Commissioner Gabriel's Meeting with European Magazine Media Association (EMMA) – [Redacted]

[Basis (CAB Gabriel/48)]

8 September 2017

EMMA (European Magazine Media Association) is a non-profit organisation based in Brussels. It is the main European magazine association and represents 15,000 publishing houses, publishing 50,000 magazine titles across Europe in both print and digital format. EMMA members comprise 22 national associations, 5 international associations and 20 corporate members.

Its mission is to promote and protect the interests of European magazine publishers vis-à-vis the Institutions of the European Union. The main aim of EMMA is to ensure a long-term survival and prosperity of a plural, diverse and economically successful magazine publishing industry in the EU.

EMMA is with EPC (European Publishers Council), ENPA (European Newspaper Publishers) and NME (News Media Europe) one of the main associations representing press publishers in Europe.

Scene setter

I. On the Digital Single Market Strategy

II. On copyright

State of play of the legislative process

The proposal for a Directive on copyright in the Digital Single market, adopted on September 2016, is being negotiated in the Parliament and the Council.
In the Parliament, the vote for adoption of the draft report in JURI (the lead committee), should take place the 10 of October. 942 amendments have been tabled. The rapporteur, Ms Comodini (EPP/MT), has been replaced by A.Voss (EPP/DE) who does not necessarily share Ms Comodini’s view as expressed in her draft report. He is notably closer to the Commission’s view on press publishers. Other EP committees (IMCO, CULT, ITRE) have adopted their opinion in June and July. The adoption of the opinion of LIBE is expected in September. (See background)

In the Council, the Maltese presidency has proposed a compromise text covering the first part of the Directive (articles on exceptions and out of commerce). On the 30 of August, the Estonian Presidency sent to Member States a compromise text on the second part of the Directive (negotiation mechanism, publisher’s right, value gap and remuneration), to be discussed during the Council Working Party meeting of 11 September 2017.

Regarding the publisher’s right in particular, the Estonian presidency presents two options:

- option A maintains the approach of the related rights as in the Commission proposal providing with some clarification including that the right does not cover the digital use of text excerpts that do not meet the threshold of originality.
- option B replaces the related rights with a presumption in favour of press publishers which entitle them to conclude licence and to take action before courts as regard the digital uses of their publication.

This compromise text is still not officially published but has been leaked. It is not close to a final position (it has to be discussed amongst Member States), so we are not sure they will want to comment it.

**Press publisher’s views on the copyright package**

As representative of the press publishers, they are expected to show the following views:

- They are very supportive of the introduction of new related rights for press publishers.

Regarding the current legislative process, they are expected to express strong concerns regarding some MEPs amendments including Ms Comodini’s (EPP) proposal to replace publisher’s rights by a presumption of representation for the purpose of enforcement, given that, in their view, this option would not recognise their role as creators and investors in a press publication nor help them in negotiations with online players. Similarly, they are likely to question the recent (leaked) compromise proposal presented by the Estonian presidency which presents two options, the second one being a presumption based solution which would facilitate not only the enforcement but also the licensing of rights by press publishers. Regarding the first option (the maintaining of a publisher’s right), they are likely to deplore the clarification regarding the threshold of originality that an extract needs to fulfil to be protected, as they consider that this requirement – proper to copyright- is not necessary regarding a related right and that it increases legal uncertainty. [NB: In a roundtable organised by Commissioner Oettinger in January 2016, they had stated in this regard that: “a publishers’ right depending on the author’s right would not protect the excerpts, because they do not reach the required level of creativity.”]
In these both regards, they will insist that they expect the Commission to keep strongly defending the press publisher's right (art.11) without originality requirement.

On the other hand, they are likely to be generally satisfied by the votes of the EP committees (CULT, ITRE and IMCO) in favour of the press publishers' rights.

III. On e-privacy
IV. On AVMSD

EMMA position
Objective(s)

I. On the Digital Single Market Strategy

- Reaffirm the Commission's commitment to achieving a fully-functioning Digital Single Market.

- Raise awareness of the upcoming proposals announced in the DSM Mid-term Review.

II. On copyright

- The ongoing negotiation in the Council and the Parliament have proven to be difficult regarding some of the areas press publishers are more interested in (see background). The introduction of the neighbouring rights for press publishers is in particular, being subject to controversy.

