, the European Consumer Organisation. We are a Brussels-based organisation representing 42 independent national consumer associations across Europe. Initially we did not really think of getting involved in this debate until the Commission decided to ask, in its public consultation, how this new right would affect users; how a EU publishers' right would affect consumers and, the European society as a whole. So that's why I am here today. We look at this debate from two points of view. On one side, the question of findability, availability and quality of journalistic content. And, on the other side, the impact of such new right in the exercise of internet freedoms. Today, an important question was raised: how to accommodate the copyright framework if we want this right to work. Thus, we would have to start looking at concepts like "making available to the public", a concept that has been already interpreted and developed by the EU jurisprudence and that would be very dangerous to deviate from just for the sake of accommodating this new right in the copyright framework. But, I think this question will be addressed by another speaker who will refer to it later so I will just try to provide the consumer viewpoint and what we can learn from consumer behaviour insights. Perhaps to start with a personal anecdote, a remember one month ago I was at the house of my in-laws in Norfolk, England, and then for breakfast we got 'The Independent'. It was the last printed edition of 'The Independent'. The first thing I felt when I saw that was sadness. I asked to myself: "Why is this happening?". The answer is: consumer behaviour in the consumption of news, of content, have changed and it will continue changing and the industry needs to adapt to these changes. This is how, in this case, 'The Independent' responded to those trends in consumption. They went online, like many other important media. So, indeed, the news publishing industry faces new challenges but, at the same time, big opportunities. The internet has given the possibility for consumers to access wider choices and also gave the possibility for big platforms, like Google, Facebook and so on, to grow in this environment. Of course, I'm not defending here Facebook or Google, they have many trade associations in Brussels that can do that job, but we have to acknowledge that these platforms have given the possibility for consumers to reach out to creators and to creators to reach their audiences in a greater way. But, of course, one cannot ignore the market power that these companies and platforms have. That's why also Prof. Naughton mentioned the European Commission's ongoing competition investigations. This is perhaps a way to address the problem around the abuse of market power in news aggregators, which must be looked only from the competition perspective, because that is what is being enforced. However, this raises the question of whether there is a need for a regulatory solution. This is how we ended up in this discussion. However, we have to be cautious about the risks of regulating with one specific company in mind. We need to see what will be the impact on other smaller market players that are present now in the market but also on those that can emerge in the future. This is why it's very, very difficult to predict today the future impact of a EU publishers' right. Therefore, is the current problem, as it was described today, a copyright problem and, furthermore, is copyright the solution? Here is where I have my doubts.

**Professor Ian Hargreaves:** Thank you. Thank you very much, Agustin. James Mackenzie is co-founder of Cutbot. Tell us what Cutbot is, for those who don't know, before you use your ten minutes.



**Mr James Mackenzie:** Thank you. I will do. We have been described today as aggregators. We are... I basically feel a little bit like I'm at a pest control conference and I'm the mouse. I'm the problem, so some people would have you believe. So, for this discussion I'll be talking about new entrants to adjacent markets like ours rather than new entrants to media and publishing markets. So we work in two sectors. The first is media monitoring. There's an awful lot of misunderstanding about what that entails. If we take aggregate, I would imagine we'd bundle the content up and give it to people. We don't do that. We send links to people; we send links to content on the original publisher's site and we identify it with a headline. We don't use any snippets; we don't extract from the article. So a lot of the discussion is a, kind of, gross misunderstanding about the way the market works. So that's the first sector we operate in. The second now is public affairs monitoring, so we're applying the same technologies to government and parliamentary institutions; at the moment only in the UK. The move into that second market was motivated in part by the difference in licensing regimes. The UK's legislative and governmental bodies use either the open government licence or licences derived from it. These are licences which could have been designed to support innovation. We can use their content provided we attribute it – which obviously we want to do – and in some cases there's a stipulation that we don't edit it to misrepresent the content, which obviously we want not to do. So it's a much more straightforward market to operate in. In contrast, the media monitoring market which we began operating in, has been the scene of a long and bitter battle in the UK between our friends at the PRCA; our competitors, Meltwater; and our friends at the NLA – a shout out to Andrew at the back. So I'm not going to go into the much-rehearsed arguments of those cases in general, but I will set out two elements of case law which still stand, despite the NLA's losses at the Supreme Court, both of which could have been designed to stifle competition and innovation. We're talking today about what changes should be made. To be absolutely clear, what I'm going to argue for is fewer rights for publishers.

So, first, where a company uses a potentially copyright work without making any element of that available to the public through another format this should not require a licence. Think of indexing and analysis. Why should there be a licence required for copies that no-one ever sees? Why should we pay a licence for that? A few years ago I met the former founder of a start-up who sought to use software to scan newspaper articles and conduct sentiment analysis which is, for programmers here, a difficult field. So they didn't have a single customer. They weren't sure how they were going to monetise this. They were a university spin-off, but from day one they were required to pay a licence for the articles that their software was looking at; a licence that obviously had no revenue. They had a very small amount of money and this requirement put them out of business. So it might have been a great business; it might have been a terrible business, but because the law has treated those unpublished server site copies as potentially infringing we'll never know. So, we need a recognition that where a nascent business never makes copyright material available to the public no licence can be required. The licences are often heavily skewed against new entrants as well. When we contested some of the NLA's licences in 2014 we were paying the equivalent of £858 a year per client. Meltwater, the largest operator in our market, which is not Google News, it's a very, very different business – Meltwater do what we do – so we're paying £858 a year per client; they were paying £660. So we're paying £130 more per client. As I say, that licence applies before you even have a customer. So this is the kind of environment which kills business. This is an anti-business environment. So, that's the first change. The second change is we need the ability to refer to a work by its title. In the case of an article on news media that title is the headline. The NLA persuaded the High Court in the UK that headlines are capable of being literary

works and a copyright claim built on this ruling is the reason why our customers had to pay a licence fee; at least if they want to receive email briefings from us which include the headlines as well as the links and those links are, to remind you, links to content on the original publisher's site. So, imagine if other rights holders adopted this approach. The phrase 'one flew over the cuckoo's nest' is clearly more defensible as a literary work than any of the top headlines on any newspaper site that you could look at right now. Take a look at one. See whether you think any of them is as creative as the phrase 'one flew over the cuckoo's nest', or as evocative. Imagine the newspapers themselves had to consider copyright when using the title of a movie or an album or a book to refer to those works. It would never be permissible, so we're arguing that we should be able to refer to the work. There was a reference earlier to... It was – let me just check my notes – Grünberger said... The title is 'Access to sufficient information to allow the user to decide whether to click. That's what we would like to be able to do without having to pay, without our clients having to pay a licence. That doesn't apply in any other field of creative endeavour, where the title of the work cannot be used, cannot be just reproduced in this way. So that's our second change.

Neither of these rights would undermine the business of publishing, nor would they prevent new media from entering the media market. There's no substitute here for the necessary work being done by journalists, but they might lead to the kind of flowering of sophisticated analytical businesses that we so rarely see in the European Union. It's not a coincidence that innovation happens elsewhere. John, in his brilliant tour de force, talked about publishing as an ecological niche and this is a metaphor which I'm drawn to and which the media themselves are drawn to. They like to see themselves... This is sometimes red in tooth and claw; sometimes symbiosis, it's full of ecological metaphors. So, let's think about the media as a forest. We are, essentially, the squirrels in the trees. We work alongside them; we don't compete with them; we, in fact, assist them in small ways; we produce a little traffic for them, an ecological benefit; we plant the acorns, clips come up. I've stretched the metaphor; I do apologise for that. But the other end of this forest, away from us, not just Facebook but again, as has been said, Craigslist and eBay are logging the forest. They are stripping it and they are cutting down the ad revenue. The rights holders are ignoring the loggers and they're trying to squeeze the squirrels. They're squeezing the smaller squirrels hardest as they chainsaws buzz beneath them. It is an impossible way to conduct a business. Think about this: we did not cause the decline in newspaper industry revenue. Squeezing a little bit of revenue out of us won't save it. Putting us out of business won't save the newspaper industry. They need to find their own models and I personally am open to public support, particularly for investigative journalism, which everyone from Clay Shirky to, well, most people in this room, would regard as the most important thing that media does other than facts and opinion which are free. So, we want more rights for innovation for business. We think publishers already have too many rights and they stifle things which there's no in principle reason why these should be infringing acts. We and Google create revenue for papers. We send clicks their way. In the case of Google vast numbers. In the case of us, tiny numbers. But if newspapers aren't making money from those extra clicks they need to work out how to improve their business model rather than blaming us for decisions that are taken elsewhere and changes that have happened in other parts of the industry. Thank you.

