

Annex I – A. Third party documents

1. Letter from AEDE (Asociacion de Editores de Diarios Espanoles), 6.09.2016, Ref. Ref. Ares(2016)5240466 **p.3**
2. Email from Allied for Start-ups, with its Annex, 13.09.2016, Ref. Ares(2016)5231395 **p.8**
3. Email from Creativity Works, Statement on the European Commission's Copyright Package, 14.09.2016, Ref. Ares(2017)627662 **p. 13**
4. Email from Hubert Burda Media, 28.09.2016, Ref. Ares(2016)5794965 **p.19**
5. Email from SCAM (CPE) with its Annex, "Douze propositions pour une Europe du livre", 17.10.2016, Ref. Ares (2017)627452 **p. 21**
6. Letter from Swobbl UG, 18.10.2016, Ref. Ares(2016)5993273 **p.28**
7. Letter from citizen (Posteo), 14.11.2016, Ref. Ares(2016) 124694550 **p.31**
8. Email from AMEC, FIBEP, 23.11.2016, Ref. Ares(2016)6576778 **p.32**
9. Email from EANA (European Alliance of News agencies), and its annex "New agencies and the EU Commission's proposed update of the copyright Directive", 07.12.2016, Ares(2017)310425 **p. 33**
10. Emails from EANA(European Alliance of News agencies),19.01.2017, Ref. Ares(2017)351355 **p. 39**
11. Email from EMMA, ENPA, EPC, NME, with annex - press release, 9.03.2017, Ref. Ares(2017)1246945 **p.42**
12. Email from ENPA, EMMA, EPC, NME with its annex" Publisher's Right. A legal analysis of the draft compromise proposal of the European Council regarding Article 11 of the draft directive on copyright in the Digital Single Market", 07.09.2017, Ref. Ares(2017)6017816 **p.46**
13. Email from ENPA, EMMA, EPC, NME, with its annex – Position on the two options on Article 11 proposed by the Estonian Presidency, 5.11.2017, Ref. Ares (2018) 1500290. **p.55**
14. Email from BDZV, meeting request with VP ANSIP, 19.04.2017, Ref. Ares(2017)2020361, **p.59**
15. Email from ENPA with its Annex 08.05.2017, Ares(2018)1500886, **p.60**

16. Email from EPC with document " Empower Democracy: Taking responsibility for the future of a free and independent press", 14.09.2017, Ref. Ares(2017)6017806, **p.65**
17. Email from Facebook with its annex, 25.07.2017, cnect.ddg2.i.2(2017)5095027, **p.68**
18. Open letter in the light of the competitiveness Council on 30.11.2017, from Copyright for creativity, Ref. Ares(2017)5887331, **p.84**
19. Letter from European Federation of Journalists 07/04/2017, with its Annex (Ref. Ares(2018)2168468), **p.92**
20. Letter from European Federation of Journalists, to Commissioner Gabriel, 20/10/2017 (Ref. Ares(2017)5131596), **p.96**
21. Email from Fondazione EYU with slides "Il copyright europeo nella transizione al digitale: modelli a confronto", 5.10.2017, Ref. Ares(2017)4872341, **p.113**
22. Email from MEP J.Redá to Commissioner M. Gabriel, with its annex "Better regulation for copyright", 20.09.2017, Ref. Ares(2017)4911834, **p.130**
23. Email from LINDE with annex, 19.08.2016, Ref. Ares(2018)5141623, **p.177**
24. Email from assistant of MEP N.GILL (Wales), 3.03.2017, Ref. Ares(2017)1147265, **p.179**
25. Letter from the International Publishing Distribution Association (IPDA), to Commissioner Gabriel, 25.01.2018 (Ref. Ares(2018)449246), **p.180**
26. Letter from ECS (European Copyright Society), 27.01.2017, Ref. Ares(2017)454150 - 27/01/2017, **p.182**
27. Email from EPC, with its Annex, 31.05.2017, Ref. Ares(2017)2739144, **p.193**
28. Letter from MEP Julia Reda, 08.08.2017, Ref. Ares(2017)3952025, **p.199**
29. Email from Innovative Media Publisher with its annex – press release, 9.10.2017, Ref. Ares(2018)1501148, **p.201**
30. Emails from EPC, 10.10.2017, Ref. Ares(2017)6017773, **p.203**
31. Letter from MEP J.REDA to Commissioners, 21/12/2017, (Ref. Ares(2017)6325973), **p.209**

Personal data

Mr. Günther H. Oettinger
Commissioner at EC of Digital Economy & Society
 e-mail: guenther-oettinger-contact@ec.europa.eu
 address: European Commission
 Rue de la Loi / Wetstraat 200
 1049 1049 Brussels
 Belgium

In Madrid, September 6th 2016

RE: Directive of the European Parliament and of the Council on Copyright in the Digital Single Market.

Dear Mr. Oettinger,

I write you as General Manager of the main press publishers association here in Spain (AEDE), with almost 90% of the press publishers represented, in relation to the future Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, that as you know—we are aware that it is made known to you—is of the utmost importance to the European press publishing sector.

First of all, I would like to express our gratitude for your brave and brilliant position in the defence of the press publishing sector at a European level so far. We really appreciate it as you understand quite well the digital challenges we face (it is not common that politicians understand this industry that well) and what kind of solutions will be actually efficient and useful for our sector.

We have thoroughly studied the leaked information connected to this issue are quite concerned about various issues that we believe that are well-founded as per the language of documents that have come to our attention. Therefore, we would like to stress our main concerns so that you could take them into account and make the most of the future Directive. The main issues are the following:

1.- A related or neighbouring right is more than welcome, but it is crucial that this new right for the press publishers at an EU level be, at least, granted in the same terms and conditions as the other neighbouring rights, currently in force, are granted. This implies the following:

A.- All kind of newspapers and magazines shall be covered by the press publishing right included in the list of articles 2 and 3.2 of the Directive 2001/29/EC.

We are concerned that the recommended option for a related right **covers only “online uses of news publications” and discards covering all publishers in all sectors, focusing only on the “news publishers”.** It is crucial that a related right is not limited to simply news and general interest publications. This would be unacceptable **as almost the**

whole of the magazine market would be excluded, with consumer and B2B magazines being by definition “special interest” (covering a huge range of diverse areas such as women, children, cars, TV-guides, architecture, travel, computers, etc.). It would also be important to **include scientific and academic journals**.

B.- Both physical and digital content need to be protected.

It is important that a publishers’ right **covers both physical as well as digital content in order to have the same level of protection and legal certainty to allow for effective enforcement for publishers of both physical and digital works**. This should encompass text and images: Impact Assessment, for instance, refers only to “text-based journalistic contributions”.

This approach covering physical works as much as digital works is also necessary to properly **address the situation following the CJEU’s ruling in Hewlett Packard vs. Reprobel** (November 12th 2015, case C-572/13), to ensure that press publishers are entitled to appropriate compensation for the re-use of physical content, not only digital, in the line with other content producers.

C.- 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 in order to 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 the other content producers and owners of the neighbouring rights—**under Directive 2001/29/EC**. This means that press publishers ought to be granted with those rights of reproduction, public communication to the public, the right of making available to the public, the rental right and the lending right (these two included in Directive 2006/115/EC as regards of distribution and rental and lending).

If press publishers are not listed in the catalogue of rightholders, they would not be entitled to compensation in such situation. The provision proposed in the Impact Assessment, which 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.

D.- The term of protection shall be meaningful, that is, it should be at least the same term as for other neighbouring rights.

Term of protection for authors is 70 years. Term of protection for those granted with related rights (such as broadcasters or interpreters) is of 50 years. **The term of protection for press publishers must be, at least, as of 50 years**. Otherwise, press publisher would **be negatively impacted as well as unequal treated** in comparison to all other rightholders. A short term would be particularly harmful when considering the commercial value of publishers’ contents and archives, which are commercialized long, long after the first publication and have a historical and social deep interest. A lower protection term would greatly **limit the licensing possibilities** and opportunities of investment in comparison to other media and rightholders.

2.- We understand that EC is convinced that a Text Data Mining (“TDM”) exception is necessary in the market and new technological environment, but it should be limited, at least, to scientific publications and, in any event, connected to non-commercial purposes.

A.- It is essential that any proposed TDM exception be limited, at least, to scientific publications—like the French approach—in order to avoid negatively impact on media pluralism and to that extent to democracy (key reasons to introduce a related right for press publishers).

Press content is financed private companies (shareholders), unlike many scientific publications which are based on publicity funded researchers’ content. **An exception would pose a huge risk to revenues streams.**

Besides, this future exception, so broadly regulated **will undermine press publishers right**, being the door open to reproduction and public communication of press publishers’ contents without neither authorization nor compensation and ending, mainly, in commercial uses and exploitation.

B.- The availability of licences (for TDM and not only for reading) should always have priority over any exception, with the possibility to be remunerated and/or compensated for the use of the 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 prioritize a license 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 to tailor the agreement. Why put a whole archive at risk for the price of e.g., a subscription?

C.- 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 organization”**. 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 organizations, but without payment. In effect, the exception would serve to

subsidy large digital companies, amongst others, while putting publishing businesses in jeopardy.

3.- 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.

4.- 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, and above all, unworkable** (also linked to the impracticality press publishers having so many contributors), **and will have huge financial and administrative implications for press publishers.** 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 jeopardize future business models and therefore media pluralism.

5.- Any language and or interpretation that might undermine the press publishers right must be avoided.

Language such *"this protection should not extent to news of the day as such or to miscellaneous facts having the character of mere items of press information which do not constitute the expression of the intellectual creation of their authors"* will **undermine a full press publishers' rights.** Therefore, it is advisable this kind of wording does not mix up with any press publishers' right.

In any event, the more clarity the better, so **in case language of the kind exposed above must be clarified** to give security and certainty to the addressees of the press publishing right.

6.- It shall be clarified in the text of the future Directive that its scope in relation to the Members States is just to guarantee a minimum harmonization.

This means that the future Directive on Copyright goal is to set a minimum protection to press publishers and this way, more protection to press publishers at a Member States' level can be established.

This understanding of the Directive as a minimum protection working **without prejudice to any other national laws being more protective to press publishers** must be

included in the language of the future Directive, so that all stakeholders can invest with certainty and security.

7.- The right of communication to the public as set forth in article 3 of the Directive 2001/29/EC shall be clarified and duly defined in the future Directive.

After the publications of the ruling in the case **GS Media** as of September 8th 2016 (case C-160/15), the CJEU ruled that *"Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed"*.

In light of what the CJEU ruled on this case, a **flexible but at the same time robust definition of "right of public communication"** shall be regulated in the future Directive to give legal certainty to press publishers and other economic agents in the sector.

This future definition must, at least, go in line of what CJUE established and **make a difference when commercial gain is pursuit and illegality of the publication linked.**

Expressing once again our gratitude for your interest and assistance, we look forward to hearing from you.

Yours sincerely,



Personal data



From: [REDACTED] (CAB-ANSIP) on behalf of ANSIP Andrus (CAB-ANSIP) Personal data
Sent: 13 September 2016 09:52
To: [REDACTED] (CAB-ANSIP); [REDACTED] (CAB-ANSIP); CAB
Subject: ANSIP ARCHIVES
Attachments: FW: Open letter for a Startup-Friendly Copyright Reform
 Don't re-copyright the internet for news publishers- support creativity and innovation instead.pdf

fyi

[REDACTED]

Personal data

[REDACTED]

Dear Vice President Ansip ,
 Dear Vice President Timmermans,
 Dear Commissioner Oettinger,

Allied for Startups is a global network of 29 regional and national startup associations, our mission is to voice the concerns of startups in politics and government. We would like to highlight the concerns expressed by startups and innovators about the upcoming Commission proposal on copyright.

Our attached open letter was signed more than 70 European startups and innovators who outline how new publisher rights, designed to give a windfall to print news publishers, create an environment of uncertainty and will make it harder for startups to run, develop and promote new innovative businesses in Europe. Ultimately, they might result in declining investment in European companies and for some startups in closing their doors entirely or moving their business abroad.

On several occasions, we have expressed our support and the need for a digital single market that allows for a wave of innovative European startups however we fear that the current proposals are a step back from a forward looking, innovation friendly copyright regime. They pitch technology and innovation against creativity, whereas technology has a huge potential to transform and democratise creation by bringing artists and fans closer together and by discovering new insights through data analytics. Reports about the new proposals however reflect an attempt to roll back the foundational elements of the internet.

The idea that everything published in writing on the internet should get an additional, new set of quasi-copyright, is mind-boggling. It amounts to copyrighting the entire internet.

Anew. It promises a new wave of legal uncertainty, complexity and red-tape for all the businesses, large and small, that thrive to harness the power of digital for social and economic betterment.

After the Commission has recognised startups as drivers of growth and jobs, we urge you to recognise that startups need an open and innovation friendly copyright regime to thrive in Europe.

Yours sincerely,


Director European Affairs

Personal data

on behalf of Allied for Startups

Don't re-copyright the internet for news publishers: support creativity and innovation instead

We, startups, digital entrepreneurs, and associations are concerned with the new proposals of the European Commission to create a broad new quasi-copyright for the benefit of news publishers.

We have witnessed first hand the negative impact of such proposals in Spain and in Germany, which have been universally condemned. We have seen it weaken Europe's potential for digital innovation as startups in those markets closed or moved to other activities or other locations. We do not have resources to fight copyright battles and hire armies of lawyers. New legal risks impact our bottom line directly, drying up our sources of funding.

We are driven by the desire to innovate, create and to make the world a better place. As innovators and creators, and often owners of copyright ourselves, we believe we should have a say in how copyright can work best for our community.

We do understand that the EU may consider different rights to those adopted in Germany and Spain. But we do not believe that such a fundamentally flawed starting point should, or can be, improved upon.

New rules for the benefit of news publishers are a step back from a forward looking, innovation friendly copyright regime. They pitch technology and innovation against creativity. They attempt to roll back the foundational elements of the internet. They reveal a lack of understanding of how creativity works in the digital environment.

The idea that everything published in writing on the internet should get an additional, new set of quasi-copyright, is mind-boggling. It amounts to copyrighting the entire internet. Anew. It promises a new wave of legal uncertainty, complexity and red-tape for all the businesses, large and small, that thrive to harness the power of digital for social and economic betterment.

We strongly oppose such a step and aspire to have a say in a more progressive, future looking copyright that recognises us as key drivers of a creative, innovative economy.

Yours sincerely,

Personal data

	sorglosinternet
	oneclick AG
	DVA
	Neupic (The World Press Project SL)
	MANGROVIA.NET
	Ubermetrics Technologies GmbH
	Echobot Media Technologies GmbH
	Asociación Española de Startups
	Kantar Media GmbH, Hamburg
	Webbosaurus GmbH
	bit & watt AGE
	Deutsche Medienbeobachtungs Agentur GmbH
	Qoolife
	Savelist
	Ventafun
	BRIT-futuro comum, raizes comuns
	Videona
	Asociación Española de Startups
	The Slovak Alliance for the Internet Economy
	Lunarmedia
	Miiskin
	None
	Danish Entrepreneur Association
	IVÆKST
	Doable
	Scienta
	Privatperson
	Iværksætterne
	WOTO IVS
	thinkinnewareas
	Carryon Golf
	Angel Partner Group
	Inicianet
	Cesar Brito Gonzalez

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[REDACTED]	WebMedian GmbH
[REDACTED]	Procyon
[REDACTED]	Erasmus Center
[REDACTED]	Factory 3D
[REDACTED]	NA
[REDACTED]	ACE Luxury Lifestyle Products
[REDACTED]	Webleisure
[REDACTED]	Fieber
[REDACTED]	Paphos Group
[REDACTED]	VenO designs
[REDACTED]	OCLC
[REDACTED]	Way2work.net
[REDACTED]	hifi-advice.com
[REDACTED]	Krobleblenda
[REDACTED]	Coadec
[REDACTED]	Startups.be
[REDACTED]	Qriouz
[REDACTED]	Pulsar
[REDACTED]	Kjuicer.com Srl
[REDACTED]	Dotmetrics
[REDACTED]	Allied for Startups
[REDACTED]	FareImpresa srl
[REDACTED]	Factory
[REDACTED]	Independent Citizen
[REDACTED]	CANGOBX
[REDACTED]	Press42
[REDACTED]	Faculdade de Economia da Universidade de Coimbra
[REDACTED]	Fusió d'Arts Technology S.L.
[REDACTED]	Spanish Startups Associaion
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From: Creativity Works!
[redacted] on behalf of
Creativity Works! <info@creativityworks.eu> Personal data

Sent: 14 September 2016 13:34

To: [redacted] (CNECT)

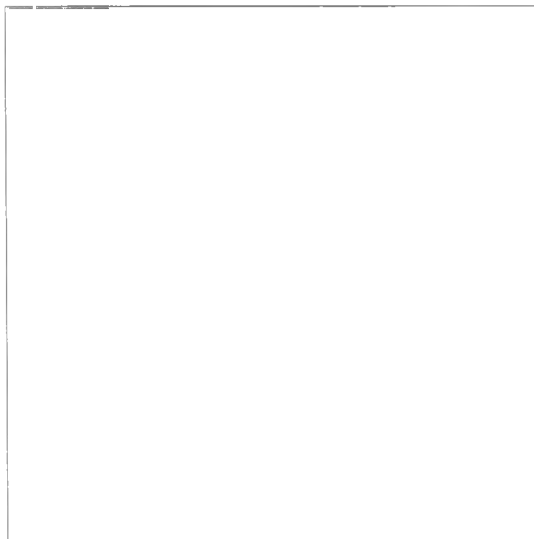
Subject: Statement from Creativity Works! on the European Commission's Copyright Package

Follow Up Flag: Flag for follow up

Flag Status: Flagged

ive content in Europe

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DIATE RELEASE – Brussels, 14th September 2016

Statement from Creativity Works! on the European Commission's Copyright Package

European Commission has published its proposals for copyright in the digital age. Copyright is the economic four
ltural and creative sectors, which employ more than 7 million people with a wide range of skills. It stimulates
nvestment, production and dissemination of creative works, and has made it possible for the creative and cultural

consumer demand for legal online content.

Companies have been devising new ways to entertain audiences for years, as new technologies have opened new possibilities for the expression and enjoyment of cultural works. Today, we are digital sectors, and audiences can access more creative content than ever before: no matter where in the EU, Europeans have access to over 30 million licensed songs; over 3,000 video-on-demand services (VOD); and over 2 million e-book titles, while images have made the internet the vibrant and engaging place it is today.

The benefits of the current ecosystem are clear: authors and other creators can be rewarded for their work, while their work remains available. They have the incentives to invest in production and in making that work widely available. Territorial exclusivity supports investment in the development, creation, production, marketing and distribution of films and audiovisual content, as well as the adaptation of film and audiovisual content to the wide diversity of consumer preferences and varying purchasing power.

The current European system of copyright exceptions and limitations strikes the right balance between protecting creators and the interests of users. It enables respect for cultural and national diversity, flexibility and an appropriate degree of innovation.

We are concerned that some of the proposed measures in fact threaten to undermine all this, and risk leaving consumers worse off than they are now, with levels of investment to fall and reducing cultural diversity. We think that's not a risk worth taking.

Our work stands for informed, reasoned debate on copyright and the creative and cultural sectors. We'll continue our work to ensure Europe's copyright framework works to the benefit of audiences and the creative sectors alike.

Comments come from across the creative and cultural sectors. Here's how they reacted:

 **Director General, Association of Commercial Televisions:**

shows that the proposed Regulation may affect European consumers and the AV industry in the short term (up to €1.5bn per annum) and the medium to long term (up to €4.5bn per annum) due to less European content being produced and less content being available to consumers. The Portability proposal remains the most adapted instrument to ensure

it respecting the economic fundamentals of the sector. In all other scenarios tabled in the DSM plans, consumers will be worse off than in the current situation."

[REDACTED], Chief Representative of FIAPF, the International Federation of Film Producers Associations:

"I am not convinced that the Commission's proposed Regulation will drive new business opportunities in the online world. It has already argued - and as evidenced by our recent research - undermining the integrity of territoriality in licensing will harm the European film sector, its funding and distribution opportunities and ultimately for its audiences. The result will be a loss of linguistic diversity and reduced choice for European audiences - creativity will be affected as will our sector's contribution to the economy and employment."

[REDACTED], President of the Federation of European Publishers (FEP-FEE):

"As a publisher you have to like to take risks; bets with new talents, chances with new topics, yet always risks. When online reaches its audience, copyright is the guarantee that we can continue to take these risks. Too many exceptions are currently in place that prevent publishers from publishing new innovative works. We will review the proposed Directive and work with the co-legislators to ensure it meets the EU's objectives of promoting innovation and creation."

[REDACTED], Secretary-General of the European Writers' Council (EWC):

"Writers and translators welcome the prospects of more control which authors and other rightholders can exercise over their copyright-protected works in online services. Legal certainty, licensing mechanisms and an equitable share of the value created will benefit all, including our readers and audiences."

[REDACTED], Executive Chair and Secretary General of IMPALA:

"The Commission has taken action on some of the issues affecting the music sector online. This is an important step forward. Member states and parliament will want to clarify this further. All players in the online ecosystem need to agree on the online economy to be sustainable. But we have reservations about other elements of the package, and will continue to discuss with our counterparts in the European Parliament and Council."

[REDACTED], Executive Director of CEPIC, the Centre for the Picture Industry:

"The Commission is right to have chosen an evidence-based approach when it comes to harmonizing exceptions. Because of the evidence on the panorama exception has showed that no regular internet user has ever been sued because of copying."

part in public spaces, its implementation is now left to Member States' discretion. In our view, there are indeed more
olve for a balanced creation and consumer friendly internet, such as bridging the value gap in all sectors. First en
been made in this direction."

Greevy, Senior Counsel, Content Protection and Information Security, Interactive Software Federation c

ng that the proposal threatens to undermine the legal protection for technological protection measures (TPMs). Ti
amental in enabling the video game industry to embrace digital distribution models and to move beyond sim
opies of games. This has clearly benefited consumers by increasing the amount of legal content available c
on's plans here seem to run counter to what they are trying to achieve."

Secretary General of European Coordination of Independent TV Producers (CEPI):

disappointing to see the Commission is clearly ignoring the impact that the broadcast regulation proposal could ha
e whole and particularly on Small and Medium Enterprises. In a time where Europe needs to be more united and c
before, TV producers have been crucial in addressing the interest of the audience and consumer by providing vari
stic content which can be monetised across the EU providing valuable re-investment, sustaining dive
eness."

mona, Director General of the International Confederation of Music Publishers:

re this Package is a step in the right direction to ensure that the value generated by online platforms when using
content is properly shared with rightholders, and we look forward to continuing working on this path with the Coun
Parliament."

Contact

Creativity Works! Secretariat:

Email: info@creativityworks.eu

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Activity Works!

Many organisations, federations and associations from the European cultural and creative sectors have formed a coalition of forces! Our objective is to encourage and support informed dialogue with EU decision-makers about the economic contribution made by creators and the cultural and creative sectors in the digital age. Our members are brought together by their belief in creativity, creative content, cultural diversity and freedom of expression.

Members include: Association of Commercial Television in Europe (ACT); Bundesliga; Center of the Picture Industry (CEPI); European Music Publishers' Association (EUMA); European Coordination of Independent Producers (CEPI); European & International Booksellers' Federation (EIBF); European Writers' Council (EWC); Federation of European Publishers (FEP); International Federation of Film Distributors Association (IFFDA); International Federation of Film Producers' Associations (FIAPF); Federation of Screenwriters in Europe (FSE); International Federation of Music Publishers (ICMP); Independent Music Companies Association (IMPALA); Interactive Software Federation (ISF); International Video Federation (IVF); La Liga; Mediapro; Motion Picture Association (MPA); the Premier League; the International Union of Cinemas (UNIC); and Verband Privater Rundfunk und Telemedien (VPRT)

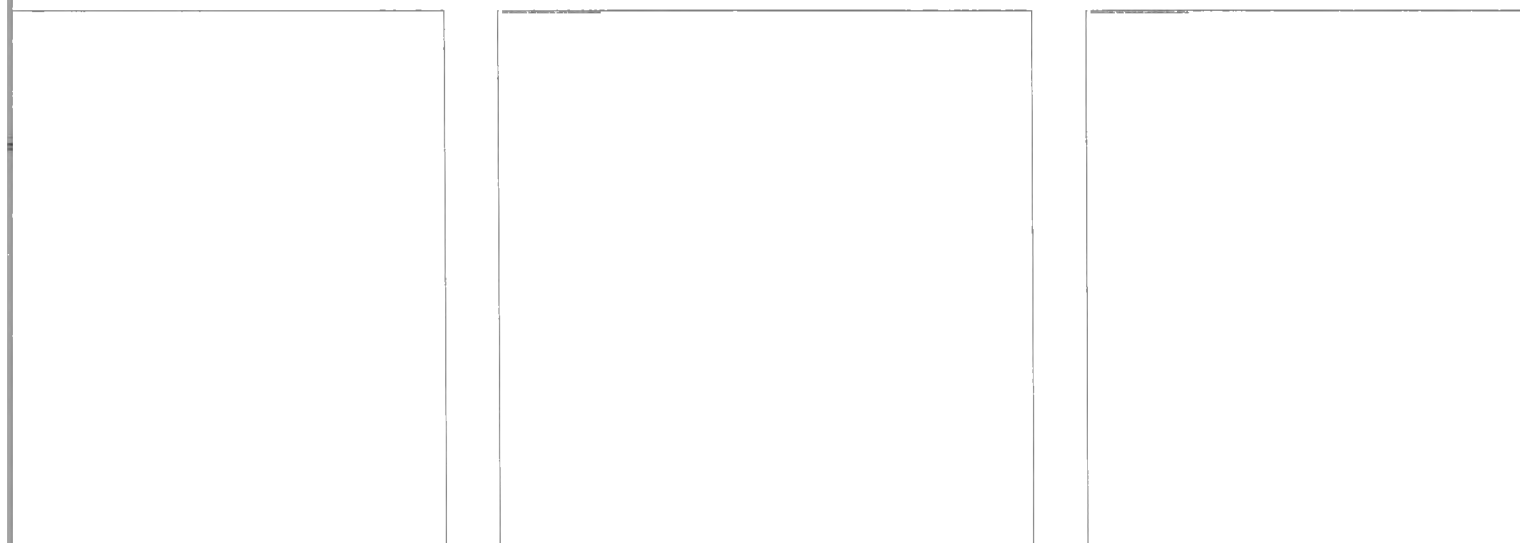
Stats & Figures

Creative and cultural sectors are an integral part of Europe's cultural and economic fabric, especially as images, words, sounds and experiences increasingly become the drivers of innovation, jobs and prosperity. IP-intensive industries contribute **26% of EU exports and 39% of GDP**; within this, the core copyright-intensive industries generate **7 million jobs**, contribute approximately **€1.5 trillion** and produce a trade surplus.

Creative and cultural industries work hard to give consumers what they want by developing digital services and products and are **successful in doing so judging by the uptake of digital online services across Europe. Fans of film, music, video games and sports can watch, listen to, see and read more creative works than ever before.** Today, consumers have access to over 2 million e-book titles and over 40 million licensed songs, and a growing number of video-on-demand services are available across Europe. Surveys have shown, however, that accessing content across borders is at most a minor consideration for most consumers.

s. According to Eurobarometer 411, only 8% of Internet users have tried to access content through online services n
her Member States. 17% of subscribers to online services – meaning less than 4% of internet users overall – have t
subscriptions while abroad.

ive and cultural sectors are digital sectors. New technologies must foster creativity, quality content and legal acc
m: copyright ensures that the necessary capital to finance creation and distribution can be raised, content creators c
eir work, and so be confident in advance of making a living, recouping investments and a return on their endeavours



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We are sending this invitation to people we think will be interested in the creative and cultural sectors in Europe.

Our mailing address is:

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Brussels 1040
Belgium

Dr. Paul-Bernhard Kallen
Vorstandsvorsitzender

Personal data

S. E. dem Mitglied der Europäischen Kommission
Herrn Günther H. Oettinger
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BERL/Commissioner
200, Rue de la Loi
1049 Brüssel
BELGIEN

München, 28. September 2016

Leistungsschutzrecht

Sehr geehrter Herr Kommissar,

vor dem Hintergrund des Vorschlags der EU-Kommission zur Schaffung von Verlegerrechten auf europäischer Ebene ist es mir ein Anliegen, Sie vorab über eine Entscheidung zu informieren, über die wir vor einiger Zeit bereits gesprochen haben.

Wir haben im Verbund mit der VG Media und ihren Gesellschaftern seit fast drei Jahren versucht, das 2013 vom deutschen Gesetzgeber geschaffene Leistungsschutzrecht für Presseverleger wahrzunehmen. Ziel war es, auf Basis des neu geschaffenen Rechts Lizenzverträge mit den gewerblichen Nutzern unserer Verlagsinhalte abzuschließen, also z.B. mit Suchmaschinen, um einen fairen Anteil an der Wertschöpfung zu erhalten, die Dritte mit unseren Verlagsangeboten erwirtschaften. Bedauerlicherweise ist dies trotz intensiver Bemühungen nicht gelungen. Deshalb haben wir uns entschieden, unsere Wahrnehmungsverträge mit der VG Media auszusetzen.