- In this context: we want to reassure them that the Commission is standing behind its proposal. At the same time, they need to be aware that the publisher's right is still fragile in the EP and, that in the Council, a considerable proportion of MS seem to be leaning rather towards a presumption based solution.

III. On e-Privacy (see scene setter)

IV. On AVMSD (see scene setter)
Line to take

I. On the Digital Single Market Strategy and mid-term review

II. On copyright

General
On publisher’s right

- The Commission’s proposal is balanced and positive for press publishers. The ongoing negotiations in the Council and the Parliament have proven to be difficult, regarding some of the areas of interest to publishers (e.g. the publishers’ right and TDM). Therefore, press publishers’ support in the discussions will be important.

- Regarding the publishers' rights, the Commission’s proposal aims to address the main problems faced by press publishers in the digital environment, both in terms of licensing and enforcement.

- The new right would help publishers in the licensing of their press publications in order to obtain a fair share of the revenues generated by the use of their content in the digital environment.

- Therefore, an approach that only addresses enforcement issues (Comodini’s draft report) would not be sufficient to guarantee that the press publishers’ role in investing and disseminating quality journalistic content is sufficiently recognised and compensated.

- Obviously, the deletion of the Commission’s proposal on press publishers’ rights would not meet our objectives regarding the press industry and would in the long run weaken media pluralism, democratic debate, quality of information and cultural diversity in the European society.

- Otherwise, the Commission is following closely the discussions in the different EP committees and in the Council. We are still analysing the proposed amendments and assessing the extent to which they could affect the effectiveness of the proposed intervention.

III. On ePrivacy
IV. On AVMSD
Defensive points

I. On the Digital Single Market Strategy

What is the Digital Single Market?

Why are you reviewing it?

II. On copyright

What is the Commission's assessment of the Compromise proposal tabled by the Estonian Presidency in the Council, regarding the press publisher’s right? (Note that the EE text is not public but its content is now widely known as it leaked – Cssr should be aware of this to decide whether she wants to comment on it)

- The Commission is still carefully analysing the text tabled recently by the Estonian Presidency, proposing to Member States two options regarding the press publishers' right issue. The Commission has not changed its position. We believe that granting press publishers a neighbouring right is the most effective solution to ensure that the press sector is supported into its transition to the digital environment.

- Overall, in the current context of negotiations with the Council and the Parliament, our objective is to ensure that the Directive keeps the level of ambition of our proposals when adopted. In particular, we need to make sure that the Directive as eventually adopted provides a real value added to strengthen the copyright industries in the digital environment.

The leaked compromise Proposal of the Estonian presidency put forward two options regarding the protection of press publishers. In the option A, they propose to maintain the approach of the related rights as in the Commission’s Proposal but they clarify that the protection will only apply to extracts that meet the threshold of originality. What is the Commission’s view on this clarification? Does it mean that the protection will not cover the snippets of press publications?

- The Commission is still carefully analysing the (leaked) text tabled recently by the Estonian Presidency, proposing to Member States two options regarding the press publishers' right issue, including such clarification.

- In general, the Commission's proposal remains "neutral" as regards the question as to whether and to what extent, the reproducing of "snippets" and/or displaying
of hyperlinks, constitute copyright protected acts under EU Law. In another
cwords, the Commission's proposal is not intended to regulate this specific kind of
situations. The protection of snippets and/or hyperlinks under copyright is a
more general question that has become a more important topical issue with the
adoption of the Proposal.

- With its proposal, the Commission's objective is to introduce a new category of
neighbouring right holders - press publishers-. It does not aim at modifying the
scope of what is already protected by copyright.

- Regarding the "snippets" in particular, reproducing or making available
fragments or short extracts of press articles, which constitute the expression of
an intellectual effort by the author, is already covered by copyright. The related
rights granted to press publishers will not change that.

- The option A of the presidency compromise proposal seems to confirm the
above-mentioned. It does not add any new requirement but just confirm the case
law of the Court of Justice on the notion of originality. It clarifies that the
protection will cover extracts (including "snippet") to the only extent that they
fulfil the threshold of originality. As a consequence, if the extracts are too short
to reflect the author's intellectual creation, they will not be covered by the new
rights.