**Professor Ian Hargreaves:** Thank you very much, James. A question on the way out, just to add to the one on the way in. How long has your business been in business? How young a company are you and what scale of company are you?

**Mr James Mackenzie:** We founded in 2009. We founded just before the NLA decided they wanted to charge licence fees, which was very clever of us. For quite a long period it was a hobby business alongside other full-time work and, in fact, in some ways it still is. So we have turnover in the tens of thousands of pounds, so we are a very small business; we work from home.

**Professor Ian Hargreaves:** Okay. Thank you very much. So, our final speaker on this panel is Mireille van Eechoud. I've been trying to get this right in my head for a couple of days. You're going to talk to us about human rights, or about free speech, that dimension of this discussion.

**Professor Mireille van Eechoud:** Thank you. Well, I guess looking around the room most of you I don't need to explain about fundamental rights and freedoms and how many we have and how common it has become in copyright and other intellectual property type to invoke lots of different fundamental rights and freedoms. I'd go as far, maybe, as to say that we're a few years away from the time when any practising lawyer who does not invoke a set of fundamental rights and freedoms when he's litigating or arguing in a case involving the use of information will be disbarred for not following the proper standards of the profession. So, one of the – there are many – but one of the drivers, I guess, in recent years is not only the internet itself but also the fact that since 2009 the Charter of fundamental rights of the European Union has come into force, so we see many more cases before the European Court of Justice and before that in the European Court of Human Rights, but also in national courts where a variety of fundamental rights and freedoms are invoked and freedom of speech is among them, of course, but also the right to privacy, the right to data protection under the European Charter and also, under the Charter, the freedom to conduct a business. Then, of course, we have the right to property which specifically in the EU charter includes intellectual property. Well, it comes with strings attached and is also protected to a certain degree, intellectual property, under the protocols of the European Convention of Human Rights. So, that's a wealth of rights and freedoms and a lot of potential conflict.

We agreed today that we would focus on freedom of speech which surely must be the queen of the ball, but because we've discussed actually very little, it has come up in discussions very little today, it might be we're actually talking Cinderella. I haven't figured that out yet. So what intrigues me about this discussion is that we are familiar in thinking of the press as invoking free speech against interferences in its function as public watchdog, notably. You know, they invoke free speech against courts, against legislation that limits the possibilities to gather and distribute information. But on today's topic the tables are slightly turned because if we speak of the impact of what an ancillary right for publishers and news publishers would do, we're talking about how such a right would interfere with freedom of speech of others; these might be private persons; they might be all types of actors in information markets. What has been mentioned today a couple of times, and that is to give it another spin, you could also conceive of rights for publishers as supporting free speech, you know, the argument that if you give us rights, additional rights, we'll have a more sustainable press and that's good for media pluralism and the public watchdog function more generally. In that context it becomes actually pitting one

person's free speech against the other person's free speech, which is not a very, sort of, common exercise as far as I'm aware. We have a fundamental rights conflict so far.<sup>1</sup>

I mean, briefly, we've had so much discussion today already about what purpose a right would serve; whether it would contribute to solving problems of the industry. There are many unknowns and only one known, I guess. Whatever shape or form it would take it would interfere with freedom of speech. Then the question becomes the million dollar question, is such a right necessary in a democratic society to protect legitimate interests? This is European Convention of Human Rights type analysis. Would it make a significant contribution to a sustainable press? So, if I summarise today's findings, we're doubtful, maybe it's putting that mildly. The other question is: what are the costs in terms of limiting the speech of other actors? We've heard lots of things today that makes me worried about this, I guess on two levels; one has to do with legal certainty, in a way, because there are too many worrisome concepts that we need to pin down: what type of use are we talking about; by whom; can we make meaningful distinctions between different actors in the light of changing technologies about who should be limited from doing what exactly? Can you make a meaningful distinction between commercial and non-commercial uses? I'm not sure, particularly if you start looking at social media, you know, and who should be the addressees of this norm? Is it just traditional search; is it news aggregators; is it all kinds of platforms? Very importantly, also, who are the beneficiaries? How would you demarcate those? Even in an ideal world where you could actually come up with a legal provision that clarifies this enough to provide a certain level of legal certainty then the other question, of course, is okay, that's the law in the books and what happens on the ground? How does it actually affect the market? How does it play out in markets? Arguments made before today are: will a right enlarge the cake or just redivide it and might that be a redivision to the detriment of freelance journalists, for instance, or local media? We haven't really discussed today the even worse position the local media are in, in the media landscape. Will it be that small players on both sides of the divide actually bear the brunt while the larger players have the benefits? I hadn't really studied the situation in Germany and Spain in much detail and I sort of had a hunch, and probably from what I gathered, it hasn't worked very well. I must say, after session two I'm convinced it has failed utterly. So, from the free speech perspective I'd definitely say to the European Commission: this is a case where you really need to err on the side of caution and follow the precautionary principle and do not legislate publishers rights because we know it has certain costs, even if we don't know the scale of them, and it has undefined benefits.

**Professor Ian Hargreaves:** Okay. I was so intent on practising my Dutch, my Dutch pronunciation, that I didn't say that you, of course, are on home turf here at the University of Amsterdam.

**Professor Mireille van Eechoud:** Yes. [Inaudible 00:36:14]

**Professor Ian Hargreaves:** Yes, but I should have said. My apologies for not doing so. Well, we've got half an hour, 35 minutes to go over the issues raised by this panel and possibly

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<sup>1</sup> Professor van Eechoud comments: I meant to convey is that we have a different fundamental rights conflict so far (e.g between privacy and free speech, not opposing claims both based in free speech)

to connect into themes that have emerged during the day. I wonder whether Jan Hegemann – not if you don't want to – but if you would like to. I mean, that's a very courteously expressed, pretty full-on statement that this panel, reflecting a lot of what has been said today, by no means everything but a lot of it, is not finding the arguments that are being made about a new publishers' right, that they're not wanting it to prosper. Having heard the arguments now, I mean, you began the day, how do you react to what's emerged here?

**Professor Dr Jan Hegemann:** Well, let's say I'm really challenged if we recall this whole day, we started with a first panel was, as I understood it, four speakers who in general think that the implementation of an ancillary right might be something that at least helps to deal with the economic struggles news publishers are in and, secondly, doesn't do any harm to anybody maybe except of Google. But we have heard now three panels who are very critical with that and you have already heard that I, for instance, agree with my German colleague in the fact that what the legislator did is maybe not sufficient; could have been done much better. The question is, is there a way to bring this concept legally in a proper and functioning way or is it a way that we should leave because it leads to nothing? Not surprisingly, I am still, even having heard these three panels, of the opinion that an ancillary right, a neighbouring right, is a very good concept. Why? I was a little bit missing in all these three panels – now I'm really challenging four, eight, 11 speakers. To stick to one very simple idea behind the protection of copyright, which is, at least in Germany and I trust in many other legislations, be that in the reasonings of the court or be that in the law, the doctrine of copyright. In Germany we have it in Section 11 of the German Copyright Act and it says – and that's something I wanted to ask to you, when you talked about looking economically to the revenues of the publishers and the impact of the users and in the triangle, I was missing the look into the revenues of Google. It's a triangle and this third section, at least, was not covered. Section 11 of the German Copyright says that the author has the right to a reasonable share of the revenues that are made out of his work. In Germany it reads 'angemessen'. I was thinking, what's the proper translation of 'angemessen'. A reasonable share; a fair share; an appropriate share. It's difficult in English. That's a doctrine that rules, I guess, all copyright systems within Europe. Now, what the news aggregators, the big ones – Google, not you – do is to earn a lot of revenue from making use of content that was produced by others, and the first producers also, not the news publisher. The question is – and I'm now looking to the author – how can we make it possible that the author gets a reasonable share of the revenues that a third person makes on its contents that he produced? If they answer this question then the news publishers come in with, as I'm convinced, a very reasonable claim to say the author would not find its public without our creative work; with our financial impact; our organisational impact; with what we do when putting together a group of journalists as a 'redaktion' as we call it in Germany, which with political colours, left, conservative, liberal, whatsoever, and with the trust in the branding, I mentioned that. That's the reasoning behind that, at least in the German discussion, the news publishers say, well, if here is a product that is the result of some creative doing we are in the position that even us, the news publishers, should also be entitled to take a reasonable share, whatever reasonable be, in the revenues third parties in the triangle make. When there is one thing that's fine with me in the German wording, it says – you have quoted it in the 87F or whatever it is – that the revenues the news publishers hopefully one day will earn from the exploitation of the ancillary rights have to be shared with the authors. There the things come back to the Section 11.