In diversen behördlichen und gerichtlichen Entscheidungen ist zwar der grundsätzliche Anspruch der Verleger unterstrichen worden, dennoch haben die zivil- und kartellrechtlichen Verfahren nicht zur erfolgreichen Durchsetzung dieser Ansprüche geführt. Google darf seine Marktmacht bis heute – zumindest in Deutschland – ohne kartellrechtliche Schranken ausspielen. Das deutsche Leistungsschutzrecht läuft damit de facto leer und auf Basis des geltenden Rechts ist eine Trendwende nicht zu erwarten.

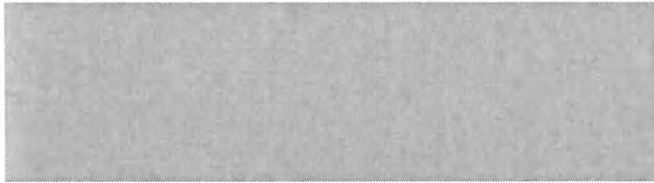
Selbstverständlich halten wir aber an unserer Forderung fest, dass die Erlöse aus der Verwertung journalistischer Inhalte entlang der digitalen Wertschöpfungskette fairer verteilt werden müssen. Deshalb setzen wir uns auf europäischer Ebene weiterhin intensiv für die Schaffung eines robusten Verlegerrechts ein und unterstützen das entsprechende Vorhaben der Europäischen Kommission voll und ganz. Wenn es in Europa gelingt, die Rechtsposition der Presseverlage signifikant zu stär-

ken, werden wir dies selbstverständlich zum Anlass nehmen, die erneute Wahrnehmung unserer Rechte durch die VG Media zu prüfen.

Von entscheidender Bedeutung ist, in Europa eine Lösung zu finden, die – im Unterschied zur deutschen Lösung – in der Praxis durchsetzbar ist. Nur so kann das Ziel erreicht werden, das richtigerweise auch der deutsche Gesetzgeber bei der Einführung des deutschen Presseleistungsschutzrechts hatte: eine faire Beteiligung der Verlage an der gewerblichen Verwertung ihrer Inhalte durch Dritte.

Gerne stehe ich für weitere Erklärungen zur Verfügung.

Mit freundlichen Grüßen



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From: [redacted]@scam.fr>
Sent: 17 October 2016 10:49
To: [redacted]
Subject: communiqué de presse CPE
Attachments: CP_CPE 17 octobre 2016.pdf; Douze propositions pour une Europe du livre ANGLAIS FINAL.pdf; Douze propositions pour une Europe du livre FINAL.pdf

Importance: High

Follow Up Flag: Follow up
Flag Status: Completed

Bonjour,

A l'occasion de la conférence de presse du CPE qui s'est tenue ce matin, veuillez trouver en pièce jointe le communiqué de presse du CPE ainsi que les douze propositions pour une Europe du livre.

Retrouver le [dossier de presse](#) complet en ligne.

Bien à vous,


 Conseil Permanent des Écrivains

Directive sur le droit d'auteur : qu'en pensent les écrivains ?

Après les annonces de l'automne 2014, la proposition de directive 2016/280 sur le droit d'auteur dans le marché unique numérique, présentée le 14 septembre 2016 par la Commission européenne, peut finalement apparaître moins inquiétante que prévu.

Le texte propose toutefois la création ou l'extension de trois exceptions au droit d'auteur.

Exception Text and Data Mining (TDM)

Il s'agit d'une nouvelle exception au droit d'auteur, pour laquelle le CPE aurait préféré voir privilégier une solution contractuelle, d'autant plus que ce n'est pas le droit d'auteur qui constitue un obstacle au développement du TDM, mais bien des problématiques essentiellement techniques, tant d'ailleurs du côté des éditeurs que des usagers. Le projet de texte est par ailleurs extrêmement flou et ne limite pas l'exception aussi clairement que le texte de la Loi française pour le numérique aux seuls usages non commerciaux. Il s'agit clairement d'une nouvelle exception « politique », dont l'objectif plus global consiste à affaiblir une nouvelle fois le droit d'auteur.

> Exception Enseignement

Cette exception est prévue sous forme facultative par la Directive 2001/29 et a été transposée en droit français en 2006. Le nouveau texte a pour objet d'étendre cette exception à l'utilisation numérique des œuvres par les enseignants et de la rendre obligatoire. Il faudrait *a minima* que, pour l'écrit, cette

exception soit limitée à l'usage d'extraits et non d'œuvres dans leur intégralité, qu'elle continue de ne pas s'appliquer aux manuels scolaires, et que le principe de sa compensation soit obligatoire et non facultatif comme dans la rédaction actuelle.

> Exception Préservation

Cette exception existe depuis la Directive 2001/29 sous forme facultative et a été transposée en droit français en 2006. Son extension permettrait la reproduction de toute œuvre présente dans les collections permanentes dans le seul objectif de conservation de ces œuvres. Elle serait dorénavant obligatoire.

Le CPE tient à rappeler que la multiplication des exceptions est dangereuse en soi et affaiblit considérablement le droit d'auteur, qui pourrait finir par devenir lui-même en Europe une exception. Il conviendra donc d'être extrêmement vigilant pour que ces exceptions restent strictement encadrées et limitées. A cela s'ajoute le fait que, dans certaines décisions récentes, la CJUE croise les exceptions entre elles pour élargir leurs champs d'application. Le CPE suggère de se fonder sur le « test en trois étapes » pour faire interdire le cumul des exceptions.

> Les œuvres indisponibles

Le nouveau texte permettrait à toute institution culturelle de passer des accords non exclusifs et non lucratifs avec des sociétés de gestion collective dans l'objectif de numériser et diffuser les œuvres indisponibles. Ces accords concerneraient tous les auteurs et non pas uniquement les membres desdites sociétés de gestion, selon le principe des licences collectives étendues. Le CPE se félicite de ce que la Commission préconise le recours à la gestion collective dans ce cadre et juge indispensable qu'une telle solution puisse également être mise en place pour les moteurs de recherche d'images au niveau européen. Ce serait un signe fort donné par la Commission de concrétiser son souhait de rééquilibrer le partage de la valeur sur internet en faveur des créateurs.

> Un droit voisin pour les éditeurs de presse

L'instauration d'un nouveau droit voisin, telle qu'envisagée par la Commission européenne, ne concernerait que les éditeurs de presse, pour le numérique et serait limité dans le temps. Le CPE, qui reste totalement opposé à l'instauration d'un droit voisin pour les éditeurs de livre, se félicite de cette proposition, d'autant plus que la Commission européenne propose par ailleurs une solution alternative pour régler la problématique de l'arrêt REPROBEL en permettant aux éditeurs de percevoir leur compensation au titre de la copie privée.

> La responsabilité des sites diffusant des contenus protégés

Au regard de ce nouveau texte, les éditeurs qui diffusent du contenu devraient prendre toutes mesures appropriées et proportionnées pour garantir l'application d'accords conclus avec les ayants droit, quand ils existent, et pour empêcher l'accès à des contenus appartenant à des ayants droit n'ayant pas conclus d'accords. Cette proposition reste très décevante. Le CPE soutient à cet égard la proposition du CSPLA de légiférer, en ajoutant un article 9bis à la Directive 2001/29, afin de responsabiliser véritablement ceux qui ne sont pas de simples intermédiaires techniques.

> Rémunération équitable et transparence

Bien que le projet de Directive ne semble pas aller très loin dans le détail de l'obligation de transparence, l'introduction dans la législation européenne de la notion de transparence au profit des auteurs est une évolution juridique et politique significative. Les auteurs devraient ainsi pouvoir bénéficier d'un accès direct aux chiffres de ventes réalisés par les éditeurs. L'idée que les termes financiers des contrats

puissent ou doivent être rediscutés au regard des recettes générées par l'exploitation d'une œuvre est une idée relativement novatrice, y compris dans le droit français, qui pourrait s'en inspirer dans certains secteurs comme le livre.

> L'exception de panorama

Le CPE se félicite que la Commission ait pu entendre que l'exception de panorama ne nécessitait pas d'harmonisation au niveau européen. Elle renvoie cette question aux Etats membres, constatant que la majorité d'entre eux ont déjà légiféré sur le sujet.

> La définition de l'acte de communication au public

Alors que les arrêts SVENSSON, BESTWATER et GS MEDIA ont permis à la CJUE de développer une jurisprudence compliquée, contradictoire et dangereuse sur les liens hypertextes et l'utilisation d'œuvres protégées sur internet, aucune proposition n'est introduite dans le texte pour définir l'acte de communication au public. Le CPE soutient à ce sujet les travaux du CSPLA qui préconise de légiférer pour définir l'acte de communication au public.

> Le droit de prêt numérique

Alors que la réponse de la CJUE à la question préjudicielle posée par les Pays-Bas dans le cadre de l'affaire OPENBARE est imminente, et que les conclusions de l'avocat général estiment que le prêt d'un livre numérique est comparable au prêt d'un livre traditionnel, le texte n'évoque pas la question. Il est pour le moins urgent de se préparer à une demande des bibliothèques de légiférer sur le sujet, en réfléchissant dès aujourd'hui sur ce que pourrait être, au regard des expérimentations actuellement menées en France, un « droit de prêt numérique ».

Lors des discussions à venir au Parlement européen, le CPE et les auteurs qu'il représente auront la volonté de démontrer aux élus les enjeux de cette directive qui doit permettre d'assurer un haut niveau de protection et de rémunération des auteurs tout en tenant compte du nouvel environnement numérique et de la nécessité de favoriser l'accès du plus grand nombre aux œuvres.

Le Conseil Permanent des Ecrivains : ADAGP, ATLF, Charte des auteurs et illustrateurs jeunesse, Cose-Calcre, EAT, Maison de Poésie, Pen Club, SACD, SACEM, SAIF, SCAM, SELF, SGDL, SNAC, Union des Poètes & Cie, UNPI, UPP.

www.conseilpermanentdesecrivains.org

Communication, Partenariats et Relations Presse
Contacts [redacted] - 0 [redacted] [redacted] - [redacted]
Scam 5 avenue Vélasquez 75008 Paris - www.scam.fr

Personal data



Ce message et / ou ses pièces jointes sont uniquement adressés à son destinataire et contient des informations confidentielles. Si vous n'êtes pas le destinataire visé, toute utilisation ou

Brussels, April 26th, 2016

Twelve Proposals for a European policy **for the book sector**

At a time when authors' rights are being debated at the European level, and when technological and economic developments (digitization, globalization) are creating new challenges for all stakeholders in the book sector, French authors, as represented by the Permanent Council of Writers, have drawn up the following twelve proposals addressed to European policy makers. Their aim is to ensure that authors continue to enjoy freedom of expression and provide Europe's biggest cultural industry with high-quality works so that European literature maintains its worldwide impact.

1. Assert strong protection for authors' rights, guaranteeing their financial and moral rights

The *sine qua non* for a steady, diversified stream of creative literature is a system of authors' rights that provides decent protection for the author. The vast majority of member countries in the European Union share the same continental system of rights, which protects authors' ownership of their works and guarantees their moral rights. European writers are very attached to this vision of *authors' rights*, centred on the author, and they do not want it to be confused with the Anglo-American *copyright* concept which is centred on the investor.

2. Guarantee authors a fair remuneration

Authors are the source of a value chain which provides work for over 500,000 people in Europe and generates a turnover of more than 23 billion euros for publishers. They must receive a fair share of the wealth generated by their works, whether within the framework of direct trade publication, derivative publication, or collective management. Competition law must not be invoked when authors' societies negotiate with publishers or users of their works. And when systems are developed to compensate for loss of income due to subsidiary use of authors' works (reprography, private copy, public lending), these systems must allocate at least 50% of collected funds to the authors.

3. Balance contractual relationships between authors and publishers

In order to ensure fair conditions to authors, it is necessary to balance contractual relationships by opposing take-it-or-leave-it contracts and unacceptable conditions (buy-out contracts) and by giving writers greater control over publication of their works (e.g., receiving regular and transparent accounts, being able to recover the rights to works no longer in publication, etc.). Collective negotiations leading to the establishment of model contracts and to professional agreements must be encouraged, and writers' organizations must be allowed to initiate class actions.

4. Favour contractual solutions or collective management over the multiplication of mandatory exceptions

Exceptions invariably mean a waiving of authors' financial and moral rights. Therefore, they should only be considered with extreme caution in specific cases that do not infringe on a normal exploitation of the work and the legitimate interests of the author.

Potential 'compensation' based on precarious public financing cannot be used to justify an increase in mandatory exceptions whose costs cannot be recovered.

Contractual solutions or collective licensing systems are thus preferable to exceptions. Such solutions already exist in almost all European nations either for educational purposes or to cover out-of-commerce works as set out in the 2012 Memorandum of Understanding. Cross-border situations regarding rights can then be handled by cooperation among Collective Management Organizations (CMOs).

5. Foster dialogue between all stakeholders in the book sector

It is absurd to place authors in opposition to readers/consumers/users. The interests of all parties involved in the book sector (authors, publishers, booksellers, librarians, readers) is to develop an environment favourable to the widest possible dissemination of books and ideas. To that end, it is also necessary to combat the "everything-for-free" illusion nourished by the internet, and to jointly build new and balanced legal frameworks and contractual practices which will allow creative writing as well as reading to thrive as a key engine of the digital economy.

6. Efficiently oppose piracy by ending the current irresponsibility of platforms and online intermediaries

As things stand, certain intermediaries on the internet take advantage of limited liability even though they actually engage in publishing activities, providing access to protected works without restricting themselves to the role of mere technical service providers. This situation makes it almost impossible to effectively withdraw illegally posted works from the internet.

To fight piracy efficiently, it is necessary that unauthorized 'providers' be clearly obliged to procure authorization from rights-holders before they can disseminate works to the public.

7. Favour the interoperability of reading systems

Readers must be able to buy any book they choose from a brick-and-mortar or online book shop without being prisoners of one provider's system. The compatibility of formats and reading systems (reading devices and software, purchase platforms) is in the interest of consumers and will help to strengthen legitimate trade.

8. Apply a reduced VAT rate to books regardless of format

The lowest possible VAT rate should apply to books regardless of their format or means of access and delivery. A high, discriminatory VAT on digital books handicaps the development of the e-book market and of the knowledge-based economy.

9. Maintain and promote fixed book-price policies

Many European countries regulate the price of books. Such regulation contributes to the cultural diversity enshrined in the aims and commitments of the European Union, as well as helps to maintain fair competition between multiple distribution networks.

We strongly back such policies, which is all the more relevant on the internet, where the book industry has been facing stiff competition from big global players who practice massive tax avoidance and price-dumping in order to establish a dominant position on the market.

10. Reinforce cultural exception

Cultural goods are not like other goods. That idea has led, among other things, to “cultural exception” clauses in free-trade treaty negotiations. Unfortunately, today such clauses apply only to the audiovisual sector. We are calling on the E.U. to insist that publishing, as well as other cultural sectors, be similarly excluded from the scope of negotiations to establish a transatlantic trade and investment partnership (TTIP) and from other commercial treaties.

11. Encourage the diversity and dissemination of works through translation

Europe is rich in cultural and linguistic diversity; translation, which efficiently contributes to the dissemination of works, must be a priority. In addition to direct support for translation projects, such a policy might include indirect support to literary translators (initial and lifelong training, mobility, full acknowledgement of their status as authors) and to initiatives leading to the development of a network of institutions and national foundations that support translation. Setting up a European fund for literary translation should also be considered.

12. Safeguard freedom of expression and encourage creativity

At a time when freedom of expression and artistic creativity is increasingly challenged everywhere, including Europe (censorship and self-censorship linked to terrorist threats, pressure applied by authoritarian governments, censorship from technical intermediaries, etc.), it is essential to stress that this freedom is one of the foundations of our shared identity, a value that we must constantly defend.

So that this freedom remains healthy, and so that authors may freely choose their subjects, mediums, channels of publication and distribution, it is also important to concretely encourage individual creativity by supporting major educational and cultural policies, by increasing public aid to authors (funds for writing, residency programs, training, support of professional organizations), and by backing innovation, notably in the digital field, via professional or regional players who promote excellence in the book industry. This is how European literature will continue to reach ever-wider audiences in Europe and abroad.



Swobbl UG
Säntisblick 8
88719 Stetten

Stetten, den 14.10.2016

Swobbl UG | Säntisblick 8 | 88719 Stetten

Europäische Kommission

Rue de la Loi / Wetstraat 200

1049 1049 Brüssel

Belgien

z.Hd. Günther Oettinger

EU Kommissar für Digitale Wirtschaft und Gesellschaft

Sehr geehrter Herr Oettinger,

nach einem gescheiterten Versuch, das Leistungsschutzrecht in Deutschland und Spanien einzuführen, versuchen Sie nun auf europäischer Ebene das Modell in verschärfter Form auf den Weg zu bringen. Hierbei, so scheint mir, ist Ihr einziges Ziel, den Lobbyrufen einzelner Verleger gerecht zu werden. Dass Sie hiermit den freien Meinungs- und Informationsaustausch einzuschränken drohen, sollte Ihnen als EU-Kommissar für Digitale Wirtschaft und Gesellschaft in meinen Augen eigentlich klar sein.

Weshalb wollen Sie Suchmaschinen und News-Aggregatoren, deren Aufgabe und Ziel es ist, Benutzer den Weg zu den gewünschten Informationen wie z.B. Zeitungsartikeln zu ermöglichen, zur Kasse bitten bzw. zwingen Ihr Angebot einzustellen?
Sind Sie ernsthaft der Meinung, dass der Zahlzwang den Zugang der Benutzer zu den gesuchten Informationen positiv beeinflusst?

Halten Sie es nicht für möglich, dass gerade Online-Zeitungen ein großer Umsatzverlust durch den Wegbruch von Nutzern entstehen wird, sollten Suchmaschinen und News-Aggregatoren gezwungen werden, ihre Arbeit einzustellen? Erinnern Sie sich zum Beispiel an den Einbruch der Nutzerzahlen auf der Webseite Bild.de, die nach der Umsetzung des deutschen Leistungsschutzrechtes durch Google und die damit einhergehende Beschneidung der Suchergebnisse, gemäß des deutschen Leistungsschutzrechtes für Mitglieder der VG Media, knapp 80% ihres Besucheraufkommens einbüßte? Der finanzielle Schaden bewegte sich laut Springer-Chef Mathias Döpfner bezogen auf das Gesamtjahr im siebenstelligen Bereich pro Marke.

In einer Stellungnahme des Max-Planck-Instituts vom 27.11.2012 zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger in Deutschland wurde festgestellt, dass Suchmaschinen und News-Aggregatoren kein Substitutionsgut für Online-Medien sind, sondern vielmehr ein Komplementärgut darstellen, da sie für eine Steigerung der Besucherzahlen auf den Online-Angeboten sorgen.

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Personal data

Stetten, den 14.10.2016

Ist Ihnen nicht klar, dass Sie durch das geplante Gesetz gerade junge und innovative Start-Ups in die Geschäftsaufgabe zwingen werden und eine Benachteiligung kleiner Anbieter droht, da Verleger dem marktbeherrschenden Dienst eine Genehmigung erteilen können, dies jedoch kleineren Anbietern verweigern und somit eine marktbeherrschende Position z.B. für Google verstärken, wie es bereits von den Mitgliedern der VG Media versucht und durchgeführt wurde?

Was wären die Folgen eines europäischen Leistungsschutzrechtes?

Presseverlage sind nicht in der Lage, auf die Dienste von Suchmaschinen und News-Aggregatoren zu verzichten. Wenn selbige jedoch aufgrund des Leistungsschutzrechts die Auslieferung von Ergebnissen auf den Seiten der Presseverlage einstellen, sind die Verlage gezwungen, mit der Erteilung von Gratislizenzen wiederum die Auslieferung zu ermöglichen. Dies führt auf der einen Seite das Leistungsschutzrecht ad absurdum und birgt erneut die Gefahr einer Benachteiligung gerade von kleineren Diensten. Denn nun müssen die Dienstleister wieder prüfen, ob alle benötigten Genehmigungen der zahlreichen Verlage vorliegen, was einen unglaublichen Aufwand, unnötige Kosten und die Gefahr der Benachteiligung einzelner Dienste mit sich bringt. Ein kompletter Wegfall von europäischen Nachrichten wiederum würde zu einer Verlagerung zu außerhalb der Europäischen Union stehenden Medien führen, was wiederum zu einer Schwächung der Verlage führt.

Weiter besteht auch jetzt schon die Möglichkeit, mit Hilfe der „robots.txt“ das Scannen und die Indexierung durch Suchmaschinen bzw. News-Aggregatoren zu unterbinden. Die Tatsache, dass diese Möglichkeit nicht genutzt wird, zeugt davon, dass die Presseverleger ebenso von positiven Effekten der Anzeige in Suchergebnissen wissen.

Abschließend möchte ich Ihnen noch die Lektüre folgender im Internet frei verfügbarer Analysen zum Thema Leistungsschutzrecht ans Herz legen, welche die in diesem Brief genannten Argumente ergänzen und verstärken.

Stühmeier, 2011: Das Leistungsschutzrecht für Presseverleger: Eine ordnungspolitische Analyse

Max Planck Institut für Immaterialgüter und Wettbewerbsrecht: Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger





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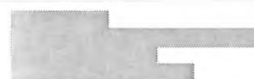
Stetten, den 14.10.2016

Hiermit bitte ich Sie um eine persönliche Stellungnahme und möchte Sie freundlich daraufhin weisen, dass ich diesen offenen Brief an verschiedene Medien mit der Bitte um Veröffentlichung versendet habe.

Mit freundlichen Grüßen



Personal data



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From: [REDACTED]
Sent: 14 November 2016 07:21
To: CAB GUENTHER OETTINGER CONTACT
Subject: Re: Save the Link: No #linktax or mandatory censorship

Dear Guenther Ottinger Member of the European Parliament,

I am writing to express my concern about the Commission's proposal on Copyright in the Digital Single Market Directive, announced on September 14.

I am worried about the proposals in Article 11 and 13 which amount to a link tax, and mandatory censorship.

The "Link Tax" proposal creates a new ancillary copyright for press publishers. This new right would create unprecedented new monopolies for publishing giants to charge fees for snippets of text that automatically accompany hyperlinks.

The Link Tax will act as a brake to innovative EU digital startups that will never be able to get off the ground if forced to pay these fees. This proposal has failed everywhere it has been previously tried, including Germany and Spain.

I draw your attention to a briefing on this issue produced by the Save The Link campaign (<https://SaveTheLink.org>), which I support. You can download the briefing here:

https://openmedia.org/sites/default/files/documents/mepbriefing-singlepgsinteractive_0.pdf

I am also very concerned about the new proposal for content filtering and increased liability of Internet companies. The proposal at Article 13 includes requirements for monitoring Internet users, demanding that tech companies produce filtering robots to detect the copyright status of user-generated content. This filtering would not be done on the basis on what is legal, but on whether uploads contain content that has been "identified" by rightsholders. This would overturn existing rights for quotation, parody and other public-interest copyright exceptions.

The European Commission pushed this idea forward despite overwhelming opposition in its consultation from over 120,000 Internet users and dozens of civil society groups.

The Commission has failed to defend the interests of citizens - we need you to stand up and act as our voice.

We ask you to pay close attention to Article 11 which proposes an ancillary copyright for press publishers as well as Article 13 and recitals 38 and 39 which propose mandated content filtering technologies.

Please, stand up for my rights and challenge these proposals which will seriously harm the Internet, and the citizens you represent.

I look forward to hearing your response.

From: [REDACTED]@kantarmedia.com>
Sent: 23 November 2016 09:34
To: [REDACTED] (CNECT)
Subject: Follow-up AMEC-FIBEP - Working Breakfast "Making Copyright Work: The Impact of Neighboring Rights on European SMEs and Innovation"

Personal
data

Categories: Red Category

Dear Mr [REDACTED],

I was very glad to attend the Working Breakfast "Making Copyright Work: The Impact of Neighboring Rights On European SMEs and Innovation" organized by SME Europe on 8th November. It was a high-level debate with many relevant and interesting points and I can see that the political debate in the European Parliament will be fruitful.

Let me come back to my speech and the difficulties that media monitoring activities will face regarding the Commission's proposal for a Directive on Copyright. The two worldwide trade bodies representing companies in media monitoring and intelligence, AMEC and FIBEP, released a press release as well as a document entitled "Copyright Review in a nutshell" that I would like to share with you.

Out of
scope

[REDACTED] As for the publisher's right, we see it as an unfair idea, unable to fix the legal uncertainty. Far from confronting the real underlying problems, the Directive would actually be unable to fix the publishers' difficulties to sign licenses with big online services providers.

Should you wish to have any further information, I remain at your disposal and I will be happy to meet you in the future to keep raising awareness on our activities.

With my kind regards,
 [REDACTED], on behalf of AMEC and FIBEP

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 92046 La Défense Cedex- France
www.kantarmedia.com



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Subject: FW: EANA and Copyright Directive
Date: 26 February 2018 11:42:12
Attachments: EANA and [redacted]

From: Erik Nylén [redacted]
Date: 7 December 2016 at 11:55:21 GMT+1
To: [redacted]
Subject: EANA and Copyright Directive

Dear Ms. [redacted]

The European Alliance of News Agencies (EANA) comprises news agencies in 32 European countries and the proposed Copyright Directive is of vital importance for European news agencies. Please find attached a short memo with EANA comments to the proposal including a presentation of EANA and its members.

I would very much appreciate if you could let me know when you could see me and a few members of the five person EANA board for a short discussion about European news agencies and the Copyright Directive, if convenient as soon as possible after New Year.

EANA is registered at the Transparency Register as a non-profit membership association 526968412531-40.

With my best regards,

[redacted]

Secretary General

European Alliance of News Agencies

Email: [redacted]

Mobile: [redacted]

Postal address: Norrtullsgatan 5, 11329 Stockholm, Sweden

Website: www.newsalliance.org

Personal data

EUROPEAN ALLIANCE OF NEWS AGENCIES

SECRETARIAT

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[Redacted]

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Tel: [Redacted]

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E-mail: [Redacted]

Web site: www.newsalliance.org

EN161128

NEWS AGENCIES AND THE EU COMMISSION'S PROPOSED UPDATE OF THE COPYRIGHT DIRECTIVE

1. Background. EANA and the role of News (Press) Agencies

The European Alliance of News Agencies (EANA) comprises news agencies in 32 European countries (the group includes press agencies, list of the member agencies and short facts about EANA in Attachment No 1). The news agency business constitutes the very basics of news gathering and distribution and is the backbone of true and unbiased news reporting in a democracy.

Licensing of content protected by copyright for use is the very basis of the news agency's business and the main source of funding for those activities. The fees paid for licensed use of this content therefore form the basis of the sustainable, long-term creation of independent, unbiased, trustworthy news content that citizens can rely on to be informed of developments in all areas from politics and economics to sports and current affairs.

For the licensing and identification of content new technology is an important tool. Relevant and up-to-date copyright legislation constitutes a necessary framework. It is essential that legislation on all levels concerning intellectual property rights recognizes the intellectual and financial efforts invested by news agencies in gathering all kinds of news.

The most common business model for news agencies is licensing agreements allowing various types of media and other companies to use news agency content (text, photos, news graphics, audio, video etc) for publication on traditional or digital media platforms or for other types of use.

Via the above mentioned licensing, news agencies are providers of content for both traditional media and digital media outlets and thereby the providers of a high percentage of the total bulk of news content on the internet.

European news agencies need a healthy environment abounding in freedom of the press, fair competition and simple and basic rules to operate. To secure an economic and legal environment for news agencies operating in accordance with these rules is therefore one of EANA's main concerns. News agencies also need to benefit from all rights protecting publishers.

The EANA member agencies are primarily providers of news stories, pictures, graphics, audio and video reports and other information to both traditional media and digital media environments created by the rapid development of information technology.

2. Licensing situation

Licensing of access to news agency's news service can be everything from buying the right to use one picture to having access to the full news agency service and publish stories/pictures/video from it in newspapers, broadcast and in any other media.

News agencies provide content in all forms, to editors in the media for a use that is defined according to the medium, for a limited period of time, and with a license that is generally non-transferable and non-exclusive.

Licenses granted by news agencies to editors in the media do not extend to search engines or content aggregators the right to reproduce this content separately on their pages.

Nevertheless, search engines in particular reproduce and distribute on their pages, millions of text stories, photos and videos as if they were free of rights, without any licence, creating a considerable financial loss to news agencies and their authors.

Fast developing information technology and borderless operations create a more difficult licensing environment.

Licenses, granted by news agencies do not authorize search engines or other content aggregators to reproduce the content separately on their own web pages and monetize the content (via fees, audience, advertising or other means). Despite this, these actors do so on a daily basis and on a massive scale, thereby causing enormous economic harm to the news agencies and those who depend on them (journalists, photographers, video journalists...).

Search engines have in fact become data banks, exploiting content they have not created and for which they have paid no remuneration. It is therefore crucial that neighbouring rights be created for news agencies, covering all activity in the communication of these agencies' content to the public, including the activities of aggregators and search engines to the extent that they profit from these activities directly (the marketing of links by aggregators) or indirectly (audience capture, retention of users within a search engine's ecosystem, remuneration for the search engine through publicity for the engine's related services) without having to assume the cost of the necessary investment for the journalistic production that they exploit.

The European directive should not exclude news agencies from those media that benefit from neighbouring rights. Only a neighbouring right will allow news agencies on the one hand to enjoy greater protection of their content (following the example of sound and video recording editors or audiovisual communications companies) and on the other hand to develop their structures and products while protecting their human and financial investments.

The proposed Directive has already acknowledged the legitimacy of this approach for press publishers. As explained herein, similar considerations to those highlighted by the Commission with respect to press publishers in justifying the creation of such a neighbouring right apply equally to news agencies. Indeed, it could be argued that they apply a fortiori in light of the fact that much of the content published by press publishers actually originates with news agencies.