The Commission has proposed a new press publishers right for the online use of
their publications. Does not the Commission's proposal risk to affect the
functioning of Internet, especially the sharing of hyperlinks or of snippets, for
instance when tweeting?

- The right of individual users to share hyperlinks or snippets, in particular in social
networks, is not affected by the Commission's proposal. The proposal does not
impact what individual users can do with press publications.

- The COM's objective is not to intervene on the way users share or use extracts
of publications online, but on the way third parties obtain financial gain from
these online uses.

- For that purpose, the COM has introduced a new category of neighbouring right
holders - press publishers- but has not modified the scope of what is already
protected by copyright.

- As regards hyperlinks, the proposed Directive specifies explicitly that the
protection granted to press publishers does not extend to acts of hyperlinking,
which do not constitute communication to the public (Recital 33).

- As regards "snippets", reproducing or making available fragments or short
extracts of press articles, which constitute the expression of an intellectual effort
by the author, is already covered by copyright. Nevertheless, if the extracts are
too short to reflect the author's intellectual creation, their reproduction will not
require authorisation or payment. The related rights granted to press publishers
will not change that.

Why does not the proposal on publishers' rights cover the rights of distribution
or communication to the public?

- The Commission has put forward a balanced proposal based on the evidence
gathered during consultation with all relevant stakeholders.
The identified problem related to the exploitation of press publishers' content is linked to the digital uses of your content.

We need to make sure that we propose something which does not go beyond what is necessary to achieve our objective.

Why scientific publishers are not holders of related rights in the Commission's proposal?

The Commission is aware of the important role and responsibility of scientific publishers in the investment and dissemination of scientific journals.

The Commission's proposal on new related rights is targeted to press publishers. It is in this area where the main problems regarding the licensing and enforcement of rights have been identified. Press publishers are today facing significant problems regarding the recoupment of investments in their press publications.

Although the transition to the digital environment is challenging for all sectors, the business models of STM publishers differ from the means of exploitation and reuse of news content by internet platforms, news aggregators and social networks.

What is the added value of the new related right for press publishers?

The new related right covering news publications will ensure that the organisational and economic contribution of press publishers (such as newspaper and magazine publishers) is recognised and incentivised in EU law, as it is today the case for other creative sectors (film and phonogram producers, broadcasters). It will in particular provide these publishers with a substantial added value when it comes to licensing out their publications for online uses by third parties, something that is increasingly important for them in the digital environment.

It will also allow press publishers to effectively act against illegal uses of press publications online, whereas today a court may ask a publisher to prove that it owns all the allegedly infringed rights (e.g. in one case reported by the publishing industry up to 22,000 contracts with journalists in order to file a lawsuit for the mass infringement of publishers' rights in DE).

Overall we expect the new right to give publishers a clearer legal framework to test new business models in the digital environment to the ultimate advantage of the consumers. This is not only about news aggregators. For example, licensed multi-brand B2C services of the type of Netflix or Spotify are just starting to emerge in the publishing sector, with the Dutch company Blendle being the best known example at the moment; we expect the new right to help publishers developing further licence-based cooperation with innovative business models in the future.
III. On ePrivacy

[Content redacted]
Background notes

I. On the Digital Single Market Strategy

DSM mid-term review
DSM State of play
II. On copyright

1. Directive on copyright in the DSM – State of play

a) In the European Parliament

In JURI (lead committee):

The draft report of Ms Comodini (EPP/MT) was delivered on 10 March. However, Ms Comodini has been replaced recently by Mr Axel Voss (EPP/DE) as rapporteur. Mr Voss does not necessarily share Ms Comodini’s views as expressed in her report (e.g. he is closer to the Commission’s views on press publishers’ rights or value gap).

The shadow rapporteurs are Lidia Geringer (S&D/PL), Angel Dzhambazki (ECR/BG) Jean-Marie Cavada (ALDE/FR), Jiri Mastalka (GUE/CZ), Julia Reda (Greens/DE), Isabella Adinolfi (EFDD/IT) and Marie-Christine Boutonnet (ENF/FR).

924 amendments have been tabled (to be added to 72 in the draft report) and were discussed on 13 July. The vote for adoption of the draft report will take place on 10 October (tbc).