**Professor Ian Hargreaves:** Are you nearly there?

**Professor Dr Jan Hegemann:** Yes. Because I've come to an end and this whole concept of bringing those who do creative work into the position to take a reasonable share in the revenues others make was a little bit, how would you say that, not enlightened in what we have heard in the last three panels, I'm sorry to say.

**Professor Ian Hargreaves:** Thank you. I thought it was right just to re-hear that argument given the weight, the surrounding weight of other things. Can I now invite a more scheduled set of questions or points for this panel? Bertin.

**Dr Bertin Martens:** I'm glad, Jan, that you finally bring us to the fundamental question, I think, in this debate, for me, at least, as an economist. I think you are very right to point out that there is this European, continental European doctrine, legal doctrine where copyright revolves around the right to a remuneration, fair, appropriate, whatever, a remuneration. You can look at copyright, indeed, from that point of view: how is that remuneration distributed; who gets what and how much? I think there is another legal doctrine as well which I would call the Anglo-Saxon, or more US-oriented, doctrine where you look at copyright not just purely from a remuneration point of view, that's one side of it no doubt, but the other side you look at copyright as a policy tool; as an instrument for society to promote innovation; to promote the production of art work and in this case to promote the production of newspaper articles. Then you look at it not only from the point of view of remuneration, that's one side of the coin, but also at the consumer welfare, the public welfare, of societal welfare as such. Then you have a more, I think, a more balanced view that looks at, for instance, you say Google News earns a lot of money on something that's produced by somebody else but in return for that money Google News produces a service which is news aggregation, which users, consumers, consider useful. These users get it for free so, from a societal welfare point of view, there is an additional service being produced, namely the aggregation service, that has societal benefits for millions of people and that has value. So, that redistributes value away from the producers or publishers but towards the rest of society and as long as that is, for an economist again, welfare-enhancing for society as a whole, then this is a beneficial move and so that looks at copyright from the two sides and not only from the remuneration side. I think from that perspective what we've heard today is that there is a lot of things to be said that this aggregation produces a societal benefit.

**Professor Ian Hargreaves:** Okay. Andrew.

**Mr Andrew Hughes:** Hi. Yes, I think that's an interesting statement but I think it kind of captures a moment in time and it doesn't have, and I don't think your earlier contributions seem to have, a historical perspective on the direction of travel. You can say at this moment in time consumers are benefiting; infinite demand for a free good, is what I remember from my economics, but I don't think you can impute from that, that that's an acceptable or a sustainable position and I don't think what you're suggesting there really is sustainable. I think there is no question that the overall session today has certainly got a consensus on one thing which is that the news model is under severe pressure and that copyright reform is not a solution to that. I also think that I agree absolutely with John that, you know, the Schumpeter diagnosis of creative destruction is what we're going through and it's going to be a very exciting time to see what emerges from that. You cannot hold on to what you've got and hang on to it and assume you have got a right to your model lasting forever. I think everybody would agree with that. I just hope that the new models that emerge are not dominated by PR paid for by corporate rather than independent

journalism, of admittedly very varying qualities over the years. So, I think on the big point, you know, there is a lot of consensus in this room even if different views have been expressed. I don't think any of the publisher bodies feel that if the database right is enacted everything's okay. I think everyone knows – and I hope some of the economic discussion we had right at the beginning – shows that a digital future for news is still a much smaller news industry and I hope everyone's clear that Google's interest in news is peripheral to their wider business. I mean, it's not Google versus the news industry. Google is much bigger than the news industry. I also need just to thank James for his comments. We had a pretty civilised debate in the copyright tribunal and I was particularly charmed by your biographical references, which some of you may have looked up, as to the result of that, which I think was based on the fact that we, the NLA – we're even smaller than this debate – we licence paid-for media monitoring and James is entering the paid-for media monitoring business and there's a licence fee that we charge for that which we charge to over 30 other companies, and he didn't want to pay and eventually the tribunal ruled that sadly you did need to pay, and that's based on a recognition that in that narrow niche market, paid-for media monitoring, licence fees work for most of the rest of the industry and they need to work for everyone to be fair. But I think the wider point is, yes, copyright reform is not the solution to the news problem, but the solution to the news problem is a much bigger and more challenging issue than that. Thank you.

**Professor Ian Hargreaves:** I just want to give the panel an opportunity to address any of the last ten minutes. Agustin, you wanted to say something.

**Mr Agustin Reyna:** Yes, just one reaction. The idea that news aggregators, whoever, is making money out of the property of somebody else. Of course, nobody should be making money out of the work or the effort that somebody has put without sharing, you know, a piece of the gain, but I think that it's also leading to the interesting discussion there was before with snippets, you know. It's the fact that these aggregations cannot be considered as a substitute of the news piece as such because, nevertheless, if you are a user you go to the news aggregator and you would go, if you're interested on the topic or you're interested on the title with something that draws your attention, then you will go, then you go and look for the whole piece. Now, irrespective of what is the means for [inaudible 00:51:51], even if it is by advertising or subscription or whatever, then you will engage the specific publisher or specific news portal. So I think it's important that you frame how this concept of Google or whoever making money out of the property of somebody else works in this context in practice and I think it's something that has to be kept in mind because at the same time we have the discussion that also Google makes money out of the data of the users, you know. So, we'll say that they should be then ancillary right for the users' data in a perfect generation, but I think it's a much broader discussion, much [inaudible 00:52:39] in terms of how the business models of these news aggregators actually affect the non-exploitation of the—

**Professor Ian Hargreaves:** What do you and what does BEUC feel about consumers using ad blocking because then they're participating in the consumption in a slightly different way.

**Mr Agustin Reyna:** Yes, that's a very interesting discussion. We have been looking at the issue of ad blocking but more from a privacy point of view in terms of whether these... of course consumers pay for the content between which [inaudible 00:53:11] with the time that they [inaudible 00:53:14] in watching the advertising and what happens when you this advertising becomes invasive, you know. Then you raise other questions about more... linked to the issue of—

**Professor Ian Hargreaves:** It's quite tricky, isn't it, because if you go against that [inaudible 00:53:28]—

**Mr Agustin Reyna:** Absolutely, absolutely. I wouldn't say we don't have [inaudible 00:53:32] to support ad blocking because it's a way, you know, to remunerate or to pay in exchange for what you're accessing. Nothing is for free, you know, and this is something, it's a concept that is [inaudible 00:53:44] question now but it would be a legislator, you know, there is on the table a proposal by the European Commission which they consider by the first time but a consumer might engage into a contract in which he or she pays with the personal data. This is the first time that it's actually happening, you know, under EU or even national law.

**Professor Ian Hargreaves:** Okay. John.

**Professor John Naughton:** I just wanted to say that I think one of the problems with today's discussion is that although the question on the table really matters to some of the people in the room, for example to Jan and his clients, it's actually a sideshow to the really serious problem. The serious problem we have is how are we, as societies, going to deal with these companies? It's not to do with publishers. The most serious, in my opinion, regulatory and, indeed, threat in other areas as well, that we have to face is, at the moment, Google and Facebook in the particular and what we have to recognise is that, first of all, for them the news business is a side issue; it's peanuts. Google could stop... I don't think it makes actually much out of Google News and I don't think it would miss it if it went, as an aggregator. What we have to recognise is that we have two giant, at least two giant, global companies which are essentially extractive companies. They appear to provide services which we appear to value, but in fact what they're doing is they're extracting colossal amounts of personal data and then secretly trading it without regulation and invisibly. That seems to me to be a much bigger problem than the difficulties, great though they are, of the news industry. But we're not focusing on that; we're focusing on this interesting and no doubt important side issue, but that's what it is.