Creating such an intellectual property right would allow news agencies to ensure better and more efficient protection for their content (along the lines of what exists in other creative industries such as record producers, video producers and broadcasting entities) as well as contributing to their commercial development and the increased quality of their output by protecting their significant investment in human resources and capital.

The protection granted to news agencies under the directive would not affect the rights of the authors in their creations included in the news agencies' services. Their neighbouring right is without prejudice to contractual arrangements concluded between the news agencies on the one side, and authors, on the other side, and the protection granted to the news agencies is not designated to be invoked against authors.

The extension of these rights to news agencies would therefore have no negative impact on copyright. The creation of neighbouring rights for news agencies would furthermore lead to greater protection for authors because they would continue to be employed and remunerated by the news agencies to which they have assigned their copyright.

It is essential to stress that existing copyright is not protective enough against unauthorized use of news agency services.

Since copyright applies to each individual work, the author or beneficial owner must provide proof of the originality of the work for each act of piracy. With the viral nature of the internet and the sheer volume of information that is distributed, it is physically impossible to pursue each illicit use and exploitation. Related rights would thus make up for the physical incapacity, assigning a right to the entirety of news agencies' production without the agencies being required to prove piracy for each illicit use.

A neighbouring right that benefits news agencies directly and ab initio would avoid the problem altogether by attributing right over the entirety of the production.

3. EUROPEAN COMMISSION Brussels, 14.9.2016 COM(2016) 593 final 2016/0280 (COD) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market

- EANA considers several aspects of the above mentioned draft a step in the right direction especially by proposing the creating of neighbouring rights for publishers compensating them for the use of their material by search engines and aggregators.
- The new neighbouring rights for press publishers are defined to cover press publications including any collection of literary works of a journalistic nature under a single title, such as newspapers, magazines and news websites. The rights do not – as currently drafted – provide any protection to news agencies, despite them fulfilling the same basic purpose as direct publishers.
- News agencies contribute a significant percentage of the content published in newspapers, in print and online. This content is continuously updated 24/7. To meet the directive's ambition of securing the sustainable production of high quality news reporting on the internet, it is therefore essential that the concept of "press publication" is widened or clarified to cover the activities of news agencies. It would be totally unfair to exclude news agencies from being compensated whereas their content is used in the same manner.
- EANA considers it vital for the sustainable production of quality news journalism to secure a reasonable remuneration for use of news content produced by news agencies. We therefore regard it vitally important that news agencies benefit from the new neighbouring right.

4. Proposal. The Commission's draft directive:

If a new right is granted to publishers of press publications, this right should also cover news agencies. News agencies fulfill a vital role in the reporting and dissemination of news and ought to be able to rely on the same legal protection as newspapers and other direct publishers of news.

(31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, news agencies and publishers of press publications are facing problems in licensing the online use of their news services and publications and recouping their investments. In the absence

of recognition of news agencies and publishers of press publications as right holders, licensing and enforcement in the digital environment is often complex and inefficient.

(32) The organizational and financial contribution of news agencies and publishers in producing news services and press publications needs to be recognized and further encouraged to ensure the sustainability of the publishing media industry. It is therefore necessary to provide at Union level a harmonized legal protection for news agencies' services and press publications in respect of digital uses. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of news agencies' news services and press publications in respect of digital uses.

(33) For the purposes of this Directive, it is necessary to define the concept of news services and press publication in a way that embraces only journalistic services and publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. Such publications would include, primarily but not only, daily newspapers, news agencies, weekly or monthly magazines of general or special interest and news websites.

(34) The rights granted to news agencies and publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as digital uses are concerned. They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.

(35) The protection granted to news agencies and publishers of press publications under this Directive should not affect the rights of the authors and other right holders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other right holders can exploit their works or other subject-matter independently from the news agencies' news services and press publication in which they are incorporated. Therefore, news agencies and publishers of press publications should not be able to invoke the protection granted to them against authors and other right holders. This is without prejudice to contractual arrangements concluded between the news agencies and publishers of press publications, on the one side, and authors and other right holders, on the other side.

Article 11

Protection of press publications and news services concerning digital uses

1. Member States shall provide publishers of press publications and news agencies with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication or news service. Such 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 or news service in which they are incorporated.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication or news services. This term shall be calculated from the first day of January of the year following the date of publication.

Attachment No 1

Facts about EANA:

- EANA is registered at the Trade Register in Berne, Switzerland as a non-profit membership association (reg number CH-035.6.031.208.5)
- EANA was founded on August 21, 1956 in connection with a conference on new media technology held in Strasbourg
- EANA's predecessor Agences Alliées was founded in 1924 and was active until the World War II when the activities were discontinued
- EANA serves as a forum for cooperation and exchange of information and experiences among European news agencies
- EANA's operations are financed by membership fees

EANA member agencies):

ANADOLU, Turkey
AFP, France
AGERPRES, Romania
ANA-MPA, Greece
ANA, Andorra
ANP, the Netherlands
ANSA, Italy
APA, Austria
ATA, Albania
AzerTAc, Azerbaijan
BTA, Bulgaria
BELGA, Belgium
CNA, Cyprus
CTK, Czech Republic
DPA, Germany
EFE, Spain
GHN, Georgia
HINA, Croatia
LUSA, Portugal
MTI, Hungary
NTB, Norway
PA, England
PAP, Poland
RITZAU, Denmark
SDA/ATS, Switzerland
STA, Slovenia
STT, Finland
TANJUG, Serbia
TASR, Slovakia
TASS, Russia
TT, Sweden
UKRINFORM, Ukraine

Personal data

From: [REDACTED]
Sent: 19 January 2017 19:44
To: [REDACTED] (CNECT)
Cc: [REDACTED]
Subject: RE: European Alliance of News Agencies

Dear Ms [REDACTED],

Many thanks indeed for your email and your interest! I very much appreciate the dialogue.

If needed, it is not a problem to prove that it partly is our content being used by third parties not having a license to do so. As I (hopefully correctly) have understood the proposed new rights proposed for newspaper publishers the basic idea is to strengthen their position in discussions with for instance Google.

It is not the newspaper publishers violating our rights. News agencies face the same problem as newspaper publishers: There are third parties like aggregators, with Google the today most dominating, refusing to sign agreements to use our content but use it to build a business based on content that they do not pay for. This is in a long term perspective undermining the production of quality journalism.

European news agencies face two main challenges: Financing and Defending a sustainable production of unbiased, quality news journalism. Defending it is unfortunately needed in some countries but an issue not related to copyright or related rights.

The news agency business model is typically licensing media companies and others to use our content. News agencies have no access to advertising revenues. While the news media market is more and more fragmented because of the rapid development of information technology and social media, news agencies still have their main income from newspaper publishers and broadcasters paying a license fee to use news agency content in print, online and broadcasting/webcasting.

Many of the 32 EANA member agencies are owned by newspaper publishers/broadcasters; some as cooperatives, others by a limited number of media companies in their respective markets.

News agencies have no interest in limiting the flow of news in online media. As all, we see it as strengthening the awareness of what is happening in democratic societies. The importance of quality news reporting is obvious when you discuss how so called fake news can manipulate a democratic process.

We have the same problem as newspaper publishers versus aggregators etc. It is not to prove what they are doing - but to make them pay a reasonable fee for doing it.

Best wishes,

[REDACTED], EANA

Personal data

From: [REDACTED]
Sent: 19 January 2017 15:06
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: European Alliance of News Agencies

Dear Mr [REDACTED],

Thank you very much for the fruitful discussion at our meeting yesterday and your follow-up email that gives me the opportunity to clarify the questions my colleagues and I were asking towards the end.

What we were trying to aim at with our questions was a better understanding of the situation of news agencies as regards infringements of their rights, be it by licensees or third parties. We understood for example that there seem to be practical concerns related to litigation (e.g. concerning proof of valid chain of title) whereas other concerns seem to have a more economic background (e.g. potential repercussions of enforcement action on the business model of news agencies). We would be interested in learning more about these problems / concerns

Kind regards,



European Commission
Unit I.2 – Copyright
Directorate General Communications Networks, Content and Technology
[REDACTED]
B-1049 Brussels
Email: [REDACTED]
Tél: [REDACTED]
Fax: [REDACTED]

Personal data

From: [REDACTED]
Sent: Thursday, January 19, 2017 9:39 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: European Alliance of News Agencies

Personal
data

Dear [REDACTED],

Just a short email to thank you and your team for seeing us yesterday for a discussion about news agency content and the proposed copyright directive.

We ran a bit short on time and perhaps the discussion was very much focused on one single issue. At the end of the meeting, you asked a question that I understood as if stressing the position as right holders could address the problem and referring to the draft directive saying: “publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side.”

I would appreciate if you could let me know if I understood your question correct?

Best wishes,

[REDACTED]

[REDACTED]

Personal
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European Alliance of News Agencies

Email: [REDACTED]

Mobile: [REDACTED]

Postal address: [REDACTED]

Website: www.newsalliance.org

From: [REDACTED] (CAB-ANSIP) on behalf of ANSIP Andrus (CAB-ANSIP)
Sent: 09 March 2017 16:19
To: CAB ANSIP ARCHIVES
Cc: [REDACTED]
Subject: FW: Press publishers disappointed following release of Comodini report // publishers' right
Attachments: 20170308_PR_ComodiniReport.pdf
Categories: [REDACTED]

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From: Max Abendroth [REDACTED]
Sent: Thursday, March 09, 2017 3:21 PM
To: ANSIP Andrus (CAB-ANSIP)
Cc: [REDACTED] (CAB-ANSIP); [REDACTED]
Subject: Press publishers disappointed following release of Comodini report // publishers' right

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Dear Vice-President Andrus Ansip,

On behalf of the four European press associations ENPA, EMMA, EPC and NME I would like to share with you our joint [press release](#) commenting on the draft report on copyright in the Digital Single Market by the Rapporteur Therese Comodini Cachia, published on Tuesday night this week.

We would like to raise our deep concern and disappointment following the release of this report. The introduced press publisher's right in the Commission proposal is crucial as it enables publishers to negotiate licences and to deal with enforcement action against large scale infringements which are compromised by the draft report replacing the neighbouring right by a "presumption of representation".

It is of fundamental importance for the future of the free and independent press sector in Europe that EU decision makers ensure a copyright framework that guarantees media pluralism as an essential basis for freedom of opinion and democracy in the the digital market. A publishers' right is fundamental to achieving this goal.

Please do not hesitate to get back to us for any questions you might have.

Yours sincerely,


[REDACTED]



■ Tel: [redacted] - Mob.: [redacted]

■ Rue de Namur 73 A, B-1050 Brussels

■ www.magazinemedia.eu

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Publishers in the Digital Age

Adequate legal protection is needed to ensure the diversity of the press and the future of quality Journalism in Europe

Brussels, 8 March 2017

Press Release

Newspaper and magazine publishers slam European Parliament report for dismissing proposal for a Publisher's Right and prioritising litigation over licensing and cooperation

Published yesterday evening, Tuesday, 7 March, EP Rapporteur Therese Comodini Cachia's report on the EU copyright reform package recommends rejection of the proposal for a Publisher's Right that would go some way to address the major challenges faced by publishers striving to finance an independent press and professional journalism in the face of wide-spread theft of their digital content and diversion of revenue-earning potential.

A Publisher's Right is a very simple and straightforward way to provide press publishers with important legal recognition that they own the content they publish, making it clear to those who want to reuse their content they need permission. This would incentivise discussions about licensing or other commercial deals as well as providing for an enforcement tool against unlicensed use of valuable online content. It would recognise press publishers large and small as rightholders in EU copyright law alongside other neighbouring rightholders in the media and creative industries. This is what publishers need to provide legal certainty for all parties involved, making it clear that publishers' content cannot be copied or reused **for commercial benefit** without their permission.

The Comodini report instead calls for rightholders to be given a "presumption of representation" rather than a neighbouring right. Perversely this will encourage litigation instead of incentivising licensing and innovative ways of making content available which was one of the Commission's objectives in proposing the neighbouring right.

Europe's leading Newspaper and Magazine Publishers' Associations EMMA, ENPA, EPC and NME said: "Mrs Comodini has bypassed the fundamental issue that the Commission addressed in their proposal that the law should recognise that publishers own the content they publish and make available. She fails to address the problem, which her own group identified in their position paper, namely, the relationship between publishers and news aggregators and search engines. A legal standing through a neighbouring right is more straightforward than her construct which incentivises litigation over negotiation."

The publishers continued: "We now call on MEPs, when they come to vote on the Commission's proposal, to agree on the importance of a legal standing for press publishers, in the form of a Publisher's Right- a straightforward right that would help us bring those who wish to use our content commercially to the table to negotiate with us for licences so that the digital ecosystem can be sustainable and work for everyone: the content creators, the distributors and the consumers."



Background:

- European newspaper and magazine publishers produce thousands of articles daily which are copied, recycled and marketed illegally by third parties within just a few seconds.

- 47% of readers who read publishers' content do not click on the links they find on search or social media back to the publishers' own sites. They stay there and read only the headlines and snippets: it is then the aggregator (who merely copies), and not the publisher (who bears the costs), who connects with the readers and monetises the content by means of advertising revenues.

- 85c of every euro spent on digital advertising goes to content distributors such as Google and Facebook.

Press publishers have long underlined the importance of being able to get a return on their investment in professional journalism, in particular, in the context of third parties' commercial use of their products, in order to continue their important role of providing information, entertainment and opinion in our democratic society.

What remains certain is that the Publisher's Right will have no impact on the freedom of the internet, in particular, on linking. All regular copyright exceptions, such as those relating to quoting, illustration, research and private copying, etc. will still apply. Consumers can continue to link, share and comment on press publications.

www.publishersright.eu

On behalf of:

EPC - European Publishers Council

www.epceurope.eu

&

Personal data

ENPA – European Newspaper Publishers Association

www.enpa.eu

EMMA – European Magazine Media Association

www.magazinemedi.eu

NME – News Media Europe

www.newsmediaeurope.eu

From: [REDACTED]
 Sent: 07 September 2017 11:39
 To: [REDACTED]
 Subject: [REDACTED]

Personal
data

Begin forwarded message:

From: [REDACTED]
 Date: 7 September 2017 at 12:33:45 GMT+3
 To: [REDACTED] <[REDACTED]@ec.europa.eu>
 Cc: [REDACTED] <[REDACTED]@newsmediaeurope.eu>,
 [REDACTED] <[REDACTED]@epceurope.eu>,
 [REDACTED] <[REDACTED]@enpa.eu>,
 [REDACTED] <[REDACTED]@bdzv.de>,
 [REDACTED] <[REDACTED]@magazinmedia.eu>,
 [REDACTED] <[REDACTED]@vdz.de>,
 [REDACTED] <[REDACTED]@axelspringer.de>,
 [REDACTED] <[REDACTED]@epceurope.eu>
 Subject: Copyright: First draft compromise text - Press publishers' comments

Personal
data

Dear Mr. [REDACTED],

On behalf of the four European Associations representing press publishers (EMMA, ENPA, EPC and NME), and in the light of the discussions taking place at the IP Working Party on 11-12 September, we would like to bring to your attention a **first legal analysis (attached) based on the Estonian Presidency's draft compromise text as regards article 11** of the Copyright Directive.

This legal analysis explains why the two alternative options as presented in Annex II of the Presidency text would miss the target of providing an effective legal protection of press publishers with regard to the digital use of their press publications.

- **Option A** endorses the approach taken by the European Commission in principle, but **substantially reduces the scope of the publisher's right**. Notably, a publisher's right as proposed under Option A would not protect press publishers against the use of short excerpts of their press products, because such excerpts will very often not constitute an "expression of the intellectual creation of the author";
- **Option B** wants to replace the European Commission's proposal by an **entirely different regulation**. Option B advocates a statutory **presumption** instead of a publisher's right which

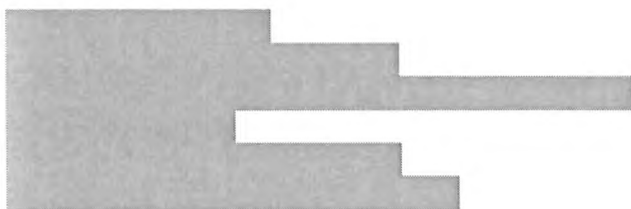
would merely entitle press publishers to conclude licences and to take legal measures concerning the digital use of the works and other subject-matter included in such a press publication.

To conclude, neither of the two options is a compromise. In fact Option A and Option B **would not strengthen the press publishers' position vis-à-vis search engines and news aggregators**, but impair it even further. This is because a regulation as proposed under Option A and Option B would have the inevitable effect that the unauthorized exploitation of press publications by news aggregators and search engines will be accepted by the law.

Do not hesitate to contact us for any further question.

Best wishes,

On behalf of NME, EPC, ENPA and EMMA,



Personal data

Publisher's Right

A legal analysis of the draft compromise proposal of the European Council regarding Article 11 of the draft directive on copyright in the Digital Single Market

A. Introduction

In its Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM 2016/0593 "**Copyright Directive**") the European Commission proposes the creation of a new right for the protection of press publications concerning digital use ("**publisher's right**").

Such a publisher's right would grant press publishers an exclusive right with regard to the digital use of their press publications. In particular would this publisher's right extend to the **use of small excerpts** from articles contained in press publications, which requires the publisher's consent. The publisher's right would hence protect press publishers effectively from the exploitation of their press publications by online services, in particular by search engines and news aggregators.

All committees of the European Parliament which have so far made their vote on the draft Directive support the publisher's right as proposed by the European Commission.

A draft paper of the Council of the European Union regarding the publisher's right dated 30 August 2017 ("**Council Proposal**") presents two alternative sets of amendments to Article 11 – so-called Option A and Option B – as a "compromise".

Option A endorses the approach taken by the European Commission in principle, but **substantially reduces the scope of the publisher's right**. Notably, a publisher's right as proposed under Option A would not protect press publishers against the use of short excerpts of their press products, because such excerpts will very often not constitute an "expression of the intellectual creation of the author".

Option B wants to replace the European Commission's proposal by **an entirely different regulation**. Option B advocates a statutory **presumption** instead of a publisher's right which would merely entitle press publishers to conclude licences and to take legal measures concerning the digital use of the works and other subject-matter included in such a press publication. Option B follows the approach supported by the former rapporteur in the Legal Affairs Committee of the European Parliament (JURI), Therese Comodini Cachia (which is off the table).

Neither of the two options is a compromise. In **fact Option A and Option B would not strengthen the press publishers' position** vis-à-vis search engines and news aggregators, but impair it even further. This is because a regulation as proposed under Option A and Option B would have the inevitable effect that the unauthorized exploitation of press publications by news aggregators and search engines will be accepted by the law. Hence,

both options would miss the target of providing an effective legal protection of press publishers with regard to the digital use of their press publications.

B. Analysis

1. The proposal of the European Council contradicts the objectives of the European Commission

The European Commission has carried out an extensive impact assessment prior to its proposal for the Copyright Directive. This assessment has clearly shown that the organizational and financial contribution of press publishers in producing press publications demands legal protection, and that to this end it is proportionate to grant a neighbouring right to press publishers. This approach taken by the European Commission would be completely undermined by the Council's proposal – both under Option A as well as under Option B.

Allegations that Option A only clarifies the regulation in accordance with the original intention of the Commission are not at all supported by the Commission's proposal nor by any other document. The recitals of the draft directive make very clear that the Commission's intention is that the publisher's right protects the investment of publishers not only with respect of excerpts from press publications which exceed the originality threshold (i.e. works and parts of works).

2. No protection for small excerpts from press publications ("snippets")

In both scenarios which are outlined in the draft proposal – Option A and Option B – press publishers would continue to rely on the copyright of authors of the articles contained in their press publications. This copyright is not sufficient to protect press publications from the unauthorized use by search engines and news aggregators, because such online services typically use small excerpts from press content. Such excerpts are very often not protected by copyright law. A regulation as proposed under Option A as well as under Option B would twofold depend on the authors' copyright: The respective article and the excerpt from this article which is used must both qualify as a copyrighted work. This will very often not be the case, because the copyright law of certain Member States will not cover small excerpts from a copyrighted work. **Nevertheless the investment made by the publisher in the news item (editorial, financial, organisational) remains the same whether the re-use is the full article or a small part.** Recital 32 indicates the rationale for the protection granted in article 11: *"organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry"*. Furthermore as demonstrated by the Eurobarometer from March 2016, 47 % of online users do not click through on the short news item/link to access the article on the press publishers website, which deprives the press publishers of not only traffic, but also advertising revenue, and constitutes a substitutional effect. To the extent the Court of Justice of the European Union has ruled that excerpts of a text can be protected as a work of authorship (e.g. ruling of 16 July 2009, C-5/08 – Infopaq), this judgement implies that

excerpts as they are typically used by search engines and news aggregators are not protected under Community Law. Articles which are not protected as literary works would not be covered in the first place. Hence contrary to the Commission's intention the gap in the protection of press publications will not be closed.

3. Further impairment of the legal status of press publishers

Since a regulation pursuant to Option A as well as Option B would not extend to the use of press publications by online services such as search engines and news aggregators, Article 11 of the Copyright Directive in the shape of the European Council's draft proposal would in no way improve the legal status of press publishers regarding the unauthorized use of their content by such online services. Instead, the regulation proposed under **Option A and Option B would** at the expense of press publishers **perpetuate the status quo to the benefit of search engines and news aggregators** – notably of the big online companies from the USA.

4. The Council's proposal misses the distinction between the press publication and its content

The purpose of the publisher's right is to provide at Union level a harmonised legal protection of "the organizational and financial contribution of publishers in producing press publications" (recital 33).

A press publication or extracts of a press publication (i.e the subject-matter protected by the publisher's right) can per se not be a personal intellectual creation. What the Council proposal obviously wants to stipulate according to the proposed amendment under Option A is that the rights referred to in the first subparagraph shall only apply in respect of extracts of a press publication provided that the extracts of the work or other subject-matter which are incorporated in the extract of the press publication are the expression of the intellectual creation of their authors.

The creative work contained in press publications is not in the scope of the publisher's right. Whether or not this work is protected by copyright law as a work or other subject-matter, can therefore be of no relevance to the need for a protection of the press publication. The protection of press publications should – like the protection of investments in the production of other subject-matter (broadcasts, sound recordings etc.) be totally independent from the protection of the elements incorporated in a press publication. Option A fails to adhere to this principle because under this option the protection of the press publication would depend on the protection of the content which is incorporated in the press publication as a work of authorship (expression of the intellectual creation of the author).

The publisher's right is linked to the author's right at the cost of the press publisher even further, because pursuant to Article 11 paragraph 2 from Option A the press publisher shall not be entitled to enforce his publisher's right when an author or a right holder has concluded licences with different persons in respect of a work or other subject-matter incorporated in a press publication. In other words: **Unless the press publisher has acquired exclusive and unlimited rights from the author, the**

scope of the publisher's right is determined by the author or other right holder who grants such a licence. This turns copyright law upside down and clearly fails to create an effective protection of the financial contribution of the press publisher in producing press publications.

5. The Council's proposal would perpetuate legal uncertainty and further fragmentation of the law

Option A obviously aims to exclude small extracts of articles incorporated in a press publication from the scope of the publisher's right, but this regulation may have far reaching effects on the concept of copyright law in general: It may – unintentionally – result in a harmonization of the general criteria for protection of text (and probably also other types of creative content) as a work of authorship by European copyright law, because Contrary to similar provisions in other directives (e.g. Article 3 (1) of Directive 96/9/EC (data bases), Article 6 of Directive 2006/116/EC (photographs) and Article 1 (3) of Directive 2009/24/EC (computer programs)) is not limited to a specific type of work. And because the concept of copyright as stipulated in Article 11 of the draft compromise proposal would be an autonomous concept of European Union law, which would therefore have to be interpreted uniformly in all the Member States (e.g. CJEU ruling of 20 Oct. 2010 in case C-467/08 – Padawan). In other words: **Option A is the creation of a European concept of authorship through the backdoor.** What appears to be a regulation with respect to press publication would in fact most probably apply to all works. This would have a negative effect on European copyright law in general which cannot be over-estimated: The European concept of "the expression of the intellectual creation of the author" as the necessary criterion for copyright protection would probably not only apply to text, but form the basis for copyright protection as a work of authorship in any other field (music, film etc.). Second, an autonomous concept of the criteria for protection as a work of authorship would obliterate the existing case law created by the courts of the Member States. The European criteria will certainly match existing national law to some extent. But it is by design that the prerogative for the interpretation of the new European concept will be assigned to the Court of Justice of the European Union (CJEU). Therefore, the introduction of such a European concept of a copyright work would inevitably result in many years of litigation until the CJEU has made its decisions. Existing rulings from the CJEU (notably the so-called Infopaq-Case) will not make litigation expendable.

The same goes for the exclusion of excerpts from works or other subject-matter that are in the public domain. This is also a concept which would have to be interpreted on Community level. The provisions of the Term Directive give an answer to the question whether a work or other subject-matter is no longer protected by copyright law. But for the reasons outlined above, the question if a work is protected in the first place or not (and then in the public domain), would have to be subject of an interpretation by the CJEU.

To the extent Court of Justice of the European Union has decided about the protectability of excerpts (e.g. ruling of 16 July 2009, case C-5/08 – Infopaq), this judgement implies that excerpts as they are typically used by search engines and news aggregators are not protected under Community Law.

Option B would equally undermine efforts to harmonize copyright law in Europe, because the question whether small excerpts from articles contained in press publications are protected as a work of authorship under copyright law – and can therefore be subject to the presumption – is in the end subject to national law. Hence, a presumption as proposed under Option B would also perpetuate the current situation of legal fragmentation across the European Union in terms of the scope of such a presumption.

6. Option A cannot work with regard to digital offerings which are fully automated

Notwithstanding the objections raised before Option A would not work in the fully automated environment of the digital economy, because this Option requires a legal assessment of each and every excerpt used from a press publication. Whether or not the excerpt of a work or other subject-matter is an expression of the intellectual creation of the author is a legal question which in principle cannot be answered by the application of technological means. A workable and practical solution which allows right holders as well as users to determine in real time whether an excerpt from a press publication is used in a way that constitutes a use that is protected by the publisher's right must provide clear and unambiguous criteria which can be applied by machines (algorithms).

7. Option B gives press publishers no own exclusive right

Unless press publishers have by contract acquired the rights they want to licence or enforce under the presumption from their authors, any claim granted by a court under such a right (e.g. for damages), would be granted to the author or be subject to rebuttal. The press publisher would not be entitled to any relief or compensation himself. This is made clear in draft recital 31b which expressly stipulates that the principle that publishers of press publications need to acquire all the relevant economic rights from the authors and right holders to incorporate their works or other subject-matter in a press publication shall continue to apply. The presumption shall expressly be without prejudice to contractual arrangements.

C. Conclusion

The draft compromise proposal of the European Council regarding Article 11 is inappropriate, because it provides **no sufficient protection of protection of press publishers with regard to the digital use of their press publications**. Therefore Option A as well as Option B run contrary to the Commission's intention. A compromise solution for effective and proportionate means of protecting press publications regarding their digital use can only be found in the Commission's proposal. The Commission's proposal for Article 11 of the Copyright Directive is well balanced – it already is the compromise solution:

The proposal by the European Commission for a Publisher's Right

- ... is – despite its limited scope – proportionate and appropriate to protect press publishers against the exploitation of their press publications in the digital environment by search engines and news aggregators;
- ... safeguards that small excerpts from press publications are protected from the unauthorized use by search engines and news aggregators;
- ... safeguards that the rights of authors of works contained in press publications will not be impaired or limited by the rights granted to press publishers;
- ... clarifies that the publisher's right does not extend to acts of hyperlinking which which do not constitute communication to the public and hence guarantees the exchange of information on the internet and the sharing of content from press publications on social media;
- ... only extends to the protection of the digital use of press publications, therefore its scope is much more narrow than the scope of other neighbouring rights;
- ... creates a uniform and harmonized legal framework in Europe for the protection of press publications in a digital environment;
- ... fosters the development of new digital business models based on licences and equitable agreements between press publishers and online services.

The draft proposal of the European Council for amendments of the Commission's proposal

- ... is inconsistent with the objectives of the European Commission, because it fails to provide adequate and effective protection of European press publishers in the digital world;
- ... would freeze the current situation in which press publications are exploited by online services and thus further impair the position of press publishers in the digital world;
- ... would be a regulation for the protection of the dominant market position of internet companies in Europe, notably from the United States of America;
- ... would in particular fall short of the necessary protection of small excerpts from press publications ("snippets") with regard to the massive and automated use of such excerpts by search engines and news aggregators;
- ... would create substantial legal uncertainty and perpetuate the law fragmentation in Europe regarding the protection of press publishers;

September 2017

Rechtsanwalt

[@cms-hs.com](mailto:cms@cms-hs.com) | www.cms.law

From: [REDACTED] (CNECT)
Sent: [REDACTED]
To: CNECT I2
Subject: FW: IP Working Party - European Publishers' Article 11

From: [REDACTED]
Date: Sunday, 5 November 2017 at 12:16:21
To: [REDACTED]
Cc: [REDACTED]
Subject: IP Working Party - European Publishers' Article 11

Personal data

To Mr. [REDACTED]
Acting Head of Unit for Copyright, DG CONNECT

Dear Mr. [REDACTED]

On behalf of the European Publishers' Council ([EPC](#)), The European Media Magazine Association ([EMMA](#)), the European Newspaper Association ([ENPA](#)) and News Media Europe ([NME](#)), and having regard to the up-coming Intellectual Property Working Party meeting on the Copyright Dossier, please find enclosed the European Publishers' Position on the two Options on Article 11 proposed by the Estonian Presidency.