Overview of the main changes proposed in the amendments tabled in JURI:

On press publishers’ rights, there is no consensus, including among political groups (EPP, ALDE, and S&D). Amendments are made with very opposite objectives, ranging from the complete deletion of the new right (Geringer, Mastalka, Reda and Adinolfi) to the extension of its scope (Voss, Cavada, Dzhambazki). The approach taken by Comodini is only followed by a couple of EPP members.
In other EP committees:
IMCO adopted its opinion on 8 June (rapporteur: Catherine Stihler). Publishers’ rights are extended to analogue uses but reduced in its term of protection to 8 years and complemented by optional rules on journalists’ remuneration.
CULT adopted its opinion on 11 July (rapporteur: Marc Joulaud). On value gap, Press publishers’ rights are extended to scientific publications and to analogue uses and complemented by rules on fair remuneration of journalists and other authors in the publication.
ITRE adopted its opinion on 11 July (rapporteur: Zdzisław Krasnodębski).
LIBE (rapporteur: Michał Boni) will vote its opinion in September (date to be defined).

b) In the Council
- MS have generally welcomed the provisions on exceptions and out-of-commerce works. Many MS are in favour of extending the exceptions to new beneficiaries and simplifying the licensing system proposed for out-of-commerce. Many MS raised concerns regarding the rationale of the proposed publisher’s rights, their effectiveness and the lack of evidence.
On 30/08/17, the Estonian Presidency sent to MS a compromise text covering the remaining articles of the Directive (negotiation mechanism, publishers' rights, value gap, and remuneration). This text is not public, but it leaked and it is now widely known by stakeholders.

2. Evolution of the discussions on press publishers’ rights

- In the Council, a first discussion on the provision on press publishers’ rights took place before the summer on the basis of a Presidency issue paper. Even though it is premature to refer to clear positions, FR, ES, IT, PT, DE have generally shown support of the approach taken by the Commission’s proposal. Several questions, including from BE, PL, NL, IE, HU, SE, UK have been raised by some MS regarding the rationale and proportionality of the proposal. The Presidency sent to MS a compromise text on this provision to be discussed during the Council Working Party meeting of 11 September 2017.

In particular regarding article 11 (and related recitals), the Estonian Presidency presents two options:

- Option A maintains the approach of the related rights as in the Commission’s proposal, streamlining the text and providing some clarifications including that the right does not cover the digital use of short extracts that do not meet the threshold of originality.
- Option B replaces the related rights with a presumption in favour of press publishers, which entitles them to conclude licences and to take action before courts as regards digital uses of their publications. This option goes beyond the presumption originally presented by Ms Comodini (EPP - JURI) in the EP which only covered rights' enforcement (and not licences).

- In the Parliament:
  - The text voted in IMCO does not include any amendment to Article 11. However, it contains other amendments, including a specific reference to the negative impacts on media pluralism and remuneration of journalists of platforms such as news aggregators and search engines free-riding press publishers’ content (recital 31). The protection granted would also apply to print uses (in recital 32) and the rights of rental, lending and distribution (in recital 34). On hyperlinks (recital 33), the protection granted would not apply to "acts of a computation referencing or indexing system such as hyperlinking".
  - In the opinion adopted by CULT, the press publishers’ rights have been maintained and extended to all uses (not only digital), with a carve-out for legitimate private and non-commercial use of press publications by individual users. The term of protection has been reduced to 8 years. A new
provision has been added under Article 11, allowing MS to provide that a fair share of revenue derived from the use of press publishers' rights is attributed to journalists.

- Finally, in ITRE, the Commission's proposal has been strengthened to apply the new rights also to scientific publications, analogue uses and situations where the content is automatically generated (e.g. news aggregators). At the same time, ITRE suggests applying it without prejudice to the rights of individuals for the use of links or extracts of a press publication for private use or not-for-profit, non-commercial purposes. A fair share of the remuneration is attributed to journalists, authors and other rightholders.

III. On ePrivacy
OBA (online behavioural advertisement) self-regulatory initiative

IV. On AVMSD

State of play
On media freedom and pluralism
Contact(s):

- For DSM Strategy: (DG CNECT, F1) tel.: 
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- For ePrivacy: (DG CNECT, H), tel.: 
- For AVMSD: (DG CNECT, I1), tel.: 

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