**Professor Ian Hargreaves:** That's what the conference was about. Yes. James.

**Mr James Mackenzie:** So, I should say, I support copyright. I would not approve of somebody in our space taking the content, the body of someone's article, and republishing it on their site. That would be infringement and we don't do that. So we're not using your content in that way. We're not republishing it. What we do with it, I believe, is entirely outwith copyright, should be outwith copyright. You ask how your businesses and their staff should get a fair amount of money from our business. I think the fair amount of money that you should get from our business is zero. You don't contribute to our indexing; to our analysis; to our email server building; to any of the work that we actually do. The work we do is not the duplication of the articles, it's the smart searching which is what people pay for. They pay for the news coming in, in a... Their company was mentioned in the 'South China Post' which they would never have noticed and then we drive a little bit of traffic to the 'South China Post'. So, we cost you nothing and we bring you revenue. If there's a financial transaction which should go on here you should be paying this. This is an entirely misconceived argument—

**Professor Dr Jan Hegemann:** That's an interesting, very interesting point.



**Mr James Mackenzie:** You want to know how your staff get paid properly, you have to run successful businesses and pay them fair wages and then ancillary businesses that shouldn't infringe any principle of copyright can be built alongside yours and, indeed, support yours. It's a complete misunderstanding. I agree with Andrew though, whatever you think the problem is, it can't be fixed with copyright. This is a structural problem in the newspaper industry and it is to do with Craigslist; it's to do with the movement of ads to online, both to the classified ads and to display ads for Facebook. We need to find a way of funding investigative journalism and I for one would be happy to tax the ... out of Google and fund investigative journalism grants that can be distributed by non-partisan people – get John to chair it, I've got a plan. That's my plan. We are not the target. Even if you get this through you would aim at Google; you would miss. They would close down Google News or they would take Spain out of it or take Belgium out of it and you would hit us and you would be putting small businesses out of work in a failed attempt to try and get big businesses who do behave unethically.

**Professor Ian Hargreaves:** Mireille, do you want to speak?

**Professor Mireille van Eechoud:** Yes, just, I guess, one in addition to, or maybe as response also to what John said about the large 'extractive' companies and the problem there. I mean, we've talked a bit today about competition law and whether, you know, market regulation could be a solution which would be worth a week's conference or longer probably. So I'm not a competition law expert at all but I think there's an issue in that area and they're struggling also with, like, how to regulate a networked economy and network effects, which is a huge challenge in this area.

**Professor John Naughton:** Just one thing about that. I mean, for example, if you think about Facebook, Facebook is actually, when you look at it, a huge share cropping exercise because you and I and other people who are members of Facebook do all the work; we write the posts; we upload the pictures; we create the content that is supposedly driving other people to log into Facebook and whose data can then be used for advertising purposes and so on. We're doing the work. We are getting in return what? Where are the revenues going for the work we do? It's completely unrecognised.

**Mr James Mackenzie:** Can I just add one more tiny, little thing? So, just specifically with regard to Facebook, so we get squeezed with licence fees and we get told we have to pay a licence if we want to display snippets, or even not display snippets, as we currently do, but if you put any newspaper article, post any newspaper article onto your Facebook page and what you'll see come up is an image and a snippet of text, the same applies on Twitter – on Twitter they're called cards, right – and what it means is the publishers have said, "Hey Twitter, hey Facebook, if you post a link to our content this is the correct snippet that is going to be of most interest to your audience and this is our copyright picture and our copyright text that you should display". They're not paying for that per time someone posts it. They're directly facilitating the big boys while trying to squeeze us out of business. It's an absurd position for anyone with a set of principles to adhere to.

**Professor Ian Hargreaves:** Okay. Yes.

**Q:** I'm so glad that this thing came up because this is one of the main arguments that is going around and I had a hard time to understand what it's all about, but it boils down, I think, to one argument which is when it comes to copyright or related, the realm of copyright in the broader sense, then there must be a market rule that says when one market player

benefits from the contributions or the investments of another market player then this first market player which benefits has to share his revenues with the other although it is an open market and they both benefit from each other. I mean, I'm not an economist but you don't have to be an economist to understand that the general economical rule is quite the opposite. I mean, the market consists of market players that are benefiting from each other, right? Otherwise the market couldn't exist. I have a hard time to understand why this should be different in the so-called creative industries where, let's say, one earns money. Let's say Apple could claim money from all these parts producers, companies that produce these headphones and everything, spare parts, whatever it is, right? There is no rule like that; it's quite the opposite, but it's supposed to be different in the creative industries and I don't think there is such a rule. When Jan Hegemann suggests that you can derive such an argument from the right of the author in a fair remuneration or a fair share, adequate share of the income of his contractual partner, that is not a competition argument or an economic argument, it is derived from an idea of natural right of a creative person who should benefit from the ones who make money out of their works, but it's not at all applicable to any other than the author, especially not to a publisher, right.

**Professor Ian Hargreaves:** Bernt, did you want to say something?

**Professor Bernt Hugenholtz:** Well, I didn't want to say literally the same but it was very much in line with what I wanted to say, what was just said by Till. Just one thing to add, and I think Bertin coined that very well, there is, of course, a discourse here between authors' rights rationale to the traditional natural rights philosophy on the one hand, and the more economic approach towards copyright on the other. But even in societies like the ones where we are here and like the ones in Germany where authors' rights are primarily grounded on natural rights' philosophies, the scope of rights are not limitless. The scope of rights is not limitless. We have everywhere in Europe accepted, including in Germany, a rule of exhaustion, for instance. We do not control after-markets for reasons that have a lot to do with competition and manageability of rights and legal certainty. All the same reasons, I think, that also would restrict any kind of an aggregation right into something very limited if existent at all. So there, even if we would generally accept in Europe your proposition, which is sympathetic to all of us, that at least authors deserve some participation in whatever profit is made wherever of their works, even that does not necessarily lead to the recognition of a right if, as we have seen in all the discussion so far, such a right is impossible to define. Its subject matter is vague, if definable at all. Its implementation at a national level are hopelessly unsuccessful. So those are all the reasons again, even accepting your proposition, to really give this another thought. By the way, your reference to the 'angemessene vergütung [recht? 01:05:10]' I don't think is very appropriate for another reason, that's a contractual rule; it's not a rule that you can enforce against third parties. It is actually the rule that obliges you as a publisher – I'm saying 'you'; I shouldn't say 'you', I should say those sympathetic to the publishers, I'm sorry for collapsing an idea and expression here – but it is an obligation on the part of the publishers to adequately remunerate authors and I'm not sure that's always happening. But that's perhaps a shot below the belt, but it's certainly part of the discussion too. It, by the way, might also explain why authors are not very much behind this whole idea because they don't see this happening on their part. Okay. I could go on for a while.

**Professor Ian Hargreaves:** There are two people, no three people, so Lucy [inaudible 01:06:14] here and then to the back. Just to flag the opportunity, rather than take him by surprise at the last moment, were Richard Danbury to wish to make a closing remark I will invite him to do that. Good. We've got five or six minutes still to play with. Lucy.

**Q:** Thank you. I'll be short. The one thing I haven't really heard discussed today is the impact that such a measure, which we really haven't defined very closely, will have on Europe's competitiveness worldwide. I mean, I would be afraid that creating such a right like this one, even though we don't know really what the controls would be, will be comparable to the creation of the database rights in 1996 and we all know what this has led to and what this means also right now for publishers, but mostly, really, for users. The database right is only useful for commercial makers of databases for no-one else, I think. So, yes, please do give a lot of thought on the impact of such a measure on Europe's competitiveness worldwide.

**Professor Ian Hargreaves:** Okay. Thank you. So, right at the back and then over here. Have you got a microphone? You have now. You first and then. One and then two.

**Q:** Okay. Two questions. The first question relating to the basic idea that right owners should participate in the revenues that are generated by using their content. Should school book publishers participate in the live income of the kids that read their books? That's the question, I think. I mean, they base everything on that. Second idea, I start a not-for-profit business that generates traffic for the newspapers. Should the newspapers pay me because I can't pay the newspapers since I'm a not-for-profit business?

**Professor Ian Hargreaves:** Well, think about those. Let's have the final question. Right at the back. Thank you.

**Q:** It's more a remark than question. It's a reaction on a remark which was made three or four speakers ago about the open market. Yes, it is true we have an open market. Yes, it is true we have the principle that you have the right to take advantage of all the presentations and the performances of someone else, but it is also true that we have a very important and, indeed, a fundamental exception to this in the field of intellectual creation, because there is a possibility that you take advantage of what someone else has done, to his disadvantage, to your own disadvantage, and you might, as a matter of fact, cannibalise his investment which would make it impossible to continue to make investments into new innovation. Now, it is always a question of how far that principle applies or not, but it is important to state it, and if it wouldn't exist then we should abolish intellectual property at all, which indeed would be a very radical proposition and, for the moment, I would not support such an idea.