Best regards,

[REDACTED]

--

News Media Europe

[REDACTED]

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[REDACTED]



Brussels 3 November 2017

Dear Member of the Council IP Working Party,

Ahead of the Working Party on Intellectual Property on 6 & 7 November on the proposed Copyright Directive, we, EMMA (European Magazine Media Association), ENPA (European Newspaper Publishers' Association), EPC (European Publishers Council) and NME (News Media Europe) - representing the interests of tens of thousands of newspaper and magazine publishers across the EU - would like to reiterate our concerns regarding the two alternative sets of amendments on Article 11 –“Option A” and “Option B” – as presented in the Consolidated Presidency compromise proposal from 30 October 2017.

We are extremely worried that the original intention of article 11 in the European Commissions' proposal has been seriously compromised by the two options under discussion. The proposed options will not in either case meet the core objectives of introducing a neighbouring right. In fact, we fear that both options would make matters worse than today for press publishers. Neither option would ensure the proper legal framework for publishers who seek to develop licensing solutions for the widespread reuse of their content by various commercial third parties on the internet. We see no point in deviating from the very simple and straightforward Commissions' Proposal on Article 11. We respectfully ask you to reconsider supporting the original EC proposal that provides European publishers with the legal standing they need to move forward in what has become an unbalanced ecosystem.

In its Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM 2016/0593 "Copyright Directive") the European Commission proposes the creation of a new right for the protection of press publications concerning digital use ("publishers' right"). This proposal aims to provide legal protection by introducing rights at EU level to protect the unauthorised reproduction and distribution of publishers' press publications in the context of the digital world. To remain competitive and independently financed in the EU, press publishers need to be able to compete effectively and profitably on all platforms, which requires clear legal rights that are recognised in the market.

Also, all committees of the European Parliament which have so far made their vote on the draft Directive support and reinforce the publisher's right as proposed by the European Commission.

Option A endorses the approach taken by the European Commission in principle, but substantially reduces the scope of the publishers' right particularly in the area of mass systematic scraping, and the unauthorised reproduction of content in whole or in part where there is no legal clarity today. Notably, a publishers' right as re-constituted under Option A would not protect press publishers against the use of short excerpts ("snippets") of their press products, because such

excerpts will very often not constitute an "expression of the intellectual creation of the author". Even though mass infringement of the reproduction right will have occurred in the first place in order that such short excerpts can be reused commercially, by introducing such a significant threshold, this change renders the modified right unworkable in the digital reality of today.

The reason why publishers need short excerpts to be included in the scope of Article 11 is shown by the results of The Eurobarometer n° 437/March 2016. The Eurobarometer shows that an increasing number of people do not click on links to access the whole article but are 'satisfied' with the headline in the hyperlink and the "snippet" to get an overview of the news of the day (67 % in some cases). This is referred to as the substitution effect. It impacts press publications because if there is no click through the hyperlink there is no traffic on the publishers' websites, and if there is no traffic there is no advertising revenue. This is highly problematic for press publishers and one of the most crucial areas that the proposal from the European Commission seeks to redress through the introduction of a neighbouring right.

Option B advocates a statutory presumption instead of a publisher's right. A presumption would not provide an effective legal protection of press publishers with regard to the digital use of their publications. This solution again fails to address the use of press publications by online services such as search engines and news aggregators. In addition, unless press publishers have by contract acquired the rights they want to license or enforce under the presumption from their authors, any claim granted by a court under such a right (e.g. for damages), would be granted to the author only, or be subject to rebuttal. The press publisher would not be entitled to any relief or compensation himself. This is made clear in draft recital 31b which expressly stipulates that the principle that publishers of press publications need to acquire all the relevant economic rights from the authors and right holders to incorporate their works or other subject-matter in a press publication shall continue to apply. Moreover, the exercise of such a presumption through litigation is very costly and will significantly disadvantage smaller publishers.

Neither of the two options is advantageous for the entities it seeks to protect because both options would have the inevitable effect that the unauthorized exploitation of press publications by news aggregators and search engines will not only continue unabated but will become accepted by the law. Such a damaging outcome will even undermine existing licences. Both solutions therefore proposed by the Estonian Presidency would miss the target of providing an effective legal protection of press publishers regarding the digital use of their press publications.

A balanced solution for effective and proportionate means of protecting press publications regarding their digital use can be found in the Commission's proposal.

We would be pleased to provide you with any additional information you might require on this crucial topic.

Yours sincerely,



NEWS MEDIA EUROPE

On behalf of:



NEWS MEDIA EUROPE

EMMA

[@magazinemediamedia.eu](mailto:info@magazinemediamedia.eu)
www.magazinemediamedia.eu

ENPA

[@enpa.eu](mailto:info@enpa.eu)
www.enpa.eu

EPC

[@epceurope.eu](mailto:info@epceurope.eu)
www.epceurope.eu

NME

[@newsmediaeurope.eu](mailto:info@newsmediaeurope.eu)
www.newsmediaeurope.eu

More information on: www.publishersright.eu

From: [redacted] <[redacted]>
Sent: 19 April 2017 16:28
To: [redacted] (CAB-ANSIP)
Cc: [redacted]; [redacted]
Subject: Demande d'entretien de Mathias Döpfner le 3 mai 2017

Personal data

Categories: [redacted]

Madame,

Suivant notre conversation téléphonique, je vous transmets ci-après la demande d'entretien pour le Vice-Président Ansip de la part de Mathias Döpfner, président de l'association allemande des éditeurs de presse (BDZV) et PDG d'Axel Springer SE.

Monsieur Döpfner souhaiterait s'entretenir avec le Vice-Président Ansip lors de sa visite à Bruxelles le 3 mai 2017, journée mondiale de la liberté de la presse, sur le projet de directive sur le droit d'auteur dans le marché unique numérique (« Directive on Copyright in the Digital Single Market »). Ce projet de directive et notamment la proposition pour un droit voisin pour les éditeurs de presse est d'importance cruciale pour l'avenir du secteur de la presse en Europe.

Je vous saurais gré de bien vouloir m'informer de la disponibilité du Vice-Président Ansip le 3 mai en matinée.

Je me tiens à votre disposition pour toute question ou demande.

Je vous prie d'agréer, Madame, l'expression de mes respectueuses salutations.



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data**From:** [REDACTED]**Sent:** Monday, May 08, 2017 6:27 PM**To:** [REDACTED] (CNECT)**Cc:** [REDACTED]**Subject:** Follow-up to our meeting

Dear Mr. [REDACTED],

Thank you again for this meeting and the discussion. This is very useful and important for us to have this continuous dialogue with you and your team on this issue.

As promised, I enclose the ENPA statement based on the EFJ announcement recently published and available [here](#). We will also now reflect on the different possible scenario that could come up in the various committees and will share our analysis and reflection with you at an early stage.

I don't have the e-mail of your other colleague who was present at the meeting with us but I guess Jaime can also send it to her if possible.

Please do not hesitate to contact us for any further question,

Yours sincerely,

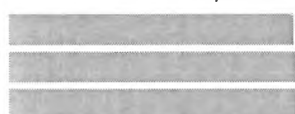
Personal data

[REDACTED]
Executive Director



ENPA - European Newspaper Publishers' Association
Rue de Namur, 73A
B-1000, Brussels, Belgium

Personal data



www.enpa.eu

The European Newspaper Publishers' Association: Key policy priorities

Copyright reform

The Commission's proposal for a directive on Copyright in the Digital Single Market, including a right for press publishers (the "press publisher's right") aims at providing a clear set of rights by granting press publishers an undisputable legal status at EU level aiming mainly at improving their bargaining position in the negotiations of licence agreements and at protecting the unauthorised reproduction and distribution of publishers' press publications in the context of the digital world.

Key Messages

- **To remain competitive and independently financed**, press publishers need to be able to compete effectively and profitably on all platforms, which requires **clear sets of rights** at EU level. The current lack of clarity benefits those third parties that want to freeride on press publishers' investment.
- **A right** (as already enjoyed by music, film and TV producers) **would grant publishers legal clarity encouraging negotiations with search engines and news aggregators through licenses and allow them to enforce their right** thereby encouraging investment and innovation in the sector, to the benefit of consumers.
- **The right as proposed by the Commission**, weaker than the one other content producers are currently benefitting from is already a compromise or should be considered as a **minimum protection and not be further weakened**.
- **Short excerpts should must be covered** in the scope of the right as they reflect investments made by publishers and as 47% of online users do not click through to access the article on the press publisher's website. This constitutes a substitution effect and deprives press publishers from traffic and advertising revenue.
- **Publishers actively encourage their readers to share links to their articles**. What has been proposed would not affect the way readers access publishers' content, or share links on social media or via apps and email to friends and family.
- **The publishers' rights in Spain and Germany have different scopes** than the one suggested by the Commission and although the process of establishing rights at national level takes time, **they started being enforced in both countries**.

Proposal for an E-privacy regulation

Out of
scope

[Redacted text block]

[Redacted text block]

Review of the Audio-Visual Media Services Directive

[illegible]

VAT for the digital press

[illegible]

[illegible]

From: [REDACTED]
Sent: 14 September 2017 15:18
To: [REDACTED] (CAB-GABRIEL); [REDACTED] (CNECT)
Cc: [REDACTED]
Subject: Suite réunion EPC - Empower Democracy: Taking responsibility for the future of a free and independent press

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Cher [REDACTED], chère [REDACTED],

Nous tenions à vous remercier de votre disponibilité aujourd'hui.

Comme convenu, voici en bas le courriel "Empower Democracy" qui est une lettre d'information régulière envoyée aux eurodéputés et aux Etats membres, sur la nécessité d'un droit voisin.

Dans cette dernière lettre d'information nous répondons aux allégations de la communauté scientifique/bibliothèques, car celle-ci vient de publier une lettre ouverte demandant la suppression des dispositifs articles 11 et 13 au nom de la science ouverte et d'"open access".

Le lien à la lettre ouverte: https://docs.google.com/document/d/1uuQQQzKtjJiH9DLh5GJreuL4-mj3PyCGDu_lJFAzmWw/edit#heading=h.5z6k7n5et72d

Out of
scope

[REDACTED]

[REDACTED]

[REDACTED] sur e-privacy.

N'hésitez surtout pas de nous contacter si vous avez des questions, ou bien si vous souhaitez d'avantage d'informations sur les différents sujet abordés.

Bien cordialement,

[REDACTED]

[REDACTED]

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TAKING RESPONSIBILITY FOR THE FUTURE OF A FREE AND INDEPENDENT PRESS

This autumn will mark an important milestone for publishing and a free and independent press in Europe. Leading on the EU draft copyright reform, the European Parliament's JURI committee is expected to vote in November. Their decision on whether or not to award press publishers a crucial neighbouring right will impact directly on the future of the free press and professional journalism, both highly valued in and essential to our democratic society. Member States will also be deciding on their national positions over the next few months and the Estonian Presidency expects to reach a common position by the end of this year.

The neighbouring right for press publishers would help create a fairer digital eco-system whereby consumers can access and enjoy our content 24/7 on multiple platforms and where tech companies and other businesses can use and distribute our content with permission and on mutually beneficial terms. The neighbouring right is crucial: in an era of fake news, publishers need to be economically viable to perform their essential role in society, providing eye-witness accounts, unearthing the truth, calling authorities to account and able to pay for quality investigative journalism.

We welcome the adoption of amendments to the draft directive by MEPs, at committee stage, which put the press publishers more closely on a par with other neighbouring rightholders so they benefit from all the EU harmonised rights relevant to publishers for both online and print publications. Furthermore, we are delighted that important amendments have been adopted to clarify that readers can continue to share or post links and articles for non-commercial purposes.

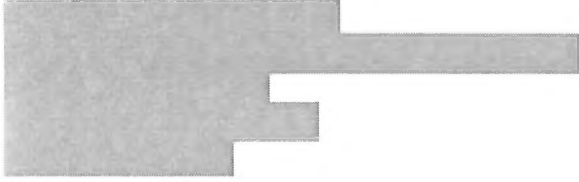
And, as for open access policies, suggestions by opponents to the reform that a publisher's right would get in the way of Open Access are ill-founded and misleading. Where a publisher agrees with the author to issue an open access publication, the neighbouring right would be licensed accordingly along the same principles.

Without a publisher's right, third parties will continue to be able routinely to exploit the lack of legal clarity, and to divert revenue-earning opportunities to their own platforms and services. Without a publisher's right, publishers' ability to innovate or negotiate terms and invest in professional journalism is severely undermined.

Please get involved in our initiative, www.empower-democracy.eu, **if you are committed to a democratic Europe with an independent and pluralistic media landscape.**

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European Publishers Council



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From: [REDACTED]
Sent: 25 July 2017 22:32
To: [REDACTED]
Subject: Fwd: Thank you for the meeting
Attachments: One pager for policy makers.pdf; ATT00001.htm; Rights-Manager-Overview_January 2017.pdf; ATT00002.htm
Follow Up Flag: Follow up
Flag Status: Flagged

Personal data

[REDACTED]
[REDACTED]
[REDACTED]
Subject: Thank you for the meeting

Dear Mr [REDACTED],

It was a pleasure to meet you and your team yesterday – I really appreciated a possibility for an open discussion (and again apologies for making you miss your next meeting!). I am following up with our position paper attached and also link to our [IP video](#).

I also wanted to send you our presentation on Rights Manager that explains the process of enrolling and usage of the tool. Please don't hesitate to contact me if you have any questions. We also would be happy to follow up with more in depth conversation when our IP team colleagues (directly involved in working with rights owners) will be visiting Brussels next time.

I look forward to seeing you again after the summer break.

Best regards,
[REDACTED]

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[REDACTED] Policy Manager
[REDACTED]

Rights Manager

Overview

What is it?

RIGHTS MANAGER

Rights Manager is a set of tools that helps you manage and protect your copyrighted content on Facebook at scale.

There are four steps to using Rights Manager:

1. Establish reference library
2. Establish match rules (actions and conditions)
3. Review matches and report potentially infringing content
4. Whitelist Pages and Profiles that have the right to use content

Apply at www.rightsmanager.fb.com

Escalate application through your Facebook PoC

1. Establish Reference Library

Use Rights Manager to establish a reference library of live and VOD video content, as well as audio files. Reference files need not be published on Facebook to be monitored.

Live: Upload live reference streams to protect live events as they're happening

- Available via API and publisher tools

Video files: Upload video files to protect video and/or related audio

- Available via API, publisher tools and video library

Reference files can be sorted by a number of criteria within the Reference Library.

2. Establish Automated Match Rules

Create match rules to specify what to do with potential matches. Match rules dictate automatic actions on content, making it easier to manage new matches.

Actions:

- *Allow*: Automatically allows detected matches to remain posted

Conditions:

- *By country*: Choose whether to match based on location
- *Content type*: Match video only, audio only, or video and audio
- *Match length*: Choose whether to match based on the duration of the match
- *Publisher type*: Choose to match based on whether content was posted by a Page or a person

Apply Match Rules Globally

In Page Settings, go to Rights Manager to establish global ownership settings for new uploads: default, or custom settings.

Upload Settings

Select custom ownership settings to apply when uploading your video posts and reference files.

Default Settings

Ownership: Video only, Worldwide, Match Rule: Show all matches, Auto-monitoring: Off.

• Custom Settings

Specify Ownership ⓘ

Video Only ▾

Worldwide

▪ By Country

Choose countries

Apply Match Rule ⓘ

Show all matches ↕

3. Manually View and Report Matches

Compare matches to reference content, and choose actions.



View and Report Matches

Add to takedown report: Adds matched content to takedown report for submission to Facebook IP Ops for processing. After adding Matches to Takedown Report, you must “Send Takedown Report” to submit.

Allow: Allow match to remain posted and visible on Facebook.

Mark as Unseen: Maintain “unseen” status of match so it is marked for later review by rights holder.

Content Doesn’t Match: Register that content was not a match and shouldn’t have been shown on the rights holder’s dashboard. Reporting mismatches helps train our system.

Remove from Dashboard: Remove match from being displayed on dashboard

Users can also export Match and Reference File data to spreadsheets. Matches can sorted by a number of criteria within the Matches tab.

Send Takedown Report

Mark matches to report for takedown
and submit to Facebook IP Ops for processing.

- Up to 150 matches per report
- Reports must be electronically signed
- Can use internal email address (ex. copyright@xyzco.com)

Send Takedown Report

You Are Reporting 1 Videos for Copyright Intingement

 5:43
993340489000002843574-6302...

Your Contact Information
Please provide your contact information below.
(Note that we require you provide your contact information, including your name and email address, the name of the organization or client who owns the rights in question, and/or the contents of your report to the person that copied the content you are reporting.)

Your Name

Player Number

Email

Company Email

You may provide an alternate email address if you do not wish to use the email address you provided in your previous reports. You may use an email address that is not the primary email address of the person who owns the rights in question, but you must provide a valid email address.

Your Organization's Contact Information

Your organization or client

Name of the rights owner

This may be your own name or the name of the organization or client you are reporting to. You must provide a valid email address.

Reporting address

Where is the rights owner based?

Declaration
By submitting this notice, you state, I truly believe a good-faith belief that the reported use described above is an action you have been harmed that is an action taken by the intellectual property rights owner, its agent, or its law, that the information contained in this notice is accurate and, under penalty of perjury, that you are authorized to act on behalf of the owner of the intellectual property rights at issue.

Do you agree? ☒ Yes ☐ No

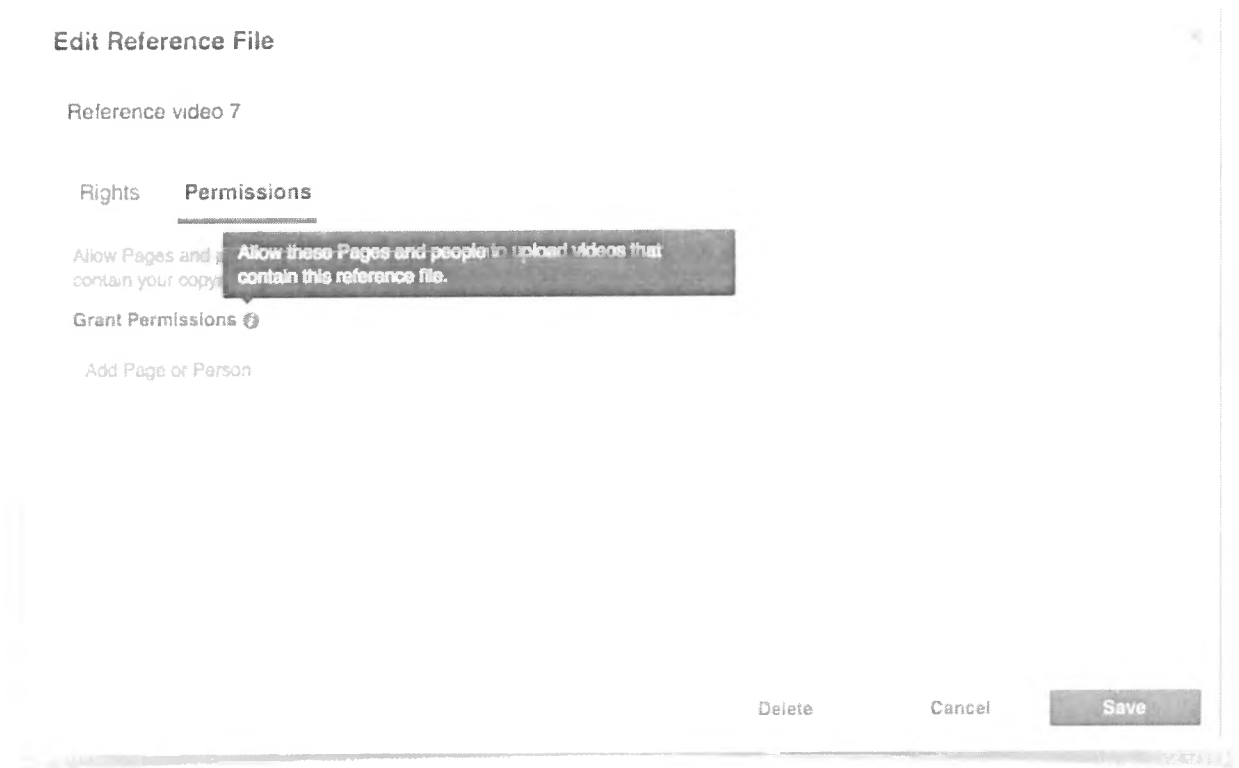
Electronic signature

Your electronic signature is required. This is your full name.

Whitelist Pages

Rights holders can choose which Pages and/or Profiles to whitelist for use of reference content.

Whitelist Pages/Profiles on the asset level.



Whitelist Pages

Whitelist Pages/Profiles for all assets

Always Allow

Always allow these Pages and people to upload videos containing your reference files.

Add Page

Enter page name

Add Person

Enter name, email or phone



Q&A

Thank you

facebook

Facebook's approach to IP

Facebook takes intellectual property rights very seriously and has developed numerous measures to help rights owners protect their content. We believe these measures are important for rights owners, users, and Facebook itself, as we want to foster an online ecosystem that encourages the sharing of lawful content. We also recognize that rights owners are key partners of ours, including by creating some of the most engaging content on our platform. These partnerships have fostered many creative solutions for rights owners and Facebook, such as our Instant Articles feature that enables publishers' articles to load for users in a faster and richer format.

Facebook's measures aimed at copyright protection begin with our Statement of Rights and Responsibilities as well as our Community Standards, which explicitly prohibit users from posting content that infringes third parties' intellectual property rights. In addition, Facebook allows rights owners to report content to Facebook through various means, including via our online reporting forms as well as by more traditional means including email, fax, and letter. Our online reporting forms can be found in our Intellectual Property Help Center (https://www.facebook.com/help/intellectual_property), which also contains detailed information relating to copyright and trademark issues.

Facebook maintains a global notice-and-takedown team that promptly removes content in response to valid reports of alleged infringement. This team provides around-the-clock coverage in a variety of languages, including English, French, Spanish, Italian, and others. In addition to removing reported content, we also disable the accounts of repeat infringers in appropriate circumstances. This includes removing users' profiles, disabling Pages and groups, and other actions as warranted. Beyond these steps, Facebook also employs numerous other teams working on issues such as spam and hacked accounts, which can also be associated with intellectual property infringement, and those teams take numerous actions to prevent violations of these types.

Facebook has implemented numerous additional measures that go well beyond the notice-and-takedown regime discussed above. Many of these features are based on direct feedback from rights owners, and this cooperation has resulted in numerous improvements and enhancements to Facebook's anti-infringement policies and practices over the years. Some of these are necessarily confidential, but one that has been widely discussed is Facebook's copyright management tool, Rights Manager. This tool, first announced in August 2015, supplements Facebook's other anti-infringement measures (including Audible Magic) and is intended for rights owners whose video content may be particularly susceptible to infringement. In its current form, the tool flags uploaded videos that match the rights owners' content and allows those rights owners to very quickly and efficiently report the videos to Facebook for removal.

Concerns with copyright proposal as drafted

1) Weakens intermediary liability protections for online services.

- The recitals in the copyright proposal suggest an expansive “active” service provider exception to the E-Commerce Directive safe harbors for online intermediaries, by

including as “active” actions that would arguably sweep in most modern service providers (recital 38: “including by optimizing the presentation of the uploaded works or subject matter or promoting them, irrespective of the nature of the means used therefor”).

- This exception to the safe harbor would potentially swallow the rule, and render the safe harbor near meaningless by greatly expanding uncertainty and litigation over the direct liability of online services.

2) Mandatory filtering and blocking.

- Language in the copyright proposal indicates that online services should be required to implement content recognition technology (in the absence of licenses). Any mandated filtering/blocking will almost certainly lead to litigation and uncertainty regarding the efficacy of such efforts. More importantly, any effort to legislate efficacy or specific requirements will likely be ineffective, as service providers need flexibility to adapt to constantly changing threats.
- As drafted, the proposal's language extends beyond audiovisual works to cover all copyrighted works, including photos and text. While mandating filtering/blocking for AV works presents all the problems above, expanding such blocking/filtering requirements to photos and text is concerning and may be technically infeasible. With respect to text, it may be legally impossible as well — e.g., how do you build a filter that will always accurately block certain words as a copyright infringement, and what are the implications on censorship and freedom of expression in Europe?
- If a content filtering/blocking directive is passed, Member States will likely disagree about how to implement that directive, increasing the possibility of counter-productive and inconsistent mandates. Combined with the weakening of the intermediary liability safe harbors noted above, these provisions would impose substantial new liability on online services operating in the EU.
- The mandatory filtering/blocking proposal is inconsistent with the existing prohibition in the E-Commerce Directive against imposing filtering requirements on online service providers (in Article 15 of the Directive).

3) New neighboring right for publishers.

- The proposal to create a new neighboring right for “publishers of press publications” in respect of “digital use[s]” raises numerous questions to be considered:
 - Does the neighboring rights proposal intend to capture hyperlinking?
 - Does the proposal intend to cover snippets?
 - If the proposal covers snippets, what constitutes a snippet? How much text, for example?
 - Would a link to a press publication posted on Facebook by a Facebook user fall within the proposal?
 - What evidence demonstrates that online platforms providing hyperlinks have harmed the publishing industry?
 - If the publishing industry has been harmed, should IP law be used to address that harm?

Additional areas of the copyright proposal requiring clarification

- Does the copyright proposal intend to re-open the E-Commerce Directive?
- If not, how can the text propose a new, expansive, “active” exception to the E-Commerce Directive (which would in practice call into question safe-harbor protection for most modern service providers), without reopening the E-Commerce Directive? And would this new active exception apply beyond copyright law?
- What is the threshold for a “large amounts of works” (for purposes of the filtering requirement)? How will that be measured?
- How is the effort to tie the filtering requirement to “large amounts of works” consistent with broader policy goals of facilitating rapid growth of European platforms?
- Are the mandatory filtering/blocking provisions meant to apply to photos? Text?
- Would the filtering/blocking obligations need to be harmonized across the 28 Member States? Across different types of copyrights?
- Should IP law be used to change contractual relationships between parties who enter those contracts freely?

Brussels, 30 November 2017

OPEN LETTER IN LIGHT OF THE COMPETITIVENESS COUNCIL ON 30 NOVEMBER 2017

Dear President Juncker,

Dear President Tajani,

Dear Prime Minister Ratas,

Dear Prime Minister Borissov,

Dear Ministers,

Dear MEP Voss,

We write to you to share our respectful but serious concerns that discussions in the Council and European Commission on the Copyright Directive are on the verge of causing irreparable damage to our fundamental rights and freedoms, our economy and competitiveness, our education and research, our innovation and competition, our creativity and our culture.

We refer you to the numerous letters and analyses sent previously from a broad spectrum of European stakeholders and experts for more details (see attached).

On behalf of the signatories,



Personal data



Copyright for Creativity

The over 80 signatories below represent human and digital rights organisations, media freedom organisations, publishers, journalists, libraries, scientific and research institutions, educational institutions including universities, creator representatives, consumers, software developers, start-ups, technology businesses and Internet service providers.



	Organisation	Country/Region
1	Access Info Europe	Europe
2	ActiveWatch	Romania
3	Allied for Startups	Europe
4	ARTICLE 19	Global
5	Asociación de Internautas	Spain
6	Asociación Española de Startups	Spain
7	Associação D3 – Defesa dos Direitos Digitais (D ³)	Portugal
8	Associação Nacional para o Software Livre (ANSOL)	Portugal
9	Association for Progressive Communications (APC)	Global
10	Association for Technology and Internet (ApTI)	Romania
11	Association of European Research Libraries (LIBER)	Europe
12	Association of Publishers of Periodical Publications (AEEPP)	Spain
13	Association of the Defence of Human Rights in Romania (APADOR-CH)	Romania
14	Association of the Internet Industry (eco)	Germany
15	Austrian Startups	Austria
16	Bits of Freedom (BoF)	Netherlands
17	BlueLink Civic Action Network	Romania
18	Brand24	Poland
19	Bulgarian Helsinki Committee	Bulgaria
20	Center for Democracy & Technology (CDT)	Global
21	Centrum Cyfrowe	Poland
22	Civil Liberties Union for Europe (Liberties)	Europe
23	Communia Association	Global
24	Computer and Communications Industry Association (CCIA)	Global
25	Copyright for Creativity (C4C)	Europe
26	Create Refresh Campaign	Europe
27	Creative Commons	Global
28	DIGITALEUROPE	Europe
29	Dutch Association of Public Libraries (VOB)	Netherlands
30	EDiMA	Europe
31	Electronic Frontier Foundation (EFF)	Global
32	epicenter.works	Austria
33	Estonian Association of Information Technology and Telecommunications (ITL)	Estonia
34	Estonian Startup Leaders Club	Estonia
35	European Bureau of Library, Information & Documentation Associations (EBLIDA)	Europe
36	European Digital Rights (EDRi)	Europe
37	European Innovative Media Publishers	Europe
38	European Internet Services Providers Association (EuroISPA)	Europe
39	European University Association (EUA)	Europe
40	Factory Berlin	Europe
41	Federation of Hellenic Information Technology & Communications Enterprises (SEPE)	Greece

	Organisation	Country/Region
42	France Digitale	France
43	Free Knowledge Advocacy Group EU (FKAGEU)	Europe
44	Free Software Foundation Europe (FSFE)	Europe
45	Frënn vun der Ënn	Luxemburg
46	German Library Association (dbv)	Germany
47	Hermes Center for Transparency and Digital Human Rights	Italy
48	Human Rights Without Frontiers (HRWF)	Global
49	Hungarian Civil Liberties Union (HCLU)	Hungary
50	Index on Censorship	Global
51	Initiative gegen ein Leistungsschutzrecht (IGEL)	Germany
52	International Federation of Library Associations and Institutions (IFLA)	Global
53	ISPA Austria	Austria
54	Italian Coalition for Civil Liberties and Rights (CILD)	Italy
55	Italian Internet Service Providers Association (AIIP)	Italy
56	Justice & Peace	Netherlands
57	Kennisland	Netherlands
58	l'Association des Services Internet Communautaires (ASIC)	France
59	League of European Research Universities (LERU)	Europe
60	Libraries and Archives Copyright Alliance (LACA)	UK
61	Media Development Center	Bulgaria
62	Mind the Bridge	Global
63	Modern Poland Foundation	Poland
64	National Online Printing Association (ANSO)	Italy
65	Netherlands Helsinki Committee (NHC)	Netherlands
66	Open Knowledge International (OKI)	Global
67	Open Rights Group (ORG)	UK
68	OpenMedia	Global
69	Platform for the Defence of Free Expression (PDLI)	Spain
70	Portuguese Association for Free Education (AEL)	Portugal
71	Public Libraries 2020	Europe
72	Robotex	Estonia
73	Roma Startup	Italy
74	SA&S – Partnership for Copyright & Society	Belgium
75	Science Europe	Europe
76	SentiOne	Poland
77	Silicon Allee	Germany
78	SPARC Europe	Europe
79	Startup Poland	Poland
80	Ubermetrics	Germany
81	Wikimedia Deutschland	Germany
82	Xnet	Spain
83	ZIPSEE	Poland

ANNEX

30 November, 2017 – Statement from Science Europe, LIBER, EARE, EUA and SPARC Europe on myths and misunderstandings about text and data mining (TDM) in the copyright reform. This statement stresses that permitting TDM by all parties will provide a significant boost to the European economy.