**Professor Ian Hargreaves:** Okay. Squeeze in, yes. A little. The last question to be squeezed in.

**Q:** Thank you very much. I will keep it short. If Mireille is right that in years to come the street cred of professional lawyers across all areas of law depends on their ability to invoke human rights arguments, here's some food for thought before we leave. I would describe the growth area, number one, of the case law of the European Court of Human Rights as the positive obligations doctrine of states. Now, something that I think for semantics-loving lawyers, something that I think could be of huge potential and something which has very much flown below the radar, is a finding by the court in 2010, only published in French, and it recognises for the first time that states are under a positive obligation to, first of all, create an effective system of protection for journalists and authors; and secondly, to create a favourable environment for a public debate in which everyone can participate without fear. So that idea of an effective system of protection for journalists

and authors; it's not explicated further; it's not elucidated by the court, but it's there and it's an invitation to all those lawyers to make good strategic use of it. Thank you.

**Professor Ian Hargreaves:** Brilliantly drawn to everybody's attention at a crucial moment. Let's just go down the panel that way and then come to Richard. So, Mireille.

**Professor Mireille van Eechoud:** Yes. I just have one immediate question, what the context of the case was because I had some thoughts down on, or looked a bit into, what positive obligations would that doctrine be any use here, and my conclusion was – but you're more knowledgeable in this area than I am – was most probably not, so just not raise it. So, it would be interesting to hear about the case.

**Mr James Mackenzie:** Touch on a few things there. You talked about competitiveness. It's, to my mind, a miracle that nobody based outside the European Union's absurd copyright regime doesn't compete with us and publish all the publishers' content on their websites, or at least links to it, not charge any fees for it, not have to pay the publishers any fee, and completely out-compete us. There's no reason why that can't happen already. I hope nobody's listening and thinks of setting up a company based somewhere which has a more modern attitude to these things because they would just turn us over.

**Professor Ian Hargreaves:** This is being screened on the internet.

**Mr James Mackenzie:** Brilliant. Well, hello Kazakhstan. I agree entirely about the school books. I mean, the ramifications are endless. Your point as well. You know, if you sell more books then there's more shelf making for book sellers, so where is the publisher's cut of that? I mean, where does this end? Again, the shelves don't care what books are on them. We don't care what articles are in our system. The parallels are quite close. It was suggested that we were disadvantaging somebody. I'm not sure, who are we disadvantaging? Who have we, other than our competitors, because we're better than them, we're not disadvantaging anyone. We're driving traffic; we don't compete with newspapers. I also note that I made a couple of contentions that rights should be removed from publishers; the idea that a headline or a title of a work should have a copyright in it, or that an unpublished article on a server somewhere that nobody in the public ever gets to see, I said these should not be subject to copyright; I didn't hear a single argument against that which tells us we're in an inappropriate position right now and we should be drawing the law back towards innovation and away from, kind of, cartel operations.

**Professor Ian Hargreaves:** Agustin.

**Mr Agustin Reyna:** Yes. I would like to very much endorse what Lucy said, that how Europe would look like after the introduction of such a right because I think that it will be a stone in the shoes of Google will be the impact for the broader, you know, Europe economy and whether we're talking a lot about attracting new talents and trying to develop and make Europe more competitive, but would this meet such an objective or just create an incentive for more companies to go to the US and continue enjoying their fair use of [inaudible 01:14:23] and developing of this business model so then they sell to us? Thank you.

**Professor Ian Hargreaves:** Thank you. John.

**Professor John Naughton:** Just a couple of things. One because I think we have concluded that a change in the law of the kind that has been discussed during the day is not going to fix the crisis of the journalism industry, the journalism business, the journalist professional. I think, sadly, that's true. What I'd really like is a conference on what might fix it. The second thing is, I was intrigued by that mention by the last speaker, I think, of a right for journalists and authors and I wonder now how you'd define a journalist in the digital age.

**Professor Ian Hargreaves:** Let's not seek an answer to that question. We'll save that for the next conference that you propose, John. So, Richard Danbury.

**Dr Richard Danbury:** Thank you. I'll keep it brief because it's the end. John, when you asked to highlight that question you asked the right person that question as I think he's done a considerable amount of research on those sorts of subjects. Just to, kind of, wrap it up, to work back to, I think to, I think... It might be useful to work back to how I laid it out at the beginning. I think we've visited a number of the arguments I mentioned as relevant, the equality argument, the free riding argument, the natural rights argument, but I think the conversation today has validated the idea that the most important one is the incentive argument. The idea remains if we have a problem in that we consider, on the whole, the production of general interest news to be valuable and we're concerned that it's no longer sustained by the business model it used to be sustained by. This is picking up John's idea of creative destruction. The first advertisements appeared in a British newspaper in 1624 and by 1700 a third of the main London newspapers' coverage was filled with advertising. Over a number of years, 300 years, they've got used, newspapers have got used to this business model which is that people aren't prepared to pay the cover price for the generation and bundling together of general interest news. What we see now is that newspapers, as a means of aggregating attention and selling it on to advertisers, have been out-competed and they've been out-competed by the internet which does it more effectively. So, we have a problem, as John identified. We have a business model which is broken and we are trying to find a way to fund it and people look to copyright. There are two central questions: copyright could help but could it help enough; and copyright could help, but at what cost? I think the answer to those questions indicates whether it's appropriate or not to bring in a new law.

**Professor Ian Hargreaves:** Okay. Any of our other chairs wish to speak? No. Everybody is talked out. Thank you. Let me then close by thanking this panel and by all of the panels and all of you for joining in with such levels of energy during another remarkable day in this church turned centre of secular discussion. No more housekeeping notes? Nothing, just everybody.

**Professor Mireille van Eechoud:** No, enjoy your evening.

**Professor Ian Hargreaves:** Enjoy your evening. Thank you.

[End of Recording]

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Warsaw, 6 September 2016

Ms  
Elżbieta Bieńkowska  
Commissioner  
  
Internal Market, Industry, Entrepreneurship  
and SMEs  
  
European Commission  
Brussels

*Dear Commissioner Bieńkowska,*

On behalf of the Polish Chamber of Press Publishers, we would like to express our views on the issue very important for the entire creative community, i.e., protection of intellectual property rights. We have been monitoring with care and interest the efforts being currently undertaken in the EU concerning the protection of intellectual property rights, actively participating in all public consultations launched both on the international level by the European Commission, and on the national level by the Polish Government.

The Polish Chamber of Press Publishers represents 115 publishers of newspapers and magazines who publish about 460 titles altogether with a global circulation of over 1.3 billion copies, including 37 daily newspapers distributed in 2 million copies a day and read by over 7 million readers in Poland. Our members reach with their titles almost 75% of the Polish readers. We are the only organisation of the kind in Poland, gathering local, regional and national press.

Due to technological development, also our members change their business models, investing heavily in new communication channels. The content provided by our member organisations is accessible on all means of communication and in all formats, and can be read both on smartphones, tablets, computers, and in a traditional form. Unfortunately, our content is used on a large scale by various kinds of intermediaries, including technological giants, whose business models are based on using other parties' content without investing into its creation and without sharing revenues with right holders. Piracy and parasitism concerning press material result in a progressive decrease of circulation of press. Within the last decade, it amounted to over 1 billion copies and the loss of 1.8 billion PLN in revenues. The ad revenues have also declined which is reflected in lower shares in the so-called ad cake. They dropped

from 29% to 10% while shares of digital ads rose from 2.8% to 21%, at the same period of time. Shrinking revenues mean smaller funds for development of digital press and a degradation of the basic source of professional information which is still the printed press.

We observe the efforts of various European countries aimed at raising the level of copyright protection with hope since without it not only further development of the press market but also maintenance of the status quo will not be possible. We welcome the information on the plans concerning adoption of a directive on copyright in the Digital Single Market. We hope that the adoption of the directive of this kind will elevate the level of copyright protection and – together with the activities concerning the execution of IPRs, which you announced during the 21 June conference – will significantly contribute to the improvement of the situation of the entire creative sector and will greatly reduce piracy and parasitism which are so widespread in Poland. It is well illustrated by the following example relating to illegal posting of the copies of entire magazines on the Internet. The so-called “systematic cleaning of Internet” which has been carried out since January this year involving investigation of 39 periodicals led to the discovery of 92 000 infringements, the number of which dropped in June to 2 600 as a result of proceedings carried out. This infringement resulted in publishers losing ca. 5 million PLN in revenues.