21 November, 2017 – Open letter from 17 Polish NGOs addressed to the Polish authorities (including the Ministry of Culture and Ministry of Digital Affairs) on the filtering obligation in the copyright reform proposal, urging the Polish government to oppose the idea of censoring the Internet.

15 November, 2017 – Statement from ALLEA (All European Academies) on the text and data mining exception, urging the European Institutions to elaborate a more balanced exception for TDM taking the needs of science and research in Europe better into account.

9 November, 2017 – Open letter from French trade associations questioning if France is pushing for the ban on hosting websites in Europe. The letter warns that Article 13 would make hosting services de facto the sole judges, ex ante, of what can or cannot be accessible on the Internet. Therefore, the signatories call upon France to defend the liability regime of hosting service providers, as they point out that this is compatible with implementing effective copyright protection.

27 October, 2017 – Open letter from CCIA, DIGITALEUROPE, EDiMA and EuroISPA on the importance of discussions on the so-called right of communication to the public (CTP) and the eCommerce Directive 2000/31/EC (eCD), in the context of Article 13 and Recital 38. The letter stresses that any clarifications made for the purposes of the proposed Directive on Copyright in the Digital Single Market must not change nor supersede the e-Commerce Directive.

20 October, 2017 – Recommendation co-signed by over 50 respected academics on measures to safeguard fundamental rights and the open Internet in the framework of the EU copyright reform, which points out that: "Article 13 (...) is disproportionate and irreconcilable with the fundamental rights guarantees in the Charter [of Fundamental Rights of the EU]" (p. 14) and "contains imbalanced, undefined legal concepts that make it incompatible with the existing *acquis*" (p. 23).

16 October, 2017 – Open letter from over 50 NGOs representing human rights and media freedom asking the EU legislators to delete Article 13. It is especially striking that organisations such as Reporters without Borders and Human Rights Watch, which are known to intervene for the protection of human rights in less democratic countries, have been moved to the point where they felt the need to voice their concerns in this matter to ensure that EU citizens are safeguarded from the EU's copyright agenda crushing their fundamental rights.

16 October, 2017 – Opinion of the CEIPI on the European Commission's proposal to reform copyright limitations and exceptions in the European Union. The opinion considers that this reform should be an opportunity to reflect on the future design of an "opening clause" to address uses that are not yet covered by existing exceptions and limitations but are justified by important public interest rationales and fundamental rights such as freedom of expression and the right to information. The authors also urge the EU legislators to promote first the interests of European authors, researchers, teachers, students and users broadly, and pave the way for Europe's future generations of innovators and artists.

29 September, 2017 – **Open letter** launched by the Free Software Foundation Europe and OpenForum Europe to secure the free and open source software ecosystem in the EU copyright review, warning that filtering algorithms will ultimately decide what material software developers should be allowed to share.

26 September, 2017 – **Open letter** from the European research and innovation community to the Members of the Legal Affairs (JURI) Committee of the European Parliament calling to secure Europe's leadership in the data economy by revising the Text and Data Mining (TDM) exception. The letter asks to revise the exception for TDM to recognize that it applies to any person that has legal access to content, including content that is publicly available on the Internet, and for any purpose.

25 September, 2017 – **Open letter** from the coalition of innovative media publishers to Members of the European Parliament and the Council of the European Union on the introduction of a new neighbouring right under Article 11 of the Copyright Directive. The letter stresses that Article 11 will have serious negative effects on the quality of the press, freedom of opinion and freedom of expression of EU citizens.

15 September, 2017 – **Study** for the European Parliament's Legal Affairs (JURI) Committee on strengthening the position of press publishers and authors and performers in the copyright Directive authored by Professor Lionel Bently, Professor Martin Kretschmer, Tobias Dudenbostel, María del Carmen Calatrava Moreno, and Alfred Radauer. The study suggest on Article 11 to for JURI to adopt the recommendations contained in the Draft JURI Report of March 10, 2017. On the EC's proposals around fair remuneration in contracts of authors and performs, the study criticizes the EC's lack of ambition.

13 September, 2017 – **Open letter** by trade associations and stakeholder organisations representing consumers, digital rights groups and technology businesses requesting clarity on article 13. The letter warns that the provision is far-reaching and incompatible with EU law, creates legal uncertainty and confusion, and dismantles the 'safe harbour' of article 14 of the eCommerce Directive.

8 September, 2017 – **Contributions** by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market. This contribution concludes that it is inadvisable to adopt Article 13 of the proposed Directive and its respective Recitals, 38 and 39. *[Compilation of all the position statement of the Max Planck Institute for Innovation and Competition on the modernisation of the EU copyright rules.]*

6 September, 2017 – **Open letter** from a group of representatives of European academic, library, education, research and digital rights communities to the Members of the Legal Affairs (JURI) Committee of the European Parliament on how the EU copyright reform threatens Open Access and Open Science. The letter urges for the removal of proposals that would restrict access to research and place administrative and legal burdens on institutional repositories. We also request improvements on proposals related to text and data mining, copyright in an education setting, and preservation and access to works for non-commercial endeavours.

10 July, 2017 – **Letter** to Members of the European Parliament by Polish digital rights organisations to express their concern with the concepts of the new rights for publishers and of general monitoring obligation for user-generated content that are included in the proposal of the Directive on Copyright in the Digital Single Market.

21 June, 2017 - Petition from RightCopyright.eu, signed by over 4500 educators from across Europe for a **better copyright for education**. The petition includes five demands that need to be implemented into the new directive for copyright in the Digital Single Market, because unfortunately, copyright laws haven't changed for over fifteen years, and this is affecting educators every day.

29 May, 2017 – Open letter from over 60 civil society and trade associations – representing publishers, journalists, libraries, scientific and research institutions, consumers, digital rights groups, start-ups, technology businesses, educational institutions and creator representatives – **asking European lawmakers to oppose the most damaging aspects of the proposal, but also to embrace a more ambitious agenda for positive reform**, highlighting three key messages:

- Article 13 ('censorship filter'): Do not impose private censorship on EU citizens by filtering user uploaded content.
- Article 11 (press publishers' right): Do not create new copyrights.
- Articles 3-9: Put Europe on the map by enabling innovation, research and education.

5 April, 2017 – Letter from over 20 startups and online services to Members of the European Parliament **to raise their serious concerns regarding proposed Article 13**. The letter warns that Article 13 of the Commission's text could cripple the growth of online innovation for startups that already exist, while also preventing new, innovative startups from entering the marketplace.

March, 2017 – Open letter from human and consumer rights calling to stop the censorship machine. The letter warns that impact of the proposed measures to weaken the current intermediary liability protections in European law will inevitably be felt in every policy area and will impact negatively on free speech and democracy around the globe.

28 February, 2017 – Common position statement from publishers expressing their concerns on Article 11. The statement cautions that purporting to fund high quality journalism and further the interests of press publications, through a levy on those making 'digital use' of their content, risks benefiting some publications at the expense of others, creating perverse incentives, and putting all EU-based publications at a competitive disadvantage.

24 February, 2017 – Open letter from independent legal, economic and social scientists that represent the leading European centres researching intellectual property and innovation law to Members of the European Parliament and the European Council setting out the key flaws of the Article 11 and Article 13 proposals. The letter remarks that with respect to both provisions, independent empirical evidence has been ignored, consultations have been summarised in a misleading manner, and legitimate criticism has been labelled as anti-copyright.

23 February, 2017 – Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law. The opinion remarks that as the "pie" does not get any bigger, the authors' share will inevitably decrease. It also notes that recent empirical evidence confirmed a negative impact on small publishers, while news aggregators might have a positive effect on online news sites.

7 February, 2017 - Joint letter from **34 educational organisations and 17 individuals to the Members of the European Parliament to raise their concerns around the proposed education exception (Article 4)**. The signatories note several unfortunate gaps in the proposed exception, and consider that without addressing these we will not have a copyright fit for modern, quality, and inclusive education. The letter stresses that this is a once in a generation opportunity to reform copyright for education in a meaningful way.

10 January, 2017 – Statement from **European research organisations on future-proofing European research excellence asking for the copyright reform to provide legal certainty around cross-border research activities and the deployment of new technologies for research and innovation**. The statement considers that in its current form, the proposal could be viewed as backward looking and is not compatible with the vision of the Digital Single Market.

January, 2017 – Study from **Dr Christina Angelopoulos, Centre for Intellectual Property and Information Law (CIPIL) at the University of Cambridge, on online platforms and the Commission’s new proposal for a Directive on copyright in the Digital Single Market**. This study concludes that the proposal’s current wording is incompatible with existing EU directives, as well as with the Charter of Fundamental Rights of the EU, as interpreted by the CJEU, and recommends that the relevant provisions should accordingly be deleted or significantly amended.

20 December, 2016 – Research paper of the **Faculty of Law, Goethe University Frankfurt am Main, by Professor Alexander Peukert, providing a legal analysis of an EU related right for press publishers concerning digital uses**. In this study, Professor Peukert analysed three possible versions of an EU related right for press publications, and came to the conclusion that “all these versions are either incompatible with fundamental rights or, alternatively, ineffective for failing to cover the current, news-related practice of online service providers and Internet users”. He concludes that a directive establishing a related right for press publications would be invalid.

30 September, 2016 – Open letter from **40 academics expressing their concerns about Article 13**. The letter points out that Article 13 imposes a general monitoring obligation upon a great number of providers of intermediary services. Such an obligation is not a special monitoring obligation but a general monitoring obligation as it does require the monitoring of the activities of *all* users. [Follow-up [analysis](#)]

26 September, 2016 – Statement from **Science Europe on the fact that the EU copyright reform recognises roles of research but fails to realise its full potential**. The statement warns that without a broader definition of the entities that can benefit from the TDM exception this copyright proposal severely undermines the competitiveness and attractiveness of Europe in terms of innovation and places significant barriers to knowledge transfer between sectors.

The European Federation of Journalists
155 rue de la loi
1040 Brussels

7 April 2017,

Subject: Amendments to the proposal of the EU copyright directive and the draft report for the JURI committee

The European Federation of Journalists (EFJ) and the International Federation of Journalists (IFJ) want to amend on the following three items in the EU copyright directive and the draft report for the JURI committee:

1. Article 4 concerning "Illustration for Teaching Exception", Article 5 concerning "Exception for Preservation Purposes", Article 7 concerning "Out of Commerce Work" and article 16a and 18 concerning "Framing".

Out of
scope

2. Article 11 on Publishers rights

Please find attached the amendments by the EFJ and the IFJ. For the journalists it is a prerequisite for these rights, that authors should be equally remunerated and that the rights are exercised by collective management societies with both publishers and authors on board.

3. Article 14-16 regarding contracts and transparency

Out of scope

Kind regards,

EFJ president

Personal data

Recital (33)

[REDACTED]

Justification:

[REDACTED]

Recital (34)

[REDACTED]

Justification : collective management is an equitable solution to ensure that the remuneration deriving from the exercise of the publishers' right is equally shared between authors and publishers.

Recital (35)

[REDACTED]

Justification : contractual arrangements concluded between publishers of press publications on the one side, and authors and other right holders, on the other, very often leave authors in a weak position. The directive must set the basis for fair and reasonable terms of negotiations to ensure a fair remuneration of the authors and other right holders.

Article 11 a

Protection of press publications concerning digital uses

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Justification: [Redacted text block]

[Redacted text block]

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Justification: in order to ensure that publishers and authors's interests, including remuneration, are being protected, the publishers' right should be managed by a collecting society that represents both entities equally.

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Article 12
Claims to fair compensation

Out of
scope

1. [Redacted text block]

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Personal data

Commissioner Marya Gabriel
 DG Connect
 European Commission
 Rue de la Loi / Wetstraat 200
 1049 Brussels
 Belgium

Re: Meeting with European Federation of Journalists

20 October 2017

Dear Commissioner Gabriel,

On behalf of the European Federation of Journalists (EFJ), representing over 300.000 journalists across Europe, I am writing to you to seek a meeting to address several issues that are of core importance for press freedom, namely authors' rights protection, quality of information and the fight against hate speech.

The European Federation of Journalists (EFJ) is the largest organisation of journalists in Europe, representing over 320,000 journalists in 71 journalists' organisations across 43 countries.

We fight for social and professional rights of journalists working in all sectors of the media across Europe through strong trade unions and associations. We promote and defends the rights to freedom of expression and information as guaranteed by Article 10 of the European convention on human rights.

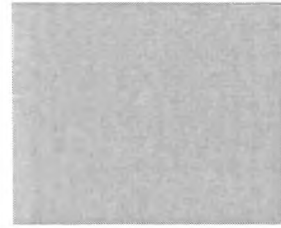
Our organisation has been active in defending the protection of journalists' authors' rights through strong collective agreements and has extensively denounced unfair contracts whereby ours colleagues are forced to sign away all their authors' rights.

These practices are rampant in our industry across the EU and this is why we have welcomed a first step taken by this Commission to introduce a reporting mechanism on the exploitation of authors' works in the latest Proposal for a Directive on copyright in the digital single market (article 14 to 16).

This directive also introduces a new right for press publishers for the digital use of press publications. While we do support the need to fight against the free aggregation of our works without our authorisation, nor payment of any remuneration, we have adopted a clear position on this new right. The need for this right to be collectively management by duly representatives collecting societies of both journalists and publishers seem to us to be the unique solution that would contribute to protect journalists' interests, as authors and ensure a fair distribution of any revenue stemming out of the exploitation of this right.



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The EFJ has also been involved in extensive discussions over the issue of so-called fake news. We are aware of the plan of the Commission to set up of an EU expert group on this issue. As one of the key stakeholders representing journalists, we are keen to participate in such a group to ensure that quality of information and ethical journalism prevail.

We are wary of recent legislative development in some EU member states regarding the issue of fake news and hate speech in the online sphere and the impact on the fundamental right to freedom of expression.

We would like to take this opportunity to request a meeting with you to discuss further on these various topics.

Sincerely yours,



EFJ President

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IFRRO AMENDMENTS TO THE

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on copyright in the Digital Single Market
COM/2016/0593 final - 2016/0280 (COD)

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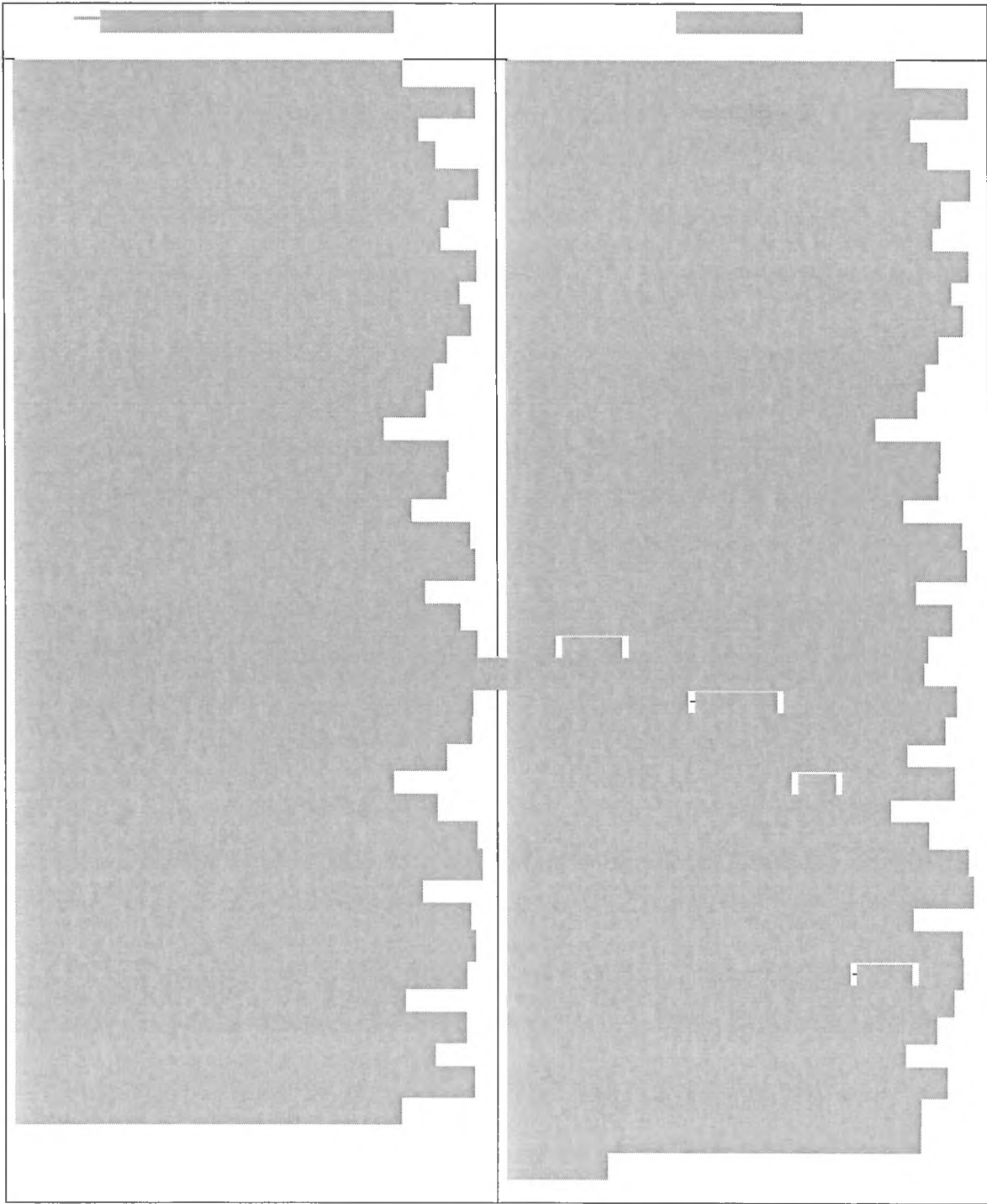
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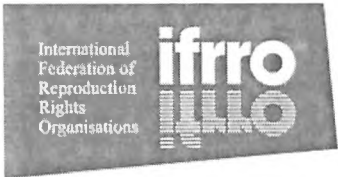
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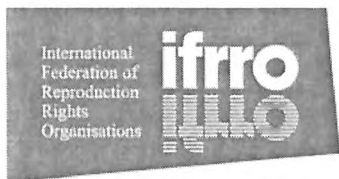
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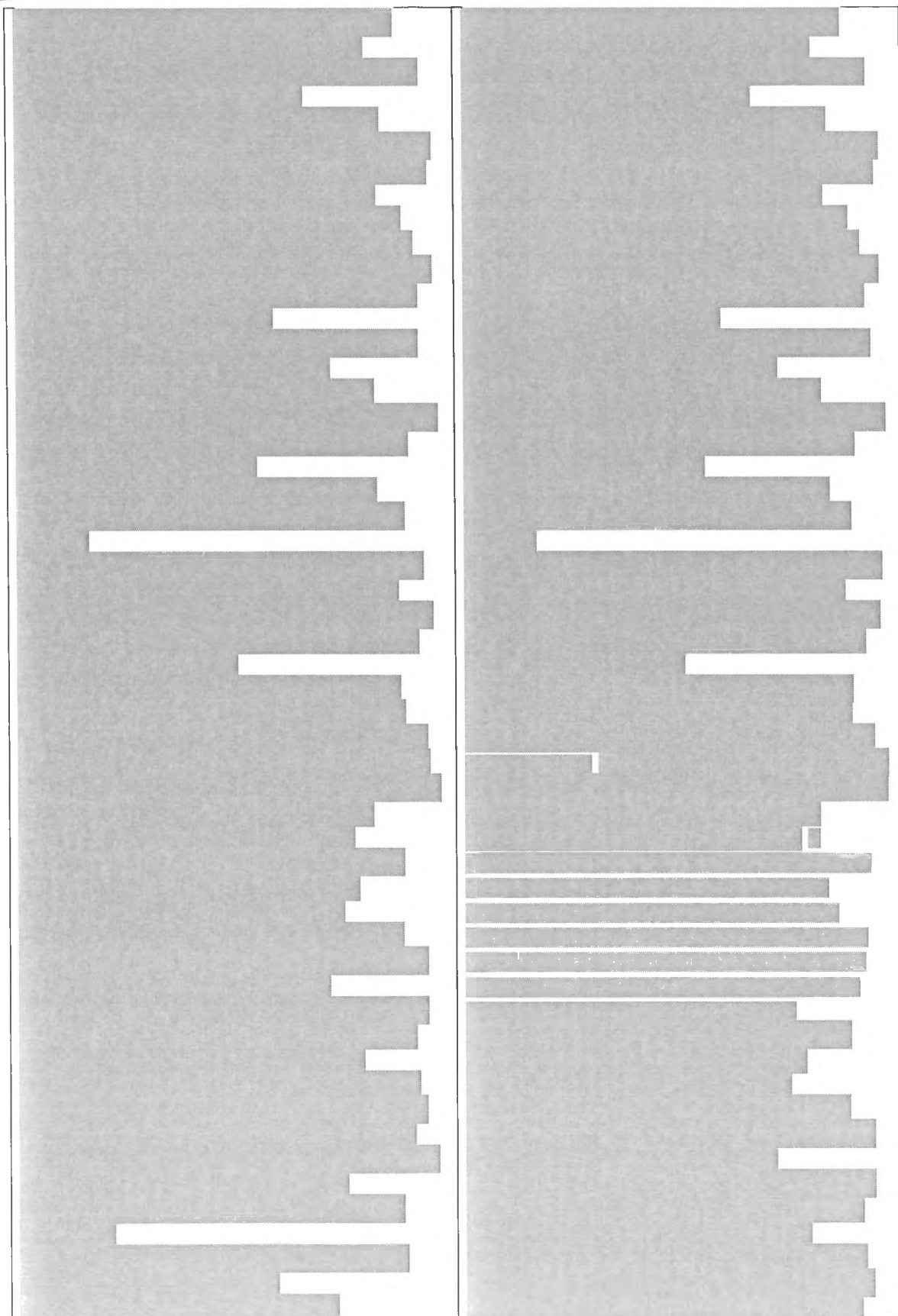
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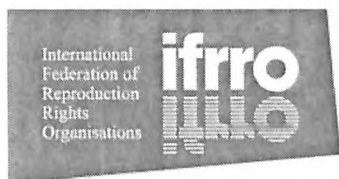
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From: [REDACTED]
Sent: 05 October 2017 12:36
Subject: Slides presentazione ricerca "Il copyright europeo nella transizione al digitale: modelli a confronto"
Attachments: Copyright digitale europeo_EYU_Scarano.pdf
Follow Up Flag: Follow up
Flag Status: Flagged

Gentilissimo, Gentilissima,

Sperando di fare cosa gradita, inviamo in allegato la presentazione delle slides relative al rapporto di ricerca elaborato dal [REDACTED] e presentato martedì 26 settembre, presso la sede del Parlamento europeo, in occasione del seminario "*Il copyright europeo nella transizione al digitale: modelli a confronto*", promosso dalla Fondazione EYU e dalla delegazione italiana del Gruppo S&D.

Cordiali saluti

[REDACTED]

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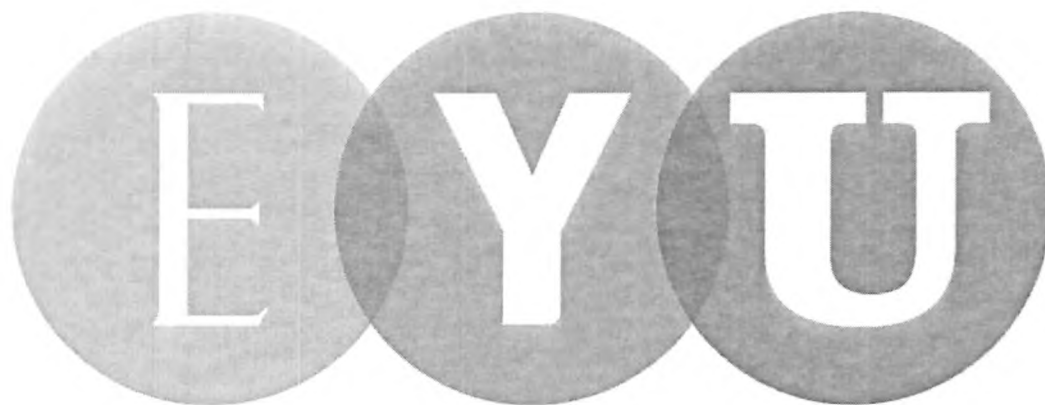
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Fondazione EYU
[REDACTED]

Via Sant'Andrea delle Fratte, 16
00187 Roma

www.fondazioneeyu.it

F O N D A Z I O N E



Il copyright europeo nella transizione al digitale: modelli a confronto

Personal data

Università degli Studi di Milano

@unimi.it

Obiettivo dell'analisi

- Confrontare i diversi modelli di relazioni tra editori e attori digitali per quanto riguarda la regolazione del diritto d'autore online

- Comparazione tra esperienze emerse finora negli Stati membri dell'UE:

Spagna e Germania vs. Italia → approcci opposti in materia

- Focus primario sulla proposta di direttiva della Commissione Europea del settembre 2016

- art. 11: introduzione dell'*ancillary copyright* per gli editori

- art. 13: introduzione di un controllo preventivo sui contenuti condivisi sulle piattaforme *advertising-funded*

Struttura del lavoro

I. L'editoria di fronte alla sfida del digitale

- il rapporto tra editori , aggregatori di notizie e consumatori
 - il cambiamento dei modelli tradizionali di business per l'editoria
 - il ruolo degli aggregatori di notizie nei nuovi processi informativi

II. I principali casi nazionali a confronto

- modello regolatorio vs. modello negoziale
 - vantaggi e svantaggi di ciascuno
 - possibili evoluzioni internazionali

I. L'EDITORIA DI FRONTE ALLA SFIDA DEL DIGITALE

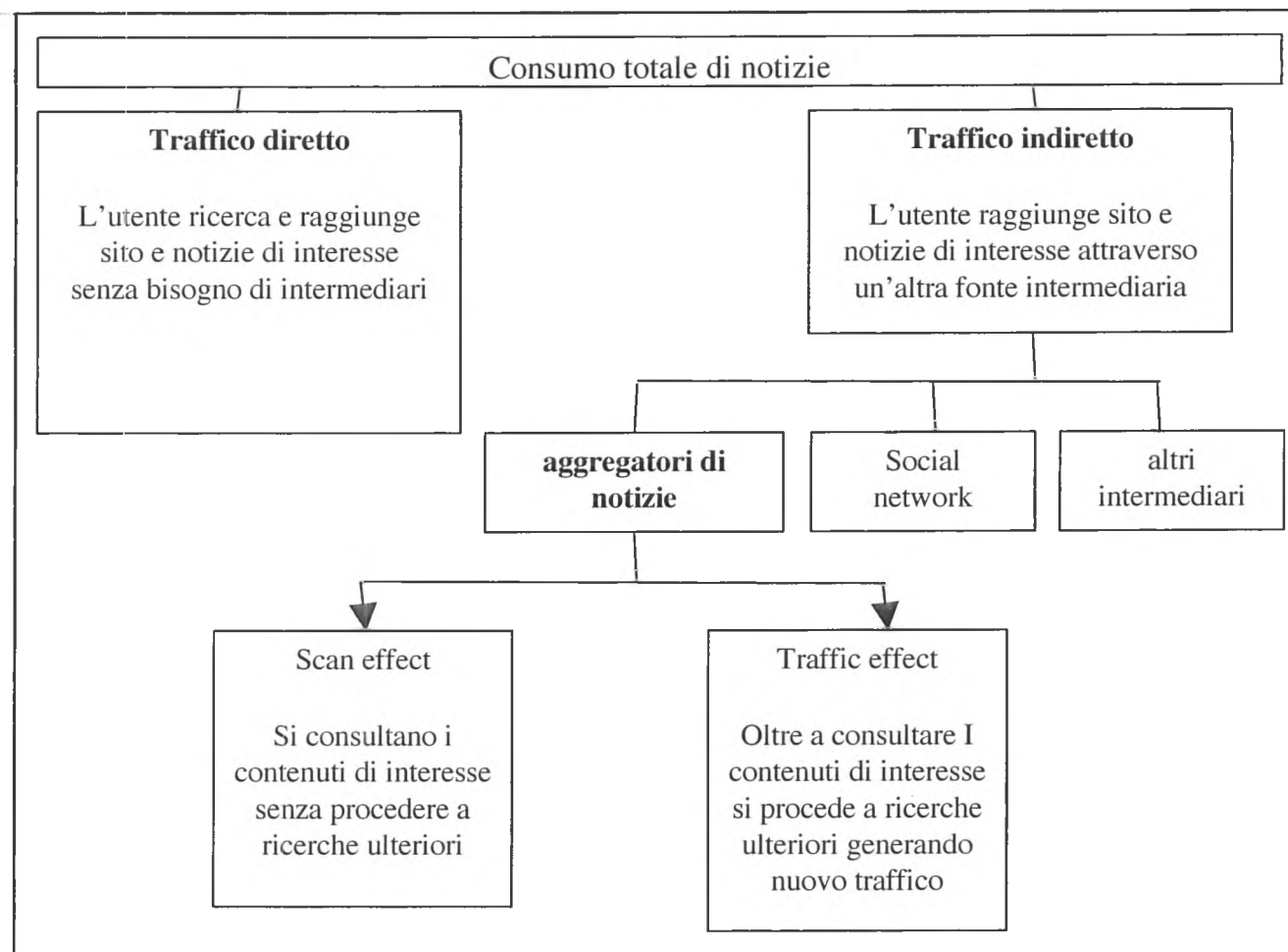
L'ambiente digitale

- Cambiamento dei tradizionali modelli di business
- Minimizzazione dei costi di produzione editoriale → nuove opportunità di guadagno
- Incremento del pluralismo delle fonti di informazione → ingresso di nuove realtà editoriali
- Nuovi modelli di consumo → incremento dell'uso di dispositivi mobili
- Comparsa di nuovi attori intermediari → piattaforme social e aggregatori di notizie

Gli attori del sistema

- Editori: “Produttori” dell’informazione
- Consumatori: destinatari dell’informazione
- **Aggregatori di notizie:** nuovi attori che si inseriscono nel processo editoriale online
 - siti Internet che raccolgono sul web informazioni da più fonti e le pubblica in uno spazio circoscritto (una o più pagine)
 - necessità di verificare il rapporto tra i servizi di aggregazione e la disciplina sul diritto d’autore, con particolare riferimento alla riproduzione e alla messa a disposizione del pubblico dell’opera protetta.