Considering the fact that in two weeks’ time – in accordance with its announcements – the EC is planning to present concrete rules concerning copyright, we wish to highlight some key issues which – in our opinion – should be included in the proposed directive.

## **1. Related right**

For a long time now, the Chamber has been acting as regards granting press publishers at least the same rights that film, music and broadcasting have already had for decades. It is crucial that all kinds of newspapers and magazines will be protected in both physical and digital form.

This kind of related right should not be limited only to news and general interest publications since such a restriction would exclude a large segment of the market, namely - consumer and b-to-b magazines. In our opinion, related rights, like copyright, cannot depend on a kind of creative content. Film, music and broadcasting programmes are protected as regards entertainment, as well as the more serious content. It should also be the case as regards press. It would also be important to include scientific and academic journals. Only this kind of approach would be compatible with the commonly accepted international law. The Berne Convention protects all kinds of literary, scientific and artistic works, regardless of the form of their expression.

As far as other elements of the protected publications are concerned, the right should cover images as well as text since images have always been central parts of magazines and newspapers.

It has to be noted, however, that both physical and digital press publications need to be protected. They need it as regards their online and offline use. There are numerous pirate websites in Poland which offer not only copies of digital content but also scanned copies of printed publications, which was mentioned above. Publishers' rights cannot depend on the proof that a reproduced product was a digital and not a printed one.

To ensure legal certainty and proper protection for both physical and digital content, and avoid the confusion of different rules for digital and physical content, the best solution would be to add press publishers to the catalogue of right holders (along with other content producers) under Directive 2001/29/EC, as regards the right of reproduction and the right of making works available to the public (Articles 2 and 3), as well as under the Rental and Lending Rights Directive 2006/115, as regards distribution, and rental and lending rights (Articles 9 and 3).

## **2. Text and Data Mining (TDM)**

In our opinion, introducing a new text and data mining exception is unnecessary and dangerous for press. If it is proposed, however, it should be properly restricted.

It is important that the proposed TDM exception is limited exclusively to scientific publications (like the French approach) in order to avoid negatively impacting media pluralism and development of our democratic society (key reasons for introducing a related right for press publishers).

Licensing is the only effective way to protect publishers' content and avoid abuse of / loss of their archives as it allows publishers to determine the terms and conditions for the rights granted. If an exception is to be introduced, it has to be ensured that it does not make licensing solutions (and therefore, important safeguards) redundant. In our opinion, the best solution would be an approach that would in the first place prioritise a licence where offered.

It is of utmost importance, however, that any exception would not apply to commercial TDM. The illustration of this kind of use are activities of two largest Polish press monitoring companies which do not pay publishers due licence fees being mandatory all over the world. Court proceedings have been dragging on for 4 years now and – as can be expected – will continue to drag on for at least the same amount of time. The publishers' assessed losses amount



to about 1.8 million PLN, annually. The introduction of an exception allowing the commercial use would mean legalising this illegal activity, the global value of which in the Polish market is assessed at about 40 million PLN. The Polish publishers – producers of press content used in press reviews do not receive even a proverbial penny in the course of this procedure.

### **3. Technical Protection Measures**

The possibility for Member States to interfere with Technical Protection Measures (TPM) must also be avoided. TPMs, currently dealt with under Article 6 of Directive 2001/29/EC, are the mechanisms that publishers of digital content depend on to control access and copying, which are crucial for the viability of their businesses. Such measures are also vital if there is to be further investment in digital publishing. People will be reluctant to invest in content if they cannot be sure they can properly protect it, so proposals to allow for Member States to interfere with TPM under certain conditions must be avoided.

We hope that the above remarks and arguments (which in synthetic way are presented in attachment) will be kindly considered by you and our suggestions will be included in the proposal prepared by the EC. At the same time, we wish to assure you that all activities aimed at the expansion of the intellectual rights' protection, including those presented by you on 21 June (like for example, establishment of special courts to try cases concerning IPR) will be promoted and supported by us and our members with the same vigour as the proposals for expanding the scope of copyright exceptions will be criticised.

Yours faithfully,



Personal data

The Chamber of Press Publishers would like to highlight its key concerns, while recognizing that the situation may well have evolved in the meantime:

**I. Related right: It is crucial that all kinds of magazines and newspapers will be protected, in both physical and digital form, and that the term of protection is meaningful**

It is overdue that all magazine and newspaper publishers get for their digital and printed editorial products at least the same rights that film, music and broadcasting have already for decades. These rights would not include any levy or other kind of aggregator-tax etc.

**1. All newspapers and magazines must be covered – Restriction to “news and general interest-publications” would exclude a significant part of magazines and a majority of all press titles in Poland and Europe**

A restriction to “news and general interest publications” would exclude a significant part of consumer magazines and the whole b-to-b magazine market. Magazines are – apart from very few general interest magazines – by definition “special interest” covering all areas people are interested in, as well as all possible professions. Like authors' rights, related rights cannot depend on the kind of creative content. Film, music and broadcasting are protected as regards entertainment, as well as with serious content. Such a restriction would also be contrary to international law – the Bern Convention protects all kinds of literary, scientific and artistic works, regardless of the form of their expression. Such a restriction would be an unprecedented discrimination against the majority of press titles in Poland and Europe.

Addressing this problem could be done by covering in the scope “all newspapers and magazines on any media (digital or printed)”. There should be clearly no restriction to news and general interest.

It would also be important to include “scientific and academic journals”. Should however these scientific publications not be part of the proposal, this does not justify excluding consumer and b-to-b magazines.

As regards further elements of the protected publication it must cover images as well as text as images which have always been central parts of magazines and newspapers.

**2. Both physical and digital press publications need protection. They need it as regards online and offline use.**

a) The online uses of both, digital and printed versions of newspapers and magazines must be protected. Pirate websites not only present copies of digital content, but offer **scanned copies of printed publications** as well. Publishers' rights cannot depend on the proof that the reproduced product was a digital and not a printed one.

b) Offline exploitations of press printed and digital press products must be covered. The printing out of digital articles is a normal and wide spread offline use in the digital age and a classic reproduction of the protected work which must be covered. Moreover not protecting the core productions of press publications, the reproduction of the printed versions, seems a very strange restriction of the right.

Covering physical reproductions is also necessary to **properly address the situation following the CJEU's ruling in Hewlett Packard vs. Reprobel** (12 November 2015 – C572/13), to ensure that press

publishers are entitled to appropriate compensation for the re-use of physical content, not only digital, in line with other content producers. The instead proposed possibility for member states to grant a part of a remuneration to rightsholders to publishers without making them rightsholders is inconsequential and not sufficient.

### 3. The rights must go beyond reproduction and making available to provide sufficient protection

To ensure legal certainty and proper protection for both physical and digital content, and avoid the confusion of different rules for digital and physical content, the best solution would be to add press publishers to the catalogue of rightholders (along with other content producers) under Directive 2001/29/EC as regards the right of reproduction and **communication to the public of works and right of making available to the public (Art 2 and 3)**, as well as under the Rental and Lending Rights Directive 2006/115 as regards distribution and rental and lending rights (Arts 9 and 3).

The recent Advocate General's opinion in **Case C-174/15** further reinforces the need for publishers to be recognized as rightsholders under Directive 2006/115, by interpreting lending as also covering e-lending. If press publishers are not listed in the catalogue of rightholders, they would not be entitled to compensation in such a situation. Not granting all the aforementioned rights would put both compensation and future licensing revenues at risk, and reduce capacity to enforce rights, thereby negatively impacting publishers' capacity to invest in content, innovation, employment and their overall business. The provision recommended in the IA, which would allow Member States to provide that publishers may claim compensation for uses, notably under the reprography exception, **does not provide an adequate solution for press publishers**.

### 4. The term of protection has to be meaningful, as for other rightholders

For a publisher's right to be meaningful and effective, it is important that the term of protection is consistent with the length of protection for other rightholders (e.g., 50 or 70 years). Otherwise, press publishers' businesses will be unnecessarily negatively impacted. A short term would be particularly **harmful when considering the commercial value of publishers' archives**, which are commercialized long, long after first publication. A shorter term would, without justification, result in press publishers having a lower amount of protection compared to producers in other creative sectors and greatly limit the licensing possibilities and opportunities for investment and growth that a longer protection would allow.

## II. Text and Data Mining exception is unnecessary. If proposed, it should be limited to scientific publications and non-commercial purposes, with licences taking priority where offered

### 1. It is essential that any proposed TDM exception is limited to scientific publications (like the French approach), in order to avoid negatively impacting media pluralism and our democratic society (key reasons for introducing a related right for press publishers).

Journalistic content in the archives of newspapers and magazines is privately financed (unlike many scientific publications, which are to a large extent based on publicly funded researchers' content). An exception would pose a huge risk to revenue streams (current and future), which press publishers depend upon to finance and sustain their businesses, pay journalists etc. This does not seem to have been factored into the IA.

### 2. The availability of licences (for TDM and not only for reading) should always have priority over any exception, with the possibility to be remunerated / compensated for use of content for TDM.

Licensing is the only effective way to protect publishers' content and avoid abuse of / loss of their archives as it allows publishers to determine the terms and conditions for the rights granted. If an exception is to be introduced, it has to be ensured that it does not make licensing solutions (and therefore, important safeguards) redundant. An approach that would prioritise a licence where offered in the first place would allow the publisher to have knowledge of the miner, what they wanted to mine, for what purpose, and thus to tailor the agreement. Why put a whole archive at risk for the price of e.g., a subscription?

### **3. It is of utmost importance that any exception would not apply to commercial TDM**

Even if the line between TDM for non-commercial and commercial purposes might be difficult to draw (e.g. research institute or professorship financed by private company; further use of content for future commercial offer), any exception should not apply to commercial TDM. This is crucial in order to protect viable business models such as press clipping as well as media monitoring services and licensing solutions for TDM for commercial players. **"Lawful access" is not a suitable safeguard** when it comes to protecting newspaper and magazine archives from massive downloads etc. It cannot be possible that for a payment of e.g., 30 euros a year for a subscription, this would allow TDM for commercial purposes, because the miner is from a **"public interest research organisation"**. This would put businesses unnecessarily at risk. Furthermore, encompassing **public-private-partnerships** under a TDM exception would allow for companies which should usually have licensing arrangements for TDM to have lawful access to publishers' content, including subscriptions and content licensed to public research organisations, but without payment. In effect, the exception would serve to subsidise large digital companies, amongst others, while putting publishing businesses in jeopardy.

### **III. Technical Protection Measures must not be endangered**

The possibility for Member States to interfere with Technical Protection Measures (TPM) must be avoided. TPM, currently dealt with under Article 6 of Directive 2001/29/EC, are the mechanisms that publishers of digital content depend on to control access and copying, which are crucial for the viability of their businesses. Such measures are vital if there is to be further investment in digital publishing. People will be reluctant to invest in content if they cannot be sure they can properly protect it, so proposals to allow for Member States to interfere with TPM under certain conditions must be avoided.

### **IV. Transparency obligations are not suitable for press publishers: they would be impracticable and costly, posing a danger to the press sector and future business models**

We are concerned that the IA recommends imposing transparency obligations on the contractual counterparty of creators supported by a contract adjustment right and a dispute resolution mechanism. Such an EU legislative initiative would be totally inappropriate, unworkable (also linked to the impracticality press publishers having so many contributors), and huge financial and administrative implications. While the IA (under Option 2) recognizes that reporting on all works to all creators may be inappropriate for sectors like press publishing, considering the large number of works used in their daily output, it does not specifically rule press publishers out of its recommended approach. A reporting obligation for the press would be **disproportionate** and must be avoided. It would unnecessarily put the press sector - already in difficult circumstances - under further pressure and unnecessarily jeopardise future business models and therefore media pluralism.

Out of scope

**From:** Media publishers [<mailto:innovativemediapublishers@gmail.com>]  
**Sent:** Tuesday, October 03, 2017 10:05 AM  
**To:** [REDACTED] (CAB-GABRIEL)  
**Subject:** Follow up on meeting with Innovative Media Publishers

Personal data

Dear Mr. [REDACTED],

On behalf of the European Innovative Media Publishers, we wanted to thank you for taking the time to meet with us and for having such a great conversation.

We really appreciated such a valuable exchange of views on the copyright directive and article 11 in particular, and wanted to let you know we are at your disposal for any potential cooperation actions that you deem appropriate.

Please find our open letter and one pager attached, and the 2017 NERA Report which includes data about the impact of the Spanish experience with a law similar to the proposed neighbouring right [here](#).

In addition, we are happy to share the link to our website:  
<http://mediapublishers.eu/>.

Please feel free to get in touch with us at any time; should you need to reach out to [REDACTED] and [REDACTED] directly, please find below their contact information:

?  
?

Personal data

I am also sending you the contact details of our Spanish member, should you wish to have more information about publishers' experience with the Spanish law:

?



Personal data

Many thanks,

European Innovative Media Publishers

Brussels, 25<sup>th</sup> September 2017

**RE: Open letter to Members of the European Parliament and the Council of the European Union on the introduction of a new neighboring right under art. 11 of the Copyright Directive**

Dear Ministers,

Dear MEP Axel Voss,

Dear Members of the European Parliament,

We are writing to you as the Coalition of Innovative Media Publishers, comprising AEEPP (ES), ANSO (IT), SPIIL (FR), 300polityka (PL), Echo24.cz (CZ), Golem.de (DE) and Meltygroup (FR). We represent associations of small and medium sized publishers, media companies and digital native outlets, committed to producing high quality news and relying on online channels to reach and grow our audiences. On a daily basis, we provide more than 1.37 million stories to 140 million readers.

We support the creation of a regulatory environment that fosters a diverse, pluralistic, competitive and innovative media publishing sector, that contributes to the EU's digital leadership globally and actively defends EU citizens' freedoms. However, we feel that the Commission's proposal for a Directive on Copyright in the Digital Single Market does not achieve these goals and **we wish to communicate our strong reservations for the proposed neighbouring right as enshrined in Article 11 of the Directive.**

A neighbouring right would have an adverse effect on the business models of online publishers: in Spain and Germany, where similar rights have been introduced, news publishers experience increasing challenges in reaching their audiences online. **The Commission proposal fails to take into consideration market realities and the fact that digital publishers and online media outlets rely heavily on a broad variety of online channels to reach their readers and generate revenue.**

**Moreover, Article 11 will also have serious negative effects on the quality of the press, freedom of opinion and freedom of expression of EU citizens.** A new publisher right makes it harder for small and medium sized publishers to reach their audience and raises barrier to entry.

## EUROPEAN INNOVATIVE MEDIA PUBLISHERS

*promote a regulatory environment that fosters a diverse, competitive, free and innovative media publishing*

**In Spain and Germany, small and medium sized news publishers suffered more from the introduction of the right than large and established publishers.**

For the reasons of (1) dismantling digital business models and (2) stifling media pluralism, we discourage you from creating a new neighbouring right in Article 11. We encourage you to work on a compromise that fairly balances the interests of all publishers of press publications. We believe that some of the alternative options tabled by the Presidency and certain MEPs through granting effective protection to publishers, are balanced, effective and workable.

We call on you, policy-makers involved in the debate, to reject the Commission's proposal to introduce new rights for press publishers, and to reject the adoption of Art 11. Should the outright rejection of article 11 not be feasible, we believe that alternatives tabled by the Presidency and certain MEPs, may form the basis for a more constructive discussion.

Yours sincerely,

The European Innovation Media Publishers

### *The Spokespersons*

AEEPP

ANSO

Personal data

300Politika

Spiil



Brussels September 9<sup>th</sup> 2016

Dear President Juncker, Vice-President Ansip, Vice-President Timmermans, Commissioners Oettinger, Jourová, Bieńkowska, Navracsics,

The signatories below are writing to you in anticipation of the upcoming copyright package reform that is expected to be released on September 15<sup>th</sup>.

We support a copyright reform that creates an online environment that promotes innovation, serves consumers and supports creators. We recognise the importance of copyright and the need to respect it, however, we ask for copyright reform that upholds and strengthens the fundamental principles of the Digital Single Market such as rights of citizens to freedom of information, access to knowledge and the limitation of intermediaries' liability, which lie at the very foundations of the internet.