Il ruolo degli aggregatori di notizie



Opportunità o minaccia?

- Timore degli editori:

- diritto d'autore → i contenuti vengono utilizzati impropriamente dagli aggregatori
- effetto sostituzione → il consumo degli estratti utilizzati dagli aggregatori di notizie potrebbe sostituirsi alla lettura completa degli articoli nelle loro fonti originarie

- Sostenitori dei servizi di aggregazione:

- Aumentano il traffico verso gli editori con più opportunità di monetizzazione online
- Il consumatore viene reindirizzato verso la fonte originaria senza bypassare l'editore

II. I principali casi nazionali a confronto

Modello regolatorio

- Legislazione che attribuisce agli editori diritto esclusivo per quello che concerne utilizzo dei loro contenuti in rete (ancillary copyright)
 - collegare il rilascio delle licenze al pagamento di un “equo compenso” da ricevere automaticamente ogniqualvolta un altro soggetto provveda ad effettuare una ripubblicazione dei suoi contenuti.
- esercizio obbligatorio: modello regolatorio di tipo rigido (Spagna)
- esercizio facoltativo: modello regolatorio di tipo flessibile (Germania)

Germania

- 2013: “Legge sul diritto d’autore” (*Urheberrechtsgesetz*)
- Solo per finalità di tipo commerciale (non si applica a blogger, associazioni, studi legali o utenti privati e non retribuiti)
- L’editore vi può rinunciare dal momento che la richiesta di compenso per l’utilizzo dei contenuti protetti è lasciata alla sua discrezionalità
- una soluzione di tipo “opt-in”: molte sigle importanti si sono astenute dall’esercitare i propri diritti (Der Spiegel)
- Un secondo gruppo di editori si è riunito in VG Media per far valere l’ancillary copyright contro la de-indicizzazione dei contenuti da parte di Google
- Authority antitrust riconosce legittimità della pratica di Google nonché interesse pubblico per il servizio di aggregazione offerto (settembre 2015)

Spagna

- 2014: “Legge sulla proprietà intellettuale” (*Ley de propiedad intelectual*)
- “irrinunciabilità” a beneficiare di equo compenso, indipendentemente dal fatto che questi desideri o meno applicarlo
- Ogni editore viene obbligato a fissare e ricevere un compenso ogniqualvolta un altro soggetto provveda ad effettuare una ripubblicazione dei suoi contenuti
- Impatto negativo soprattutto sulle piccole realtà
- Nonostante le polemiche per il ritiro del provvedimento (*Coalicion ProInternet* ed *El Pais*, su tutte) si è arrivati alla chiusura di Google News poco prima dell’entrata in vigore della legge

L'evoluzione europea: la Direttiva della Commissione

- Proposta che si pone sulla scia di iniziative legislative intraprese da Spagna e Germania
- Art. 11: estensione dell'ancillary copyright su scala europea

	Favorevoli	Contrari
Motivazioni di carattere economico	garantire agli editori un ritorno per i loro investimenti	la concessione di diritti a sempre più attori finisce per ridurre il valore economico di ciascuno di questi, laddove sono posti a esercitare la medesima funzione
Motivazioni di carattere organizzativo-istituzionale	Maggiore semplificazione delle legislazioni sul copyright digitale presenti negli stati membri	Livello addizionale e poco sostitutivo rispetto alle legislazioni nazionali esistenti con il rischio di applicazione differenziata e incertezza normativa
Motivazioni di carattere politico	Tutelare la parte editoriale	rischio di contrazione delle fonti di informazione a scapito dell'utenza

Art. 13

- norma che riguarda le piattaforme che si finanziano con la pubblicità (*advertising-funded*) e contengono principalmente contenuti generati dagli utenti
- Il Considerando 38 della proposta sancisce la necessità per i provider di ottenere un'apposita licenza da parte titolari di diritti laddove i provider forniscono accesso al pubblico su opere tutelate caricate dagli utenti
- Un meccanismo di risarcimento viene applicato ogni qual volta questo diritto viene lesa con automatica responsabilità del provider
- Obbligo di predisporre tecnologie per individuare automaticamente opere audiovisive che i titolari dei diritti hanno identificato e la cui autorizzazione o eliminazione è stata concordata con le piattaforme
- Critiche :
 - la norma si porrebbe in contrasto con la giurisprudenza della CGE
 - dubbio sulla compatibilità con i diritti fondamentali dell'UE (eccezione sollevata da Stati Membri)

Vantaggi e svantaggi del modello regolatorio

- Vantaggi:

- L'*ancillary copyright* viene concepito, tra i sostenitori di questo modello, come un diritto fondamentale nell'epoca digitale, una vera e propria strategia atta a fronteggiare le trasformazioni dell'ambiente digitale.
- convinzione che si tratti di una esigenza di tutela economica degli editori, che si pone proprio a garanzia della diversità dei prodotti e della concorrenza nel settore

- Svantaggi:

- ostacolo all'ingresso di nuovi operatori dell'informazione all'interno del sistema editoriale in rete → beneficio solo per i brand maggiori
- Innalzamento costi di transazione: incertezza legale sull'applicazione della norma sia in termini di calcolo del compenso dovuto sia in termini di perimetro di applicazione
- Riduzione del pluralismo delle fonti di informazione in rete Pericolo di contrazione dello spazio pubblico online

Il modello negoziale

- approcci che non prevedono una regolazione imposta per legge ma sollecitano partnership formate dagli attori direttamente coinvolti nel sistema affinché vengano elaborate soluzioni atte a favorire un rafforzamento del sistema editoriale e del giornalismo.
- Possibile alternativa all'*ancillary copyright* come modalità di gestione e regolazione della transizione degli editori nell'ambiente digitale

Italia

- 2016: l'accordo siglato tra la Federazione Italiana Editori Giornale (FIEG) e Google
- Investimento di 12mln da parte di Google su 4 aree strategiche:
 - **distribuzione mobile e video:** possibilità di valorizzare i contenuti editoriali con l'utilizzo, attraverso il meccanismo del *revenue sharing*, della soluzione di distribuzione mobile "Google Play Newsstand" + sviluppo di una nuova strategia di condivisione dei contenuti video attraverso la piattaforma YouTube;
 - **tutela del diritto d'autore:** maggiore collaborazione e azioni congiunte con il motore di ricerca per la protezione dei contenuti in rete;
 - **formazione:** creazione di un "Digital Lab" per trasferire know-how sulle possibilità offerte dall'ambiente digitale in trasformazione;
 - **strumenti di web *analytics*:** opportunità per gli editori di avere accesso alle informazioni ricavate tramite

Esempi di partnership su scala europea

• evoluzioni internazionali che riguardano il rapporto tra attori del digitale ed editori, con l'obiettivo di rendere più efficace la transizione al digitale di questi ultimi

- Facebook Instant Articles
- Google Digital News Initiatives
 - Accelerated Mobile Pages Project (AMP)
 - YouTube Player for Publishers
 - Project Shield

Vantaggi e svantaggi del modello negoziale

- Vantaggi:

- Investimenti destinati a fondi per l'innovazione digitale;
- Condivisione delle tecnologie;
- Maggiore sfruttamento delle piattaforme social e di comunicazione;
- Promozione di iniziative e progetti destinati a cultura, formazione, sviluppo e trasferimento di know-how;
- Accesso alle informazioni e alle caratteristiche dei flussi di utenza

- Svantaggi:

- Efficacia è limitata alle parti stipulanti
- Possibile eterogeneità nella qualità degli accordi raggiunti in base alle differenze di condizioni tra stato membro a stato membro

Envoyé de mon iPhone

Début du message transféré :

Personal data

Expéditeur: "REDA Julia" [redacted] >

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Objet: Thank you for your keynote at "Better regulation for copyright"

Dear Mariya,

thank you once again for giving the keynote at our event "Better regulation for copyright". The event was a great success and will hopefully have set the tone for this debate for the coming months. Without your active support, it would not have been possible to provide this forum for dialogue between academics and policy-makers.

Please find attached the collected submissions by the academics in pdf format, which is also available for download from the event web page, where you can also find a recording of your keynote speech, followed by the remainder of the conference <https://juliareda.eu/events/better-regulation-for-copyright/>

All the best,
Julia

--

Julia Reda
Member of the European Parliament
Vice-Chair Greens/EFA Group
Pirate Party
ASP 5F158, Rue Wiertz 60, 1047 Brussels, Belgium

Personal data

BETTER REGULATION



FOR COPYRIGHT



ACADEMICS **MEET** POLICY MAKERS

KEYNOTE by Commissioner Mariya Gabriel

PANEL DEBATES: • Neighbouring right for publishers
• Platform Liability • Copyright on data

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Contents

Neighbouring Right for Publishers

<u>The proposed press publishers' right: an actual solution?</u>	<u>5</u>
<u>The proposed publishers' right in press publications: an evidential mistake</u>	<u>11</u>
<u>The Press Publishers' Right in a Nutshell</u>	<u>17</u>

Platform Liability

<u>Filtering obligations and fundamental rights: can the EU eat the cake and have it too?</u>	<u>23</u>
<u>Addressing the value gap on user-generated content platforms from the perspective of weaker copyright holders</u>	<u>31</u>
<u>Form and Substance in the Value Gap Proposal</u>	<u>39</u>

Copyright on Data

<u>Data producer's right: Powers, Perils and Pitfalls</u>	<u>51</u>
<u>Text & Data mining Issues</u>	<u>59</u>
<u>Data Property: Unwelcome Guest in the House of IP</u>	<u>65</u>

Neighbouring Right for Publishers

The proposed press publishers' right: an actual solution?

Eleonora Rosati*

Abstract

Article 11 of the draft Directive on copyright in the Digital Single Market contains a provision that, if adopted in the form proposed by the European Commission, would introduce a new neighbouring right at the EU level in favour of press publishers for the digital use of their press publications.

The proposal has attracted significant commentary. This brief note discusses whether – from a copyright perspective – the idea of an EU-wide press publishers' right: is supported by an internal market rationale which justifies an intervention at the EU level; will grant press publishers broader and more certain protection than the one already enjoyed under the EU copyright acquis; will improve press publishers' 'bargaining position' as per the Commission's stated intention.

Overall, the answer appears to be in the negative. This contribution holds the view that – at best – a press publishers' right will not change the situation of its beneficiaries and – at worst – will increase the complexity of the legal system and distract the attention from other options that could be potentially more effective in supporting the European press publishing sector.

The content of the proposal

Under the umbrella of its Digital Single Market Strategy¹ and among a number of other legislative proposals, in the final part of 2016 the European Commission released a proposal for a new directive on copyright in the Digital Single Market² ('DSM Directive').

With the declared goal of helping press publishers "increase their legal certainty, strengthen their bargaining position and have a positive impact on their ability to license content and enforce the rights on their press publications"³, the draft DSM Directive contains a provision which, if adopted in the form proposed by the Commission, would introduce a new neighbouring right over press publications for their digital use. The rationale of the proposal stems from awareness of the difficulties facing press publishers when seeking to license their publications and prevent unauthorized uses by online services.⁴

Entitled 'Protection of press publications concerning digital uses', Article 11 of the draft DSM Directive would mandate upon Member States to provide publishers of press publications with the rights of reproduction and making available to the public, as envisaged by Directive 2001/29⁵ (the 'InfoSoc Directive'), for the digital use of their press publications. Such rights would leave intact and in no way affect – including by means of deprivation – any rights of authors and other

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1 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final.

2 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593.

3 European Commission, Commission staff working document – Executive summary of the Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, SWD(2016) 302 final, 3.

4 European Commission, Commission staff working document – Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, SWD(2016) 301 final, 155.

5 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ, L 167, 10-19.

rightholders, in respect of the works and other subject-matter incorporated in a press publication. The duration of this new neighbouring right would expire 20 years after the publication of the press publication.⁶

Criticisms of the proposal

The Commission's proposal for a press publisher's right has been subject to extensive commentary and possibly even more extensive criticism, notably within academic circles.

Having already expressed critical views⁷ regarding the introduction of a press publishers' right at the EU level further to some national experiences – notably Germany (sections 87f, 87g and 87h of the Urheberrechtsgesetz, ie the German Copyright Act)) and Spain (Art. 32 of the Ley de Propiedad Intelectual, ie the Spanish Intellectual Property Law)⁸ – at the time (2016) of the Commission's Consultation on the role of publishers in the copyright value chain⁹, in early 2017 the European Copyright Society (ECS) referred once again to the proposal for a neighbouring right in favour of press publishers in negative terms. Overall sceptical regarding the actual achievement of its underlying goal (this being to support a struggling newspaper industry), the ECS also stated that an exclusive right to control the exploitation of press contents online would “not only negatively affect freedom of expression and information, but also distort competition in the emerging European information market.”¹⁰ The latter would be because of higher barriers of entry to the online news market that would make it more difficult for emerging businesses to access it.

The position of the ECS echoes similar views expressed in late 2016 by a group of 37 intellectual property professors based in the UK, and the Opinion the Centre for International Intellectual Property Studies (CEIPI) at the University of Strasbourg.

In a letter sent to the Copyright Policy Directorate of the UK Intellectual Property Office, a group of 37 professors from a number of UK universities considered that the Commission's proposal for a press publishers' right would be “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.”¹¹

⁶ The full text of Article 11 is as follows:

Article 11 Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such 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.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

⁷ European Copyright Society, Answer to the EC Consultation on the role of publishers in the copyright value chain, 15 June 2016, available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2016/06/ecs-answer-to-ec-consultation-publishers-role-june16.pdf>.

⁸ For the content of these national legislative initiatives, see further E Rosati, 'Neighbouring rights for publishers: are national and (possible) EU initiatives lawful?' (2016) 47(5) IIC 569, 573-574.

⁹ European Commission, Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', 23 March – 15 June 2016, available at <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>.

¹⁰ European Copyright Society, General Opinion on the EU Copyright Reform Package, 24 January 2017, 6.

¹¹ L Bently, Call For Views: Modernising the European Copyright Framework, 5 December 2016, available at <http://www.iposgoode.ca/wp-content/uploads/2016/12/IPOModernisingIPProfResponsePressPublishers.pdf>, 1.

With a similar tone, the CEIPI Opinion considers that the proposal for a press publishers' right would: fail to contribute to the construction of a Digital Single Market; be contrary to the interests of authors; be unsupported by a clear economic rationale; be detrimental to the public domain; apply to any publication, including those in respect of which the relevant press publisher's investment has not been substantial; and have an excessive duration.¹²

The Parliamentary debate

Further to the release of the Commission's proposal for a DSM Directive, the discussion moved to the European Parliament, where MEP Therese Comodini Cachia was appointed rapporteur on behalf of the Committee on Legal Affairs (JURI).

On 10 March 2017 a first draft of her report on the proposed DSM Directive was released.¹³ MEP Comodini Cachia appeared to take a rather radically different view regarding the desirability of having an EU-wide press publishers' right. In fact, she proposed that press publishers would be granted, not a neighbouring right over their press publications, but rather (and more simply) a presumption of representation of authors for the sake of rights enforcement (Amendment 52):

“Member States shall provide publishers of press publications with a presumption of representation of authors of literary works contained in those publications and the legal capacity to sue in their own name when defending the rights of such authors for the digital use of their press publications.

In mid-2017 MEP Comodini Cachia announced that she was renouncing her role at the European Parliament, and MEP Axel Voss was appointed new rapporteur on the proposed DSM Directive. The final version of the Report is scheduled for adoption in the final part of 2017.

In the meantime, other Parliamentary committees have expressed views for the Committee on Legal Affairs on the proposed DSM Directive. In its Opinion (Rapporteur: MEP Catherine Stihler) the Committee on the Internal Market and Consumer Protection (IMCO) held the view that there are no sufficient grounds that would justify the introduction of a press publishers' right.¹⁴ To ameliorate enforcement of rights, it would be sufficient to amend Article 5 of Directive 2004/48/EC¹⁵ (the 'Enforcement Directive') by means of a regulation that would make this provision also applicable to press publishers. The Opinion also holds the view that “[t]here are potentially more effective ways of promoting high-quality journalism and publishing via tax incentives instead of adding an additional layer of copyright legislation.”¹⁶

Other Committees have also proposed amendments to the original Commission's proposal, especially for the sake of clarifying the scope of the resulting right. In its draft Opinion (Rapporteur: MEP Marc Joulaud), the Committee on Culture and Education (CULT) deemed it necessary to clarify that non-commercial and private uses of professional¹⁷ press publications are not covered¹⁸, and that protection does not extend to acts of hyperlinking, or to the text fixating the hyperlink, where such acts do not constitute communication to the public under the InfoSoc Directive.¹⁹

¹² C Geiger – O Bulayenko – G Frosio, Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law, 28 November 2016, 2-3.

¹³ Committee on Legal Affairs, Draft report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 2016/0280(COD).

¹⁴ Committee on the Internal Market and Consumer Protection, Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, <RefProc>2016/0280</RefProc><RefTypeProc>(COD), 4.</RefTypeProc>

¹⁵ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), OJ L 195, 16-25.

¹⁶ Committee on the Internal Market and Consumer Protection, Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, cit, 4.

¹⁷ Committee on Culture and Education, Draft opinion <CommissionResp>of the Committee on Culture and Education</CommissionResp> <CommissionInt>for the Committee on Legal Affairs</CommissionInt> on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, <RefProc>2016/0280</RefProc><RefTypeProc>(COD)</RefTypeProc>, Amendment 24.

¹⁸ Ibid</RefTypeProc>, Amendment 18.

¹⁹ Ibid, Amendment 24.

In a similar fashion, the Opinion (Rapporteur: MEP Zdzisław Krasnodębski) of the Committee on Industry, Research and Energy (ITRE) recommended the inclusion of a new recital that would state that "[t]he rights for press publishers should apply without prejudice to the rights of individuals for the reproduction, communication or providing links or extracts of a press publication to the public for private use or not-for-profit, non-commercial purposes."²⁰

Three questions

While awaiting further developments at the level of EU legislature, this note will only consider whether – from a copyright perspective – the idea of an EU-wide press publishers' right:

- is supported by an internal market rationale which would justify an intervention at the EU level;
- will grant press publishers broader and more certain protection than the one already enjoyed under the existing *acquis*;
- will improve press publishers' 'bargaining position'.

Overall, the answer appears to be in the negative. While this brief note does not touch upon potential issues connected with fundamental rights (notably freedom of expression and information) and competition law, it holds the view that the adoption of a press publishers' right is unlikely to change the situation of press publishers. It could however increase the complexity of the legal system and distract the attention from other options that could be potentially more effective in supporting the European press publishing sector.

(1) An internal market rationale?

Similarly to the other EU copyright directives, the legislative basis for the proposed DSM directive is Article 114 of the Treaty on the Functioning of the European Union (TFEU), ie the realisation of an internal market where the free circulation of goods and services based on or incorporating copyright content is ensured. All this is premised upon the idea that differences in Member States' laws are such as to raise barriers to such free circulation. As in all cases of shared competence, such as copyright and – more generally – intellectual property, the directive must also satisfy the requirements of subsidiarity (Article 2(2) TFEU) and proportionality (Article 5 of the Treaty on European Union).

With regard to the proposed press publishers' right, neither the draft directive nor the accompanying Impact Assessment ('IA') provide a satisfactory explanation as to why intervention at the EU level is needed. In particular, the IA provides contradictory inputs. It recalls that a number of Member States has already intervened to remedy or reduce – whether by means of *ad hoc* initiatives or as part of broader arrangements – the negative impact of reduced revenue in the press publishing sector. Such copyright-related initiatives include: the introduction of neighbouring rights (as is the case in Germany); provisions on collective works; provisions on presumption of transfer; copyright protection of the typographical arrangement of published editions; and mandatory fair compensation requirements (as is the case in Spain).²¹

Focusing specifically on the German and Spanish experiences, ie recent initiatives specifically designed for the benefit of press publishers, the IA itself acknowledges that these have been somewhat "ineffective", and links such ineffectiveness to "the lack of scale of national

solutions."²² While it appears that such initiatives have failed to achieve their underlying goal, no support is provided as regards the existence of a direct connection between their alleged ineffectiveness and lack of cross-border or EU-wide effect.

In this sense, the internal market rationale of the proposal remains obscure. The IA and the proposed DSM Directive also fail to clarify in what sense the introduction of an EU-wide neighbouring right would satisfy the additional requirements of subsidiarity and proportionality.

(2) A broader and more certain protection?

Despite extensive criticisms, the scope of the proposed press publishers' right is not broader than the protection already available under existing legislation. Not only will the rights of reproduction and making available to the public be akin to those already envisaged under the InfoSoc Directive and relevant case law of the Court of Justice of the European Union (CJEU), but the new neighbouring right will be also subject to relevant copyright exceptions and limitations under national copyright regimes (Recital 34 of the proposed DSM Directive), further to Article 5 of the InfoSoc Directive.

There is probably no need to recall that the latter provision has been criticised extensively for failing to establish a harmonised system of copyright exceptions and limitations across the EU.²³ The optional nature of Article 5 exceptions and limitations (with the exclusion of the exemption for temporary copies), together with the different language, conditions and – therefore – resulting scope of exceptions and limitations at the national level, is such that the substantive scope of copyright protection across the EU varies.²⁴ In this sense, the resulting press publishers' right would not be different, including with regard to the application of the national exceptions (specifically mentioned at Recital 34 of the draft DSM Directive) for quotation and news reporting.

(3) A stronger bargaining position?

Declining revenues in the press publishing sector are not a new phenomenon (in some Member States the decline began with the advent of television). However, they have become particularly problematic since the early 2000s²⁵, with some indicating the internet and news aggregation services as primarily responsible for such phenomenon. These considerations have been the main factor supporting the adoption of a (waivable) neighbouring right in Germany and the reform of the quotation exception, by means of the introduction of a (non-waivable) fair compensation requirement, in Spain.²⁶

Considering both current practices (notably the fact that employed journalists do not usually own the copyright to the articles they author and freelance journalists are regularly asked to assign the copyright in their own contributions) and existing national arrangements, one could wonder whether a specific press publishers' right is really needed at the EU level. It appears that a presumption of transfer of rights (as proposed by MEP Comodini Cachia) would be sufficient to achieve the goal of easier rights enforcement, if this remains the principal objective of a legislative initiative in favour of press publishers.

It is unlikely that either initiative, ie a neighbouring right or a presumption of representation, would help press publishers have a stronger bargaining position or recoup part of the revenue lost to the Web. With particular regard to the latter, from the data provided by the press pub-

²² Ibid, 161.

²³ PB Hugenholtz, 'Why the Copyright Directive is unimportant, and possibly invalid' (2000) 22(11) EIPR 499, 501. In the same sense, see MC Janssens 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation', in E Derclaye (ed) Research handbook on the future of EU copyright (Edward Elgar:2009), 332, and bibliography cited in it. For similar criticisms, expressed at the proposal stage, see M Hart 'The proposed directive for copyright in the information society: nice rights, shame about the exceptions' (1998) 20(5) EIPR 169, 169–170.

²⁴ See further E Rosati, 'Copyright in the EU: in search of (in)flexibilities' (2014) (2014) 9(7) JIPLP 585, 590–594, questioning to what extent diverging implementations of Article 5 exceptions and limitations are allowed by the InfoSoc Directive.

²⁵ G Price, Opportunities and challenges for journalism in the digital age: Asian and European perspectives (2015) Chatham House--The Royal Institute of International Affairs, available at http://www.asef.org/images/docs/FinalC_hathamHouseMonograph-ERT7-20150825.pdf, 3.

²⁶ See further, Rosati, 'Neighbouring rights', cit, 569–570 and 573–574.

²⁰ Committee on Industry, Research and Energy, Opinion <TitleType></TitleType><CommissionResp> of the Committee on Industry, Research and Energy</CommissionResp> <CommissionInt> for the Committee on Legal Affairs</CommissionInt> <Title>on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 2016/0280</RefProc><RefTypeProc>(COD), Amendment 18.</Title>

²¹ European Commission, Commission staff working document – Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, cit, 188 .

lishing industry and included in the Commission's Impact Assessment, it cannot be inferred that the positive trends associated with growth of digital revenue are due to the existence of a copyright environment in which press publishers benefit from an *ad hoc* right.²⁷

Conclusion

From the brief analysis conducted above it would appear that the Commission's proposal on a press publishers' right is not firmly supported by an internal market rationale. It is also unlikely to improve the position of press publishers substantially, possibly with the exception of enforcement scenarios in which a less pervasive measure, eg a presumption or representation, would suffice.

Lacking a clear basis that justifies the introduction of a new neighbouring right at the EU level from a copyright perspective, other types of solutions – also indicated in the various parliamentary committees' opinions – could be explored to support the press publishing sector, whether at the national or EU levels.

²⁷ European Commission, Commission staff working document – Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, cit, 175-176.

The proposed publishers' right in press publications: an evidential mistake

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Introduction¹

One of the most controversial features of the European Commission's proposal for a Directive on copyright in the Digital Single Market is the provision introducing a related (or 'ancillary') right for publishers of press publications (art. 11 CDSM proposal).² As it is currently proposed, this provision would grant publishers of press publications a set of broad exclusive rights of reproduction and communication to the public to authorise digital uses of their press publications until 20 years after first publication, subject to the same exceptions and limitations that apply to copyright works. Effectively, it would mean that, unless an exception or limitation applies, prior authorization would have to be obtained from publishers for any digital reproduction (direct or indirect, temporary or permanent, by any means and in any form) and any making available of their press publications, in whole or in part, including possibly the smallest snippets.³ This right is offered in addition to existing copyrights protecting the content (articles, photographs, illustrations, etc.) of newspapers, magazines, journals and other periodicals.

In the past year, fierce criticism has been raised against the proposed publishers' right, both by academics,⁴ independent publishers⁵ and other stakeholders, including creators in the news publishing industry.⁶ In this contribution, the key points of criticism will be analysed and discussed in the light of the EU's objective for 'better regulation'. After a short introduction into the background of the proposal, the paper will elaborate on four main objections against the proposed publishers' right. It will conclude that, in view of the evidence available, it is clear that the proposal is ill-suited to address the problems that press publishers are facing. Therefore, the proposed publishers' right should at best be removed from the legislative agenda or at worst be replaced by a presumption that publishers represent the authors' copyright in press publications and have the right to sue in their own name against digital infringement of that copyright, as was proposed in the draft report of the European Parliament's JURI committee of 10 March 2017.

¹ The research for this paper was conducted in the framework of the research programme Veni with project number 451-14-033 ('The challenge of evidence-based intellectual property law reform: Legal pragmatism meets doctrinal legal reasoning'), which is partly financed by the Netherlands Organisation for Scientific Research (NWO).

² European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14 September 2016, COM(2016) 593 final, art. 11.