We call upon the European Commission not to create new ancillary rights for publishers. The creation of a new ancillary right for publishers is against those fundamental principles. The creation of similar ancillary rights in Spain and Germany has produced no positive outcomes but has harmed consumers, innovation and the internet at large.

We request that the European Commission publishes the response to its public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'. From individual consumers to start ups, publishers, small and large businesses, civil society organisations, academics, universities and industry groups, many have pointed out that new ancillary rights for publishers were harmful.

We strongly urge the Commission to preserve the Internet as an engine of growth, by maintaining the tenets of the e-commerce Directive liability regime in its upcoming copyright proposal. The limited liability principles for hosting providers – as enshrined in the Directive – have allowed the European digital economy to flourish. The limited liability regime for intermediaries provides a balanced framework which ensures that the interests of right holders, citizens, consumers, and businesses can be vindicated in the online environment. An undermining of the safe harbour and no-general monitoring obligations of the e-commerce Directive would have immediate and far-reaching chilling effects on innovation, consumer rights and freedom of expression and would risk turning back the clock on Europe's Digital Single Market.

Furthermore, limiting a proposed Text and Data Mining (TDM) exception to only "public interest research institutions" could ultimately restrict, rather than unlock, use of TDM across sectors and would be more likely to drive such research and innovation out of Europe. Any entity that has lawful access to data should be permitted to perform TDM and analytics on that data, regardless of the entity's status as a research organisation or commercial entity.

We await with interest the legislative proposals that the European Commission will adopt later this month and hope that you will take our concerns into consideration.

Should you have any questions regarding the above, please contact any one of the signatory organisations.

Yours Sincerely,



**Allied for Startups**

**Application Developers Alliance**

**C4C - Copyright 4 Creativity**

**CCIA – Computer and Communications Industry Association**

**CDT - Centre for Democracy & Technology**

**Centrum Cyfrowe**

**Communia**

**DIGITALEUROPE**

**EBILDA - European Bureau of Library, Information, and Documentation Associations**

**EDiMA**

**EDRI**

**EIFL – Electronic Information for Libraries**

**EuroISPA – European Internet Service Providers Associations**

**EFF – Electronic Frontier Foundation**

**EFF – Electronic Frontier Foundation**

**IFLA - International Federation of Library Associations and Institutions**

**IGEL - Initiative Gegen Ein Leistungsschutzrecht (Initiative against an ancillary copyright law for press publishers)**

**Kennisland**

**LACA – the Libraries and Archives Copyright Alliance**

**OFE - Open Forum Europe**

**Open Media**

**ORG – Open Rights Group**

**SA&S - Samenwerkingsverband**

**Auteursrecht en Samenleving (Partnership Copyright & Society)**

**VoB - Vereniging van Openbare**

**Bibliotheken / The Netherlands Association of Public Libraries**

**Wikimedia**

**From:** [REDACTED] (CNECT)  
**Sent:** 05 March 2017 21:07  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED] (CNECT); [REDACTED] (CNECT)  
**Subject:** Fwd: On Copyright in the digital single market  
**Attachments:** image002.jpg; ATT00001.htm; image004.jpg; ATT00002.htm; Letter on the proposal on the Directive on Copyright in the Digital Sing....pdf; ATT00003.htm

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Sent from my iPad

Begin forwarded message:

**From:** EUROCADRES Secretariat <[REDACTED]@eurocadres.eu>  
**Date:** 2 March 2017 at 14:46:09 GMT+1  
**To:** "[REDACTED]@ec.europa.eu" <[REDACTED]@ec.europa.eu>, "[REDACTED]@ec.europa.eu" <[REDACTED]@ec.europa.eu>  
**Subject:** On Copyright in the digital single market

To the attention of Mr [REDACTED], DG CNECT, I2

Dear Mr [REDACTED],

Please find attached a message for your consideration in the ongoing work on Copyright in the digital single market (COM(2016)0593 - 2016/0280(COD)).

Yours sincerely

[REDACTED]  
President

## The proposal on the Directive on Copyright in the Digital Single Market

Eurocadres is the European cross-sectoral trade union voice of professionals and managers, a recognised social partner participating in the European cross-sectoral social dialogue.

Eurocadres welcomes that the EU Commission regarding the proposal on the Directive on Copyright in the Digital Single Market has an approach, where existing well-functioning systems regarding licensing should be continued. The wording not only to wish, but to ensure these systems on licensing and extended collective licensing to continue and to be models for the development in other countries.

Furthermore, it is important for Eurocadres, as the cross-sectoral European trade union organisation for academics, to emphasise the need for initiatives ensuring a better balance between stakeholders within the academic publication ecology. In particular, we think that the reform of European copyright needs to become more synchronised with and support existing EU Open Access strategies.

We have the following recommendations:

### 1. Self-archiving rights for academic authors

Researchers in the role as academic journal article authors, per academic tradition hand over their copyrights to publishers for free to receive academic credit. The tradition allows academic publishers to exploit both researchers and research institutions' need to provide access to academic literature. It has created a market place where publishers thrive, but where research institutions, due to exorbitant price increases, no longer can provide exhaustive access to the academic literature for the same researchers producing it.

Eurocadres suggest that a new exception is introduced, allowing academic researchers, after a reasonable embargo following the ERC's OA guidelines (max 6 months for science, technology and medicine, max 12 months for humanities and social sciences) to self-archive copies of their published journal articles in a repository of their choice, to ensure that researchers are always able to share published research results with fellow researchers and that publicly funded research is always available to the society financing it.

## 2. Article 3, Text and Data Mining

The application of technical protective measures is per default implemented by the right holder to prevent protected content from being downloaded on a large scale and in a systematic manner. The proposal must in a detailed and clear manner define under what conditions the intended exception always can be used.

We suggest that it is specified that research institutions and researchers who wish to perform TDM on content they have legal access to, must always be able to do this without risk of blockage, provided that advance announcement of the intent is communicated to the rights holder.

## 3. Article 4, use of works and other subject-matter in digital and cross-border teaching activities

Our over-all view is to have as few exceptions as possible and to make remuneration mandatory for digital use of works and other subject-matter in the education as well as in another situation. Regarding illustration for teaching, the three-step test must be guaranteed, and it should be emphasised, that this is regarded more narrow than in the Infosoc directive. We also find the terminology “fair compensation for the harm incurred” in article 4.4 misleading as that could be translated as if authors must prove such harm.

Thus, in article 4 we urge the Commission to following changes:

- Introduce mandatory collective management schemes
- Article 4.2: replace the wording “may provide” by “shall provide”
- Article 4.4: delete the wording “for the harm incurred”

## 4. Article 11, Protection of press publications concerning digital uses

Though the article 11 about publisher’s rights does not directly affect the academic environment, we in Eurocadres are concerned about the future development and in particular because it is the sole right for publishers. We therefore firstly recommend the Commission to delete article 11. Secondly, if it remains in the directive, we strongly recommend to introducing paragraphs that ensure that publishers rights cannot be generated in situations where publishers have received rights from authors for free. Any revenue from these rights

will be distributed fairly and at best 50-50 between authors and publishers through collective management organisations.

Thus, in article 11, we recommend the Commission to introduce the following sentence:

- 11.2: Revenues from these rights must be distributed to both authors and publishers through collective management organisations including both publishers and authors as they should be remunerated on a fifty-fifty basis.

#### 5. Chapter 3, Article 14-16, Fair remuneration in contracts of authors and performers

Eurocadres welcomes the paragraphs on transparency and contracts and supports strengthening of these paragraphs to ensure that authors not only have their rights, but also will achieve better means to defend their rights and benefit from them. We also see the paragraphs as the first and very important steps towards transparency on revenues within the academic publication industry, today obscured by confidentiality clauses of licenses agreements.

In particular article 15 on Contract adjustment mechanisms could have a positive impact for academic authors. We do, however, again see a need to highlight the singularity of the marketplace of academic publishing:

As per academic tradition, researchers transfer copyright of research journal articles to publishers without remuneration. On this background, fair contracting and suitable contract adjustment mechanisms for academic authors of research articles does not relate to additional, appropriate remuneration but to retaining rights to store and share the articles they author with other researchers as well as making it freely available to the society at large having paid for the research being published. We refer to the suggested exception for self-archiving.

Yours sincerely,



*President*  
Eurocadres