³ See the impact Assessment accompanying the proposal (SWD(2016) 301 final, Brussels, 14 September 2016), p. 157 (n. 485), referring specifically to the CJEU's *Infopaq I* judgment (Case C-5/08), in which it was held that capturing 11-word text fragments of newspaper articles constitutes a reproduction in part of these works under art. 2(a) Directive 2001/29 'if the elements thus reproduced are the expression of the intellectual creation of their author.'

⁴ See e.g. 'EU Copyright Reform Proposals Unfit for the Digital Age', Open Letter from European Research Centres to Members of the European Parliament and the European Council, 24 February 2017, available at: <http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf>, p. 3-5 and the references to independent studies and opinions contained therein.

⁵ See e.g. News Now, 'Common Position Statement on the proposed EU Directive on Copyright in the Single Market', 28 February 2017, available at: <<http://www.newsnow.co.uk/eu-link-tax/publishers-position-statement.html>>.

⁶ See e.g. Platform Makers, Response to the internet consultation on modernising EU copyright of the Ministries of Economic Affairs, of Education, Culture & Science and of Security & Justice in the Netherlands, 1 December 2016, available at: <https://www.internetconsultatie.nl/modernisering_eu_auteursrecht_dsm/reactie/59245/bestand>, p. 3-5.

Background to the proposal

A central point that the Commission wishes to address by the introduction of the press publishers' right is the future sustainability of the quality press, which according to the Impact Assessment is in jeopardy. As this 'would be prejudicial for the media pluralism, good quality information and the role [press publishers] play in democratic societies',⁷ the Commission believes that legislative intervention at EU level is needed.

In a nutshell, the problems that press publishers are facing stem from the fact that they have been struggling to cater to the two-sided market of readers and advertisers in the digital environment.⁸ In recent years, press publishers have seen a significant decline in print readership due to structural changes in consumer behaviours. In the past, it were traditional outlets such as newspapers, radio and TV channels that brought news to the people, but nowadays, most news is consumed on the internet, through different digital formats and online sources. Data provided by the press publishing sector show a steady decline in print circulation of daily newspapers in eight EU Member States, although the differences between countries are noticeable, varying from an 8% decline in Belgium, to an 18% decline in the UK and a 52% decline in Italy in the period 2010-2014.⁹

Concomitantly, press publishers have seen structural changes in advertising markets. Advertising takes place where audiences can best be reached. As a consequence, online advertising has grown at the cost of traditional off-line advertising. This has affected news publishers in particular, as advertisers tend to favour search engines, social media and other channels over news media.¹⁰ News publishers have also lost their position in the advertising market for jobs, housing, (used) cars and tourism, which on the internet is controlled predominantly by specialised platforms and online marketplaces.

As a result of these developments, news publishers have witnessed a persistent decline in turnover over the past years, both in terms of sales and advertising revenues, which is expected to continue in the near future.¹¹ This has already caused news publishers to close down or reduce editorial staff,¹² thus leading to a decline of quality of the free and pluralist press. If, due to their poor financial situation, press publishers can make less resources available to conduct quality journalism, they may indeed lose 'gatekeeping' power. This threatens the traditional function of the press as a 'public watchdog'¹³ and may put citizens' access to information at risk. Ultimately, such state of affairs could be detrimental to public debate and the proper functioning of a democratic society.¹⁴

To ensure the sustainability of a free and pluralist quality press, news publishers have called for a new 'ancillary right' that enables them to (a) take legal action against online infringements of their publications, and (b) license their publications to online service providers, such as social media, news aggregators and search engines, which currently provide unauthorized access to press publications made freely available online by news publishers. This has resulted in the proposed press publishers' right, which is aimed at protecting the investments of publishers in producing press publications.¹⁵

Key objections against the proposal

Objection 1: A publishers' right is unnecessary as press publications are already protected

It is somewhat awkward that the Commission is proposing a new related right in press publications, the content of which normally already benefits from copyright protection. Most press articles, photographs, illustrations, etc. are protected by copyright, which is usually transferred to press publishers before publication. Accordingly, press publishers often enjoy copyright protection in their press publications due to a transfer of rights by journalists, photographers, illustrators, etc.¹⁶ Press publishers nevertheless complain that licensing and enforcement in the digital environment is complex and inefficient, as they are not recognised as rightholders in their own right.¹⁷ But this raises the question: Why would existing copyright not be a good enough instrument to protect the interests of press publishers? And why would they be helped by the introduction of an additional layer of rights, which essentially grants a similar type of protection?

The Commission maintains that the introduction of a self-standing intellectual property right in press publications is needed to tackle the legal uncertainty that press publishers face when licensing and enforcing rights in the online environment.¹⁸ But that argument cannot convince. Although it may be easier for press publishers to negotiate licenses if they have their own right, they can already license on the basis of the copyright that is contractually obtained from journalists and other content creators. To the extent that press publishers face difficulties to prove that they own the copyright in press articles (i.e. to establish the chain of title of all rights in their publications), the legal uncertainty they face is unmistakably the result of a lack of adequate rights administration and not of a market failure. This could simply be cured through improved rights administration and does not warrant the introduction of a new press publishers' right.

Objection 2: The proposed right does not fix the problems of the press

Although sometimes met with scepticism, the problems that news publishers are facing with the transition from print to digital are real and should be taken seriously.¹⁹ They might warrant legislative action, but the idea that introducing a press publishers' right would help to cure the existing problems of print media in the digital environment is mistaken. Clearly, neither the behaviour of news consumers nor the advertising market will change as a result of the introduction of a press publishers' right. Accordingly, the proposal by no means addresses the key underlying drivers of the problem.

Moreover, while the Commission assumes that the proposed press publishers' right will have a positive effect on media pluralism,²⁰ the relationship between the two is unclear. In general, it is difficult to establish a causal effect between intellectual property rights and incentives to invest in content creation,²¹ let alone to demonstrate that a publishers' right will aid media pluralism. Even if it would yield additional income for publishers, it cannot be automatically assumed that the money will be invested in journalistic efforts. Hence, there is no evidence that the introduction of a press publishers' right will result in better news coverage or the creation of more diverse media content.

The proposal may even have adverse effects on media pluralism, as it is uncertain how online service providers will respond to the introduction of a press publishers' right. If they will refuse to engage in licensing negotiations with publishers and stop providing access to newspaper contents, as Google News and other news aggregators initially did in Germany and Spain where

⁷ Impact Assessment, *op. cit.*, p. 161.

⁸ M.M.M. van Eechoud, 'A publisher's intellectual property right: Implications for freedom of expression, authors and open content policies', study conducted on commission from OpenForum Europe, January 2017, par. 2.3.

⁹ Impact Assessment, *op. cit.*, Annex 13A.

¹⁰ Van Eechoud 2017, *op. cit.*, p. 14.

¹¹ Impact Assessment, *op. cit.*, Annex 13A.

¹² *Id.*, p. 156 (reporting on outcomes of the 2016 public consultation on the role of publishers in the copyright value chain).

¹³ The European Court of Human Rights has consistently emphasized the role of the press as "public watchdog". See D. Voorhoof et al & T. McGonagle (ed. sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights* (IRIS themes, vol. III), Strasbourg: European Audiovisual Observatory 2016.

¹⁴ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 31.

¹⁵ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 32.

¹⁶ Europe Economics, L. Guibault & O. Salamanca, *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works*, Brussels: European Commission DG Connect 2016, available at: <http://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf>, p. 73-83.

¹⁷ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 31.

¹⁸ Impact Assessment, *op. cit.*, p. 160.

¹⁹ R. Danbury, 'Is an EU publishers' right a good idea?', Final report on the AHRC project: Evaluating potential legal responses to threats to the production of news in a digital era, University of Cambridge, 15 June 2016, available at: <https://www.civil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.civil.law.cam.ac.uk/documents/copyright_and_news/danbury_publishers_right_report.pdf>, p. 11.

²⁰ Impact Assessment, *op. cit.*, p. 161.

²¹ See e.g. N. Elkin-Koren & E.M. Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis*, London & New York: Routledge 2013.

similar, though narrower, rights in press publications have been introduced,²² this may have negative effects on the accessibility of news online and will certainly lead to a fall in referral traffic to newspaper websites. This may be harmful for small press publishers, in particular. A 2017 study shows that, after the introduction of the obligation to pay compensation for online use of news articles in Spain, the traffic to Spanish newspaper websites fell by a 5.3% decline in visits on average, with a decline of 4.9% for large newspapers, 6.3% for medium-sized newspapers, and 12.6% for small newspapers.²³ As a result, press publishers attract significantly less advertising revenue, which in Spain is estimated to be around 9-18 million annually in the short term.²⁴

The EU legislator should not take such effects lightly, but examine them seriously before even considering to introduce a press publishers' right. This is particularly important in light of new business models in online news publishing, which are still in development, as the Commission also acknowledges.²⁵ Caution is warranted, as it is uncertain how the introduction of a press publishers' right will affect traditional as well as future business models, including the B2B licensing market for online news publications.

Objection 3: The proposed right is possibly bad for authors of press publications

An additional concern is that the proposed press publishers' right might have a negative impact on journalists, photographers, illustrators and other creators, whose works are included in news articles. Although the proposal clearly states that the press publishers' right 'shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication',²⁶ it cannot be excluded that it will nevertheless affect them.

This is especially the case for journalists, photographers, illustrators and other creators who work as freelancers. To establish a name and reputation, which is crucial for their work and business, freelancers need maximum exposure of their work online. A press publishers' right might hinder that. As Van Eechoud explains: 'If the operation of the proposed publisher's right were to lead to a decline in referrals, shares, snippet-linking or the ability to blog about a journalist's works, this would directly harm the journalist's visibility, and thus opportunity to sell future work.'²⁷

Also, the proposal may worsen the bargaining position of journalists and other content creators. There is no guarantee that, after the press publishers' right is introduced, more money will become available to compensate for the online use of press articles. If the pie would grow, the surplus will presumably be taken by press publishers in the exercise of their related right. If the pie remains the same, there is a reasonable chance that press publishers on the basis of their related right will demand a larger share of it, in which case journalists, photographers and other creators would need to take a loss.

²² §87f-h German Copyright Act grants press publishers a one-year exclusive right to prohibit the use of 'snippets' (not being individual words or the smallest of text excerpts) by search engines and news content aggregators; Art. 32(2) Spanish Intellectual Property Act contains an obligation for content aggregators to pay compensation to news publishers for the use of 'snippets' of press publications.

²³ NERA Economic Consulting, *Impact on Competition and on Free Market of the Google Tax or AEDE fee*, Report for the Spanish Association of Publishers of Periodical Publications (AEEPP), 2017, available at: <http://www.aeepp.com/pdf/Informe_NERA_para_AEPP_%28INGLES%29.pdf>, p. 59.

²⁴ *Id.*, p. 62.

²⁵ Impact Assessment, *op. cit.*, p. 157.

²⁶ Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, art. 11(2) and recital 35.

²⁷ Van Eechoud 2017, *op. cit.*, p. 5.

Objection 4: The proposal is overly broad

Apart from the questionable assumptions that underlie the proposal, there are further ambiguities, in particular regarding its beneficiaries and scope. Even if the proposal would aid press publishers, it goes way further than what is required to protect the quality press. The definition of 'press publication' (art. 2(4) CDSM proposal) is so broad that it covers virtually all content published periodically under a heading of news. The beneficiaries of the proposed right are thus not only the quality press, but all periodical media, including newsletters, blogs, glossies, social media, etc. It goes without saying that not all these media play an equally important role in democratic societies and they certainly are not in a similar situation of crisis as the quality press.

In respect of its scope, it is unclear why the proposal affects all online users of news, including consumers and other legitimate users, if the real intention is to target the use of press articles by social media, news aggregators and search engines. Furthermore, do press publishers really need broad exclusive rights, if they merely seek 'to participate in the advertising revenues generated by their content on third parties' websites'?²⁸ And why is a 20-years term of protection proposed, if the commercial life span of most press articles is no longer than a day, a week or a month at most? These are all questions to which the Commission's proposal does not provide adequate answers.

The proposal further leaves unanswered what exactly will be protected: would the right protect press publications, *including* the content they comprise, or merely the fixation of press publications as identifiable media items? In the latter case the right seems useless, as online service providers seldom reuse or provide access to media items as a whole, but rather offer snippets to their content. If the right would also protect the *content* of a press publication, however, then this might extend the scope of protection beyond that of copyright protection. Brief and simple news items that contain little expression apart from facts, such as 'news of the day' or 'miscellaneous facts having the character of mere items of press information' are outside the scope of copyright,²⁹ but would arguably be protected under the proposed press publishers' right.³⁰ Not only would this be contrary to the Berne Convention, but it would also impair the free flow of information.

Conclusion

The proposal for a related right for publishers of press publications is flawed. Although the problems that print media are facing in the online environment are real, there is no evidence that a press publishers' right will meaningfully contribute to addressing these problems. Also, there is genuinely no need for a new right in press publications, as news publishers often already benefit from copyright protection contractually obtained from journalists and other content creators. In response to the draft impact assessment that accompanies the proposal, the European Commission's Regulatory Scrutiny Board also observed that '[t]he report should more convincingly demonstrate that the creation of a new standalone right for news publishers would effectively contribute to reinforcing their role in the digital world and that action at EU level is needed.'³¹ In my view, it still makes no case for why the introduction of a press publishers' right is needed.

Various European Parliament's committees that are looking into the matter also seem to recognize that the evidence is against the proposal. The CULT Committee's draft report of 6 February 2017 advised to significantly limit the proposal and the draft report of the IMCO Committee of 20 February 2017 even suggested to abandon the press publishers' right altogether. The suggestion to replace the right with a presumption that publishers represent the authors' copyright in press publications and have the right to sue in their own name against digital infringement

²⁸ Impact Assessment, *op. cit.*, p. 157.

²⁹ See specifically art. 2(8) Berne Convention: '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.'

³⁰ The proposal contains neither a threshold for protection, such as the originality criterion in copyright, nor a carve-out to exclude 'news of the day' or 'miscellaneous facts' from the scope of protection.

³¹ European Commission, Regulatory Scrutiny Board, Opinion on DG CONNECT's draft impact assessment report on the modernisation of EU copyright rules (version of 1 July 2016), Ref. Ares(2016)3846527, 22 July 2016, available at: <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2016/sec_2016_0407_en.pdf>, p. 3.

of that copyright, as was made in the draft report of the JURI Committee of 10 March 2017, is probably easier to reach political agreement on. But in the absence of final votes on their positions, all is still out in the open.

Accordingly, the European Parliament has an important task ahead to make right what is wrong. Admittedly, this task is not easy. Still, the EU legislator should be very cautious to create a new right without having a clear picture of all its intended and unintended consequences. Lawmaking is not a process of trial-and-error. It actually has bearing on the subjects targeted by the legislation. As the potential impacts of the proposal on the position of journalists, on media pluralism, on future business models and on the B2B licensing market are not yet assessed, thoughtfulness and caution are warranted.

The Press Publishers' Right in a Nutshell

Thomas Höppner*

I. Current Market Failure Necessitating the Proposed Right

The proposed right reacts to new technical opportunities for the mass-copying of press publications combined with strong economic incentives for companies to take advantage of these technical opportunities.

1. New Technical Means to Copy Press Publications en masse

Some 20 years ago, when the current InfoSoc directive 2001/29 was drafted, there was no need for an independent publishers' right. It was simply not economically viable for any company to copy and distribute newspapers and magazines en masse. Today, as a result of digitalisation, this is a different story of course. Press publications can be replicated and distributed globally through various digital platforms in the blink of an eye.

2. Strong Economic Incentives to Copy Press Publications en masse

There are not just new means to mass-copy, there are also strong economic incentives for companies to do so. This incentive is inherent in the internet ecosystem. It constitutes the standard business model of the internet economy to publish attractive content on one's website in order to attract internet users for advertising or subscription purposes. The easiest way to do that, of course, is to take the content from other websites and to display it on one's own site. The economic success of such aggregation platforms depends on bundling and presenting as much content as possible. More content attracts more users and more users mean higher advertising revenues or subscription fees. Consequently, every aggregator has an economic incentive to display as much third-party content as possible directly on its site.

This also applies to news intermediaries. There are many examples for such aggregators. They systematically index and copy third party news websites in order to set up their own news outlet. To this end, they have typically pre-installed news categories on their homepages. Users are presented with the most relevant text extracts that are often sufficient to convey the key message and thus the value of the article. If a user clicks on any of the news extracts copied from third party news websites, even more third party content becomes visible. Users are then invited to comment or to otherwise interact with the aggregating website. Thus, aggregators use third party press publications to build up own monetisable customer relationships and to ultimately keep users away from the source and on their own website. That explains why according to the Commission's Impact Assessment, 47% of all users of aggregators do not click through to a press publishers' site anymore.¹

3. Aggregators' Free-riding on Press Publishers' Efforts Distorts Competition and Eliminates Incentives to Invest and Innovate

Now, if nearly half of the users of such aggregators do not click through to publishers' sites but remain on the aggregator's site, it is apparent to me that we are not talking about a symbiosis here between aggregators and press publishers or even a win-win-situation as has been claimed by others. Instead, many aggregators are directly competing with press publishers' sites for the same advertising budgets by satisfying the same information demand of the same users. Regrettably, at the moment, they are also competing with the same content that the press publishers produce at high costs and that the aggregators merely copy at no costs. This is a classical market failure that needs to be addressed. The legal framework has to ensure that press publishers' incentives to invest in reliable, high-quality publications are maintained. That in turn is a traditional function of copyright law. The publisher's right as proposed by the EU Commission is capable of addressing this issue.

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¹ European Commission 'Staff Working Document, Impact Assessment on the modernisation of EU copyright rules' (SWD(2016) 301 final), 14.9.2016, p. 157.

II. The Proposed Right Strikes the Right Balance of Interests

Contrary to all the scaremongering from the side of aggregators, there are no substantial reasons for anyone to be afraid of the proposed right. It strikes a fair balance.

1. The proposed right does not limit but strengthens consumers' access to news

First, it has been argued that the publishers' right somewhat limits the flow of information and the ability of consumers to express their opinions freely.² However, it is difficult to see how the proposed right could have such effects. Press publishers vigorously defend the freedom of expression. Why would they want to prevent their readers from engaging with their publications? That is neither the purpose nor any likely effect of the publishers' right. The right does not protect any ideas or facts that are published. Everyone remains free access to the press publications published online. And everyone remains free to comment on any subject covered by a publication, to quote it, to link to it or to share it with others. Recital 33 of the proposed directive clarifies that the proposed right "does not extend to acts of hyperlinking" which are typically used for sharing and referencing purposes.

2. The proposed right supports a continuing availability of quality news

The critics ignore that the alternatives to a publishers' right would interfere much more significantly with the freedom of expression and consumers' access to information than a publishers' right. Without a better protection of publishers' online investments, press publishers would be forced to either invest less in quality content, make less content available online or to hide that content behind paywalls and subscription models. Each of these alternatives would leave consumers worse off. It is the consumers who benefit the most from the press publishers' current approach of making news available for free and anyone online. Aggregators' unrestricted copying of this content is threatening this approach.

3. The proposed right does not harm but back up journalists by empowering the entire press

Another point of criticism is that the publishers' right could in some way harm journalists by decreasing their public exposure.³ Again, it is difficult to see how this could happen. It would be surprising if there was any journalist who would not prefer being paid to merely being visible online but unpaid. The publishers' right aims at securing the sustainability of the entire press including its journalists. Empowering the press with an updated legislation is the best measure politicians can do to secure a diverse and open media landscape.

4. The narrow definition of a "press publication" appropriately restricts the rights' scope

Another criticism that has been raised is that the right was apparently too wide as it had no built-in restrictions.⁴ In fact, the proposed right contains a very important built-in restriction, that is the definition of the term "press publication". To be protected, the publication must be, inter alia, "a fixation of a collection of literary works of a journalistic nature within a periodical or regularly-updated publication under the initiative, editorial responsibility and control of a service provider." These criteria are not easy to fulfill. They require substantial and continuous investment and justify particular protection.

5. The proposed right is narrower than that for other media publishers

The proposed publishers' right is not wider but in fact narrower than comparable related rights for music producers, film producers or broadcasting organisations. Their protection is granted for certain activities, namely for the mere first technical fixation of a phonogram, a film or a broadcast, irrespective of the quality, relevance or originality of these activities. There is no legitimate reason to treat press publications any differently. If anything, considering their relevance for democratic societies, press publications merit additional legal protection not less. That is why the proposed publisher's right merits support.

² EDiMA, Directive Copyright in the Digital Single Market: The impact of Article 11 – publisher rights, 2017, p. 7, 16.

³ Van Echoud, A publisher's intellectual property right: Implications for freedom of expression, authors and open content policies, OpenForum Europe 2017.

⁴ *ibid.*

Platform Liability

Filtering obligations and fundamental rights: can the EU eat the cake and have it too?

Sophie Stalla-Bourdillon*

Setting the problem

The European Commission in its explanatory memorandum to the proposed new Copyright Directive in the Digital Single Market¹ released on 14 September 2016 states that the proposal “has a limited impact on the freedom to conduct a business and on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders.”² The European Commission, however, does not explain how the mitigation measures and its balanced approach meet fundamental rights requirements and does not even address the risk that its proposal could lead to divergent interpretations across and within Member States. Notably, the European Commission does not even refer to all the fundamental rights taken into account by the Court of Justice of the European Union (CJEU) when undertaking its own balancing exercise, including the rights to data protection and privacy (which were considered in the *Promusicae/Sabam*³ and *Scarlet/Sabam*⁴ cases).⁵ The European Commission’s impact assessment is not of great help either in this respect.⁶ The European Commission seems to rely on the fact that, implicitly, the choice of restriction is left, in the first instance, to the service providers meaning that it is not directly imposed by the transposing legislation.

It is therefore crucial to determine whether the proposed Copyright Directive strikes an appropriate balance between the different fundamental rights at stake in the light of CJEU case law and in particular, whether Article 13 is compatible with the EU acquis broadly defined including the Charter of Fundamental Rights of the European Union (the EU Charter).

Article 13 of the proposed Copyright Directive in its first paragraph provides that:

“Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.”

It thus expressly prescribes the use of effective content recognition technologies as a means to ensure the functioning of agreements with rightholders or to prevent the availability of copyright works. Recital 38 is more explicit in that it specifies that the obligation to “take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies” “should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.”

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1 European Commission, Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, COM(2016) 593 final (Proposed Copyright Directive).

2 Proposed Copyright Directive, p. 9.

3 Case C-275/06 *Promusicae*, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 29 January 2008, EU:C:2008:54, para. 64.

4 Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011, EU:C:2011:771, e.g. para. 50.

5 For a similar point see e.g. Stalla-Bourdillon S et al. (2016), A brief exegesis of the proposed Copyright Directive, <https://ssrn.com/abstract=2875296>.

6 Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules - Part 1, SWD(2016) 301 final.

In other words, hosting providers, as a species of intermediary providers, should also implement effective technology, by which one should understand content recognition technology, also implicitly equated to upload filters as content recognition technology is described as a measure of its own to prevent the availability of copyright works. Crucially, the implementation of upload filters implies both the screening of online material and the removal of material matching reference files of copyright works. It also implies filtering for all file types (audio, audiovisual, photography, text) and all protected works, irrespective of their lengths (e.g. including snippets).

Can the European legislature decide to require mandatory upload filters to the detriment of certain online platforms defined as “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”? Could it be that such a requirement would prove incompatible with the EU acquis and the protection of fundamental rights? To say it bluntly, are mandatory upload filters and fundamental rights friends or foes? Can the EU legislature impose *ex ante* filtering obligations upon certain online platforms and still argue that the proposed Copyright Directive is fundamental rights compatible? More prosaically, can the EU legislature eat the cake of fundamental rights and have it too?

Assessing mandatory upload filters in the light of fundamental rights

Mandatory upload filters are the wrong answer to a poorly formulated problem, confusingly referred to as the “value gap” conundrum.⁸ The European Commission in its memorandum explaining the new proposed copyright Directive states that “[i]t is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter.”⁹ Implicit in this statement is the idea that online platforms are unfairly appropriating part of the value generated by the use of copyright works. Several meanings can be attached to the concept of “value.” Economic theory suggests that the value of copyright works is not and should not be entirely appropriated by rightholders. The market value of a copyright work and its societal value are measured differently and should evolve over time.¹⁰ Moreover, value creation also relates to innovation.¹¹ “Value creation results from actions that entail the novel combination and exchange of resources, by which resources are diverted from known applications to be deployed in new contexts.”¹² The European Commission therefore does not account for the value created by online platforms themselves and more generally by transformative uses of copyright works.¹³ The chain of value creation to which online platforms contribute does not end with online platforms. By way of example,

plenty EU companies develop their businesses based on code sharing platforms.¹⁴ Furthermore, value created by online platforms does not necessarily relate to the use of copyright works but also to the use of personal data relating to service users (in particular data about content consumption and content sharing habits) for service personification and advertising purposes in the context of highly concentrated markets. As a result, Article 13 as a means of redistributing value between online platforms and rightholders can only be a very approximate tool unable to cater for complex value creation processes with multiple stakeholders.

Upload filters are a reality. Google’s Content ID¹⁵ is probably the most well-known example. However, this is an expensive technology and only few online platforms use them.¹⁶ YouTube claimed in 2016 to have invested more than \$60 million in Content ID.¹⁷ Could the technology be then realistically licensed for a few hundred euros? Ironically, making upload filters mandatory would thus strengthen the market position of dominant online platforms. This is also supported by the fact that neither Article 13 nor Recitals 38 or 39 clarify whether online platforms will be permitted to use the reference files corresponding to copyright right without requesting a license.

Even if upload filters are already a reality, the EU legislature should be asking itself whether upload filters should be made mandatory, for a significant number of market players and for all types of protected works (e.g. including code-sharing platforms and software).

A crucial reason why making upload filters a requirement for certain online platforms is an ill-conceived policy is its incompatibility with fundamental rights. This has been explained by the CJEU in a series of cases starting with the landmark *Scarlet/Sabam* case and followed by the *Sabam/Netlog* case.¹⁸ In *Netlog*, in particular, the CJEU clearly highlighted the intimate relationship that exists between a cornerstone of the digital single market legal framework, i.e. Article 15 of the E-commerce Directive,¹⁹ and the protection of fundamental rights.

In *Sabam/Netlog*, Sabam, the Belgian Association of Authors, Composers and Publishers, had requested

“that Netlog be ordered immediately to cease unlawfully making available musical or audio-visual works from SABAM’s repertoire and to pay a penalty of EUR 1000 for each day of delay in complying with that order.”²⁰

How could Netlog, a social media platform, comply with the order in practice? By using content recognition technology and implementing upload filters. Netlog then claimed

“that the granting of such an injunction could result in the imposition of an order that it introduce, for all its customers, in abstracto and as a preventative measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cin-

However, the European Commission was of the view at that time that it needed to further “investigate the specific needs of non-professionals that rely on protected works to create their own works.” European Commission, Communication on Copyright in the Knowledge Economy, COM(2009) 532 final.

14 SUSE (Germany), <https://www.suse.com/contact/>, and Linagora (France), <https://linagora.com/>, are two examples. The European Commission itself has recognised the importance of open source software for the European economy and the necessity to focus “on policy actions that strengthen the OSS knowledge base and the exchange of best practices between private and public organizations.” European Commission (2017), Final Report - The Economic and Social Impact of Software and Services on Competitiveness and Innovation, (SMART 2015/0015), p. 12. Notably, many independent projects of a small or medium size rely upon code-sharing platforms.

15 Youtube Help, How Content ID work, <https://support.google.com/youtube/answer/2797370?hl=en-GB>, “Videos uploaded to YouTube are scanned against a database of files that have been submitted to us by content owners. Copyright owners get to decide what happens when content in a video on YouTube matches a work they own. When this happens, the video gets a Content ID claim.” Copyright owners can choose to block or monetise the video or track its viewership statistics.

16 One could also add to the list Audible Magic technology, <https://www.audiblemagic.com/Content-ID/>, and Facebook technology, <https://rightsmanager.fb.com/>.

17 How Google fights piracy, <https://drive.google.com/file/d/0BwxyRPFduTN2cl9ILXJOYjYsJA/view>.

18 Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, 16 February 2012, EU:C:2012:85.

19 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) OJ L 178, 17.7.2000, p. 1–16.

20 *Sabam/Netlog*, para. 21.

7 As per Article 13 of the proposed Copyright Directive.

8 Such a view is shared by many academics and research centres across Europe. See e.g. S. Stalla-Bourdillon et al. (40 academics) (2016), Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society: <https://ssrn.com/abstract=2850483>; S. Stalla-Bourdillon et al. (2016), A brief exegesis of the proposed Copyright Directive, fn 5; C. Angelopoulos (2017), On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market (study commissioned by Julia Reda MEP), https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf <https://ssrn.com/abstract=2875296>; G. F. Frosio (2017), Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy, Northwestern University Law Review Online, 2017, Forthcoming, <https://ssrn.com/abstract=2912272>.

9 Proposed Copyright Directive, p. 3.

10 C. Handke, Y. Girard, A. Mattes (2015), Fördert das Urheberrecht Innovation? Eine empirische Untersuchung, Studien zum deutschen Innovationssystem Nr. 16-2015, p.12, https://diw-econ.de/wp-content/uploads/2015/02/StuDis_16_20151.pdf.

11 A. Fayolles (2007), Entrepreneurship and New Value Creation – The Dynamic of the Entrepreneurial Process, Cambridge University Press, p. 48.

12 D. Di Gregorio (2013), Value Creation and Value Appropriation: An Integrative, Multi-Level Framework Journal of Applied Business and Economics vol. 15(1) 39, p. 40, http://www.na-businesspress.com/JABE/DiGregorioDWeb15_1.pdf referring to Schumpeter, J. A. (1928). The instability of capitalism. Economic Journal, Sept., 361–386. Reprinted in Schumpeter, J. A. 1988. Essays on entrepreneurs, innovations, business cycles, and the evolution of capitalism. New Brunswick: Transaction Publishers, 47–72.

13 8 years ago, in 2009 the European Commission had observed that

“Web 2.0 applications, such as blogs, podcasts, wiki, file or video sharing enable users to easily produce and share text, video and pictures. This has fuelled the development of new applications on the Internet and highlighted the issue of user-created (amateur) content, where consumers are increasingly becoming creators of content, sometimes using copyright-protected material as a basis for their creation.”

ematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently that it block the exchange of such files.”²¹

The CJEU ruled that such an injunction is incompatible with EU law. The reasons for such a holding are plural but nonetheless related.

The first one is a violation of an existing secondary legislation, i.e. the E-commerce Directive, and more precisely its Article 15.

Article 15(1) of the E-commerce Directive provides that:

“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

The CJEU therefore states that issuing such an injunction would amount to imposing a monitoring obligation of a general nature:

*“The injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost **all the data relating to all of its service users** in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31.”²²*

The CJEU continues its analysis by considering and ultimately attempting to balance different fundamental rights. It finds that the rights to data protection, freedom of expression and to conduct one’s business, respectively protected by Articles 8, 11 and 16 of the EU Charter, were all engaged in this case.

It is worth reproducing the reasons for these findings:

1. *“The injunction requiring installation of the contested filtering system would involve the identification, **systematic analysis** and processing of information connected with **the profiles created on the social network by its users**. The information connected with those profiles is **protected personal data** because, in principle, it allows those users to be identified.”²³*
2. *“That injunction could potentially **undermine freedom of information**, since that **system might not distinguish adequately between unlawful content and lawful content**, with the result that its introduction could lead to the **blocking of lawful communications**. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned.”²⁴*
3. *“In the main proceedings, the injunction requiring the installation of the contested filtering system involves **monitoring all or most of the information stored by the hosting service provider concerned**, in the interests of those rightholders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also works that have not yet been created at the time when the system is introduced. Accordingly, such an injunction would result in a serious infringement of the **freedom of the hosting service provider to conduct its business**.”²⁵*

A careful analysis of these three arguments shows that it is the unfettered monitoring of all or most of the information stored by the online platform that raises fundamental rights concerns: either because it amounts to the systematic processing of personal data, or because it is unable to distinguish between lawful and unlawful information or more simply because of its costs. There is in particular a very intimate relationship between the finding of a monitoring obligation of a general nature and the finding of an engagement of Article 8. Certain amendments have been tabled in the European Parliament arguing that only the reference files are being checked, and thereby there is no processing of personal data. However, personal data must be processed in order to allow the proposed appeals process to function. It is also argued that a search for specific reference files is not a general monitoring. This ignores the fact that it is the size of the targeted population that is crucial (i.e. whether the entire user base is in fact targeted by the monitoring or not) as well as the wide range of information searched for. Furthermore, the number of reference files will run into hundreds of thousands, if not millions. Assuming each search for a matching with a reference file should be deemed monitoring “*in a specific case*” within the meaning of Recital 47 of the E-commerce Directive, which in itself is debatable as all service users would be concerned as well as all their platform activities, Article 15 would certainly be undermined by the systematic juxtaposition of hundreds of thousands of specific cases. Finally, the argument based on cost should be related to the discussion on innovation and value creation processes.²⁶

In consequence, the E-commerce Directive and its Article 15 are not the only reason why Article 13 of the proposed copyright directive is problematic. Said otherwise, fundamental rights concerns explain why mandatory upload filters are incompatible with Article 15. Article 15 of the E-commerce Directive thus finds its roots in the protection of fundamental rights, including the rights to data protection and freedom of expression of Internet users.

Reforming copyright at the EU level

What should the EU legislature do then? Once again, the decision of the CJUE *Sabam/Netlog* is worth rereading and in particular the reasons for finding that Article 11 of the EU Charter is engaged in the case at hand. The CJEU observes, more or less implicitly, that beyond the approximation of upload filters the route to automation can only reasonably start with the harmonisation of copyright exceptions. To repeat the words of the CJEU, “*it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another.*” Going back to the big sister of the proposed Copyright Directive, i.e. the infosoc Directive,²⁷ the latter comprises 20 optional exceptions and thereby cannot be describe as an attempt to reduce divergences.²⁸ The three mandatory exceptions²⁹ introduced in the proposed Copyright Directive will not change the situation.

For freedom of expression concerns to be (partially) alleviated, context assessment should be made possible in order to determine if the act at stake is permitted or justified without the rightholder’s consent. Because the technology itself is not able to assess context, processes in the sense of a set of steps taken in order to reach a decision whether to restrict access to a particular content become crucial to meet fundamental rights requirements.

²⁶ See p. 3.

²⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22/06/2001 p. 10 - 19.

²⁸ Notably, the infosoc Directive had already been criticised for its lack of ambition. See e.g. Bernt Hugenholtz (2000). Why the Copyright Directive is unimportant, and possibly invalid, vol. 22(11) EIPR, p. 501-502, https://pure.uva.nl/ws/files/3086454/9021_opinion_EIPR.html (“If the Directive does not produce much legal certainty, it does even less in terms of approximation. This is painfully visible in the piece de resistance of the Directive, article 5 on copyright exceptions”).

²⁹ See Articles 3-5 of the proposed Copyright Directive.

²¹ *Sabam/Netlog*, para. 23.

²² *Sabam/Netlog*, para. 38.

²³ *Sabam/Netlog*, para. 49.

²⁴ *Sabam/Netlog*, para. 50.

²⁵ *Sabam/Netlog*, para. 45.

Article 13 does not put in place a proper process for the use of content recognition technology in order to reach a decision whether to restrict access to particular content. The only safeguard found in Article 13 would become relevant once the decision to restrict access has been taken, i.e. the availability of complaints and redress mechanisms.³⁰

Notice-and-action procedures are one example of processes, although there is a range of variations and not all notice-and-action procedures are well balanced. However, the EU legislature has up until now always postponed the task to harmonise through hard law or soft law such procedures, although such a possibility had been envisaged right from the beginning by the drafters of the E-commerce Directive.³¹

Notice-and-action procedures are all the more important since the right to freedom of expression is not the only fundamental right at stake. The right to data protection in the EU Charter and the right to the respect of one's private life imply following CJEU case law that the systematic processing of all or most user information to prevent copyright infringement raise serious concerns. Yet notice-and-action procedures are based on the premise that the processing undertaken by rightholders is only partial as per definition rightholders do not have access to the entirety of user information. In addition, notice-and-action procedures make possible the coupling of a second stage consisting in an assessment of the context in which the copyright work at stake is actually being borrowed from. This does not mean that notice-and-action procedures cannot be partially automated,³² at least at the detection stage. As a result, the use of content recognition technology should not be equated to the implementation of upload filters.

Amending Article 13, Recitals 38 & 39

In its draft report,³³ rapporteur Therese Comodini Cachia proposes to amend Article 13 and Recitals 38 and 39. The amended version of Article 13 does not refer to content recognition technology any more. Because of the confusion widely spread between the use of content recognition technology and the implementation of upload filters this disappearance could be seen as an improvement of the text. Besides, it is now clarified that intermediary providers would not be required to implement upload filters, although it is not entirely clear who would count as “information society service providers [that] are actively and directly involved in the making available of user uploaded content to the public and where this activity is not of a mere technical, automatic and passive nature.” Nevertheless, the reference to “appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders for the use of their works” is maintained. Whether such a drafting is enough to make it clear to both national legislatures and judges that mandatory upload filters should not become a requirement could still be questioned.

With this said, the new paragraph 2a adds that:

“The measures referred to in paragraph 1 shall be implemented without prejudice to the use of works made within an exception or limitation to copyright. To this end, Member States shall ensure that users are allowed to communicate rapidly and in an effective manner with the rightholders who have requested the measures referred to in paragraph 1 in order to challenge the application of those measures.”

³⁰ Article 13(2) of the proposed Copyright Directive provides that: “Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.”

³¹ See Article 21(2) of the E-commerce Directive.

³² See e.g. P. Zhang, S. Stalla-Bourdillon and Lester Gilbert (2016), A content-linking-context model for “notice-and-takedown” procedures In WebSci '16 Proceedings of the 8th ACM Conference on Web Science, ACM New York, NY, USA, p. 161-165, <https://eprints.soton.ac.uk/397678/>; P. Zhang, S. Stalla-Bourdillon and Lester Gilbert (2017), A content-linking-context model for “notice-and-takedown” procedures, Journal of Web Science, Forthcoming.

³³ Draft report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8 0383/2016 – 2016/0280(COD)), Committee on Legal Affairs, Rapporteur Therese Comodini Cachia, Rapporteur for the opinion Catherine Stihler 13 March 2017. Therese Comodini Cachia has been replaced by Axel Voss. The vote on the report is scheduled for 10 October 2017. Three opinions have been adopted respectively by IMCO, CULT and ITRE, [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0280\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0280(COD)).

Such a paragraph should therefore be read as requiring an assessment of the applicability of copyright exceptions before the decision to restrict access to a contentious material is taken.

It is true that the expression content recognition technology does not disappear completely from the text of the amended proposal and is maintained in the new version of Recital 39, which reads as follows:

“Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies.

In such cases, rightholders should provide the necessary data to allow the services to identify their content...”

The amended version of Recital 39 still feeds on confusion. At least two interpretations are possible: either Recital 39 still implies that content recognition technologies should be systematically used by online platforms in an attempt to detect potentially infringing content or Recital 39 implies that content recognition technologies should be used after the reception of a notification to check whether the claim made in the notification is legitimate. Importantly, such a check should not be seen as superfluous as notice-and-action procedures can be abused and have been abused in the past.³⁴ As it should be clear from the foregoing, the second interpretation should be preferred. With this said, whether online platforms shall be permitted, without additional licenses, to use reference files to check the legitimacy of claims made in the context of notice-and-action procedures is not explicitly stated in the amendment.

Concluding remarks

Making upload filters a requirement for certain online platforms is an ill-conceived policy at least for two reasons. First, mandatory upload filters are not meant to ensure a fair redistribution of value between the different stakeholders involved in the value creation process. Second and more importantly, they raise serious fundamental rights concerns and appear incompatible with the EU acquis broadly defined, including the EU Charter. Making the copyright framework fit for purposes in the digital single market would require dedicating time and energy to the simplification of the exceptions landscape and streamline processes such as notice-and-action procedures to the benefit of European culture and society.

³⁴ See e.g. Jennifer M Urban, Joe Karaganis, and Brianna L. Schofield (2016), Notice and Takedown in Everyday Practice. UC Berkeley Public Law Research Paper No. 2755628, <http://ssrn.com/abstract=2755628>.

Addressing the value gap on user-generated content platforms from the perspective of weaker copyright holders

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Introduction

In a piece published on The Guardian in October 2013, the former leader of Talking Heads, David Byrne, was very pessimistic about how the Internet would have impacted on the commercial value of copyright.¹ Byrne argued that streaming services such as Spotify and Pandora might be good to discover new music but they bring no income to today's artists across the creative industries.² Byrne's voice has not been isolated in emphasizing a situation that is due not only to the notoriously weak bargaining power of the average authors and performers vis-à-vis content producers (e.g., record labels, film studios, etc) but also to the widely uncompensated dissemination of copyright works on user generated content platforms and social media.³

From the outset of the so-called 'Web 2.0', the preservation of the incentive/reward rationale of copyright on online platforms that encourage and enable user creativity and participation has been a highly debated and complex problem. It is still unclear how copyright works and materials that users share and make available to others without the authorization of the respective rights-holders should be identified and removed. More than ten years after the first publication of a YouTube video,⁴ this question is still valid and open in Europe because of the legal uncertainties that characterize the regime of liability of providers of such services in different jurisdictions.

A copyright reform proposed by the European Commission in September 2016 seeks to bring the aforementioned uncertainties to an end.⁵ Notwithstanding its title (i.e. 'Copyright in the Digital Single Market') the priority of the draft directive is not the attainment of territorial unification or integration of digital markets. At least when it comes to the business-related aspects of the draft directive, the main goal is, rather, the achievement of a well-functioning market place for creative works through a EU-wide, more effective and broader protection of copyright. This objective is pursued through several provisions that aim at bringing greater fairness and transparency in the assignment and enforcement of copyright, also in the domain of user generated content. As acknowledged in the impact assessment that accompanies the directive proposal, licensing practices in this sector have been very difficult to develop. One of the main assumptions the directive proposal has drawn upon is that the advent of user-generated platforms and social media in the last decade has triggered a significant erosion of the value of copyright because of the central role these platforms have gained in making creative works available to the public and given the widely unlicensed character of the copyright works they provide access to.⁶

1 David Byrne, 'The Internet will suck all creative content out of the world', The Guardian, 11th of October 2013.

2 Byrne mentioned the example of the song of the summer 2013, 'Get lucky' by Daft Punk, which made the two members of the band earn approximately 13,000 USD each, as a result of 104,760,000 Spotify streams this track reached until the end of August 2013 ("What happens to the bands who don't have International summer hits?", he commented).

3 IFPI & IMPALA (coordinators), Securing a sustainable future for the European music sector, Letter addressed to Jean-Claude Juncker on 29th of June 2016 (signed by almost 1300 artists and songwriters from across Europe and who regularly perform in Europe as of 18th of July 2016). In the letter the artists claimed that the future of music was jeopardized by a substantial "value gap" caused by user upload services like Google's YouTube, which are taking value away from the music community and from its artists and songwriters.

4 The first video was uploaded on YouTube on the 23rd of April 2005 by Jawed Karim (with the title "Me at the zoo").

5 European Commission, Proposal for a directive of the European Parliament and of the Council, COM(2016)593 final, Brussels, 14.09.2016 (hereinafter '2016 directive proposal' or 'draft directive').

6 The central role of such companies and of their services is also due to their very successful businesses: YouTube's value was estimated to be \$70 billion and its revenues in 2015 were reported to be \$9 billion; Pinterest has been valued \$12 billion in 2015; Soundcloud \$700 million in 2014, etc. These figures are reported in European Commission, Impact assessment on the modernisation of EU copyright rules, Commission Staff Working Document, SWD(2016) 301 final, Part 1/3, Brussels, 14.09.2016, p. 146 (hereinafter 'Impact assessment').

From a legal point of view, the debate has been widely monopolised by the question about whether and how these kinds of platforms should be granted the special immunity from liability Directive 2000/31 (e-Commerce Directive) created for providers of hosting services when the web infrastructure was in its infancy.⁷ The provision of Article 13 of the 2016 draft directive seeks to bring clarity on this front, entailing that interactive services which play an active role in giving access to user generated content (e.g., by optimising the presentation of the uploaded works or promoting them) should be subject to copyright and be obliged to take measures to make unauthorised contents inaccessible.⁸

As we will see, this means that platforms such as YouTube, Facebook, Twitter, Instagram, Pinterest, Vimeo and Soundcloud and many others would be expected to clear copyright for the contents that pop up on their platforms and to implement technologies which ensure an accurate identification of those items made available by their service subscribers without the permission of copyright holders.

The 'value gap' provision

Article 13 of the draft directive aims at creating an obligation for providers of user-generated online content platforms to prevent the availability of unauthorised works on their services by means of appropriate and proportionate measures, for instance by implementing effective technologies. In the copyright reform debate and in the policy documents used for the preparation of the legislative proposal the provision has been constantly associated to a 'value gap' (from an expression used for the first time by the music sector) that would exist to the detriment of the creative sector because of the widely uncompensated use of copyright works.⁹

The entities that would be obliged to make un-licensed works inaccessible are "... providers that store and provide to the public access to large amounts of works or other subject matter uploaded by their users ...". As clarified by the Commission, assessing the size (i.e. "large amounts") of a user generated content platform would require an analysis of combined factors, such as the number of users and visitors and the amount of content uploaded over a given period of time.¹⁰ Appropriate and proportionate measures to be implemented would include technologies - such as Google's Content ID, currently used across the YouTube platform - ensuring accurate identification of the works for which the platform devisers must have concluded licensing agreements with their respective copyright holders.¹¹ As it has been critically observed, the text of the Commission proposal could be better drafted in so far as it does not specify whether Article 13 would impose a new filtering obligation only on platforms with existing licensing agreements or - as it seems more correct, at least to me - on all platforms, regardless of these agreements.¹²

In essence, the provision at issue aims at re-affirming the basic copyright principle according to which whoever reproduces and/or communicates to the public works protected by copyright must obtain *prior* permission to do so from their respective copyright holders. Without such permission - under copyright law - unauthorised uses such as those happening on social media or online platforms certainly expose users to the consequences of copyright infringement. However, it still uncertain in the case law of the EU member states whether or not the platform deviser would be (directly or indirectly) liable for infringements of their subscribers.¹³

A limited liability of platforms has somehow been entailed by judgments of the Court of Justice of the European Union (CJEU). In particular, the Court found that the unauthorised embedding of copyright works on social media is lawful in so far as the linked or embedded content has already been made already to the public with the consent of the copyright holder.¹⁴ The CJEU found also that the installation of permanent filtering measures on social networks for purposes of copyright enforcement would be excessively costly and burdensome for online platform and would eventually run against their freedom to do business online.¹⁵

From a formal point of view, Article 13 would not directly modify the regime of liability exemption granted to providers of 'hosting' services. The e-Commerce Directive, at the end, would not be amended. The draft text, in this regard, clarifies that Article 13 would be applicable also to providers who qualify for the existing exemption, in a way that the two layers of regulation would operate simultaneously and in a complementary manner. However, it is evident that the provision would avoid, with EU-wide effects, an excessively broad application of the 'safe harbour' exemption by not allowing national courts to shield online platforms from liability in case of online copyright infringement. What is controversial is the fact that the provision would change the allocation of responsibilities between copyright holders and service providers, with the consequence that the new law would veer away from the above-mentioned CJEU judgments that are deemed to guarantee a fair balance between the goals of online copyright enforcement and freedom to do business online.¹⁶

The central question, in my view, is whether such a change of policy is justified by the new function, purposes and features of online platforms and social networks, considering also that such interactive environment did not exist when the current legislation was drafted and enacted. If such services are no longer passive actors but increasingly determine - at least with regard to professionally produced content - how we have access to copyright works, why should we treat them differently from how we treat professional content providers, such as media companies? If such services, in addition to user creations, systematically give us access to contents we previously sought on radio and TV, why should we grant these platforms the privilege of not remunerating what their businesses rely upon? Are the platforms media companies "by accident"?

If the new provision were interpreted, as it seems fair, as presupposing the obligation for online platforms to enter into licensing agreements with copyright holders, the implementation of filtering mechanisms and similar technologies could be regarded as a practical consequence of that obligation. At the end of the day, the obligation to clear the right of making content available to the public is already provided under Article 3 of Directive 2001/29, which aims to ensure a high level of protection also in relation to interactive forms of making content available.¹⁷ Article 13 of the draft directive would just specify an existing obligation in the realm of user-generated content by urging platform devisers to do what the biggest platforms have already started doing, as the example of YouTube's 'Content ID' shows. Unlike the hosting providers from late 1990s, today's platform providers are in a position to ensure accuracy of content identification by relying on sector-specific content databases and to remove unauthorised contents at the best of their abilities. It goes without saying that such activity might be insufficient to prevent copyright infringement and the related technologies might be mistaken and/or imperfect in performing such tasks, especially with regard to certain types of work. However, because of the above-mentioned technological change, there is no reason in my view to leave the burden of monitoring user-generated content just to copyright holders (i.e. through notice-and-takedown mechanisms) and to not force platform devisers to co-operate with copyright holders in order to verify and, if necessary, to filter the contents they commercially exploit. In assessing the plausibility of such obligation one should carefully consider that online platforms are already tracing user access to digital content in order to run their advertising-based and user profiling businesses.

All these cases are mentioned in the Commission's impact assessment, p. 143.

14 See C-466/12, *Svensson v. Retriever Sverige AB* (2014) and C-348/13, *Bestwater International GmbH v. Michael Mebes* (2014).

15 See C-70/10, *Scarlet Extended SA v. Sabam* (2011) and C-360/10, *Sabam v. Netlog* (2012).

16 See the Open Letter of European Research Centres, p. 6.

17 Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright in the information society, OJ L 167, 22.06.2001, pp. 10-19.

7 Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.07.2000, pp. 1-16 (hereinafter 'e-Commerce directive').

8 See the 2016 directive proposal, recital 38.

9 Helen Smith, (IMPALA), Véronique Desbrosses (GESAC), Frances Moore (IFPI), 'Value gap is crucial for the music sector', *The Guardian*, 24th of July 2016.

10 See Impact assessment, p. 146.

11 See YouTube, *How Content ID works*, available at support.google.com.

12 European Research Centres (Amsterdam, Barcelona, Berlin, Cambridge, Glasgow, Munchen, Paris, Strasbourg, Tilburg, Torino), *EU Copyright Reform Proposals Unfit for the Digital Age*, Open letter to the Members of the European Parliament and of the Council of the European Union, 24th of February 2017, p. 6 (hereinafter 'Open Letter').

13 See the *GEMA v YouTube* cases in Germany (Higher Regional Court Hamburg, July 2015; Higher Regional Court Munich, January 2016), where the courts considered that, while YouTube presents itself as an alternative to Spotify and similar services, it does not carry out an act of communication to the public (which is carried out by the uploaders). A similar interpretation was given by the Court of Paris (January 2015) in the case *Kare Productions v YouTube*.

The European Commission's reasoning

In the impact assessment that accompanies the directive proposal, the European Commission pointed out that a legislative intervention on user-generated content and social networks is needed for copyright holders to re-gain control over the modes and conditions of online exploitation of their works. The Commission emphasized the necessity to continue to support and remunerate digital content creation at a time when, with the rise of interactive online environments, copyright holders have proven to be unable to rely on an undisputed legal obligation for platform and service providers to obtain permission for what their users/subscribers make available online and what the platforms gain through customized commercials.¹⁸

A situation of uncertainty, as regards such obligation, has arisen with regard to providers of social media and social network services because of their frequent inclusion, in the case law developed in various European jurisdictions, into the categories of hosting providers who benefit from the liability exemption under Article 14 e-Commerce Directive. The Commission acknowledged that this situation of uncertainty has significantly weakened the bargaining power of copyright holders and decreased the value for copyright content, especially with regard to TV broadcasts.¹⁹ On the one hand, online platform providers have offered to rights-holders – according to the impact assessment – mostly ‘monetization agreements’, which are regarded as being concluded on a voluntary basis, not as a result of an obligation of online platforms to clear copyright. On the other hand, these deals do not reflect the value (and the price) of the licensing agreements that copyright holders enter into with on-demand content suppliers such as Spotify, Deezer and Netflix and with TV broadcasters, who are therefore placed in a disadvantaged position vis-à-vis the user generated content platforms.²⁰

To motivate its decision to intervene, the Commission stressed also that the activities of providers of today's user generated content are unlikely to fall within the scope of the liability exemption created under Art. 14 of the e-Commerce Directive. The main reason for that is that the exemption, as explained by the Court of Justice of the European Union in a landmark decision,²¹ shall be reserved to merely technical and automatic activities, and not to services whose functionalities include content categorization, recommendations, playlists or the ability to share contents.²² In short, these functionalities make online platforms clearly distinct from the passive and unaware hosting providers the drafters of the e-Commerce Directive had in mind when shaping the exemption.

Aren't users already obliged to not publish unauthorized works?

The rise to prominence of video-sharing platforms such as YouTube, Daily Motion and Vimeo, social networks like Facebook and Twitter and other interactive services or dedicated platforms for photos (e.g. Instagram, Pinterest) and sound recordings (e.g. Soundcloud) has significantly expanded the opportunities for Internet users to access copyright works and to become authors themselves. As of October 2015, YouTube had 1,3 billion users (i.e. one third of all Internet users) who upload 400 hours of video content every minute; Daily Motion has 300 million users watching 3,5 billion views every month; Vimeo has a monthly audience of approximately 170 million users and 35 million registered users; Soundcloud's user community has grown exponentially, going from 11 million users in 2011 to 150 million in 2015 and 250 million in 2016.²³

From a legal point of view, access to such platforms is made conditional upon the acceptance by each single user/subscriber of terms and conditions that are relevant from a copyright-related perspective. Standard terms and conditions that apply to online content platforms contractually oblige subscribers not to share and publish contents created by third parties and which they cannot lawfully dispose of.²⁴ This means that no ‘value gap’ provision would have

¹⁸ Commission's impact assessment, p. 139.

¹⁹ Impact assessment, p. 141.

²⁰ *Ibidem*.

²¹ See C-324/09, *L'Oreal and Others v. eBay International AG and Others* (2011).

²² Commission's impact assessment, p. 138.

²³ *Ibidem*.

²⁴ See, for instance, YouTube's (<http://youtube.com/terms>) and Facebook's (<http://facebook.com/terms>) Terms of Service.

been necessary if the online platform devisers had effectively enforced their own terms of service with regard to the upload of unauthorized materials. No copyright infringement would have massively materialised in the era of Web 2.0 if the online platforms, from the outset, had paid attention (both legally and technologically) to the contents entire user communities were sharing on their networks. In this regard, what the value gap provision is seeking to achieve now is to make *legally* explicit what has already been expressed and required *contractually*, but not properly enforced, to the detriment of the value of unauthorised creative works.

A lose-lose situation for copyright holders

It is easy to understand why user-generated content platforms and social networks give rise to a ‘lose-lose’ situation for copyright holders if one considers the two aspects below:

1. Copyright holders have not been able to rely on a proper enforcement of their rights when someone else makes available their works without permission within an online platform. If an author or a copyright holder has no resources to monitor content generation on platforms and to send notices to take content down, her copyright remains ineffective unless the platform deviser acts spontaneously and removes the unauthorised work. It must be borne in mind that notice-and-takedown procedures have been mostly used by music and film majors and by their respective anti-piracy bodies, for which these industries have invested significant amounts of money across Europe. To the contrary, the notice-and-takedown mechanism has never worked properly for individual creators such as photographers, writers, composers and film or video makers and small producers because of the lack of time and money to be dedicated to online enforcement procedures.
2. The standard terms and conditions which are accepted by users of social networks and user-generated content services require subscribers to give platforms such as YouTube, Facebook and Instagram a global, free and perpetual licence for the platforms to use and exploit all contents (e.g. writings, photos, music, multi-media and audiovisual works) authored by users. This means that whoever wished to make available his or her works in order to take advantage of the remarkable exposure opportunities provided by large online platforms would instantaneously lose – especially in the absence of bargaining power, as in the case of individual creators and small-size content producers – all remuneration opportunities by the condition of gratuity imposed under standard terms and conditions. Moreover, the “exposure” effects the online platforms have strongly advocated are primarily beneficial to performing artists (i.e. musicians, actors) who could view uncompensated viewings on user upload platforms as a way to boost their live performance businesses. However, this is not a mechanism that fits the business of non-performing authors of works such as films, videos and other multi-media works for which the making available on a user-generated content platform inevitably compromises the exploitation and remuneration opportunities for each of those works.

Addressing the value gap from the perspective of weaker copyright holders

If one considers the relevance of copyright and of its effective enforcement for the purpose to preserve and stimulate diversity of content creation, Article 13 can be easily placed in relation to other measures of the draft directive that seek to help copyright holders gain a better position to negotiate and licence their online rights and to gain adequate remuneration. From this angle, the ‘value gap’ provision can be viewed as a complementary tool to achieve a broader policy objective, which is that of ensuring a fair share of income to copyright holders who – under the current legal framework – have been unable to gain adequate revenues from online uses of their works.

For the first time in the history of European copyright policy, the 2016 draft directive targets the contractual relationships between individual creators and their assignees with the intent to introduce a common approach of transparency requirements across the EU and to strengthen the bargaining power of original copyright holders.²⁵ To this end, Article 14 of the proposal

²⁵ Commission's impact assessment, pp. 173 ss.

obliges Member States to ensure that authors and performers be given, in accordance with the specificity of each sector of the creative industries, a right to timely and adequate information on the modes of exploitation of their works and the related revenues.²⁶ Moreover, Article 15 gives authors and performers the possibility of seeking contractual adjustments whenever their originally agreed remuneration proves to be disproportionately low in comparison to the earnings and benefits derived from the online exploitation of their works.

The above-mentioned provisions show that there is a clear attempt to enable copyright holders to take advantage of the expected increase of revenues produced by the implementation of Article 13. This is even more important for copyright holders with a weaker bargaining power in so far as their newly created rights to obtain sector-specific and timely information and an adequate remuneration – to be sought also through contractual adjustments – were made effectively enforceable and non-waivable on EU-wide grounds.²⁷

It would be much easier for individual copyright holders to licence and price their works, also through their collecting societies, if they knew how profitable their use has been in interactive environments. This would be true not only with regard to user generated content platforms and social networks but also in the realm of on-demand services. It is therefore not surprising that, among the hundreds of amendments which have been tabled in the European Parliament, a few of them seeking to pursue a fair remuneration strategy in a more straightforward way (i.e. through the codification of a right to remuneration to be paid directly to authors and performers for the making available of their works by on-demand content providers) were eventually incorporated in the opinions sent by the Culture and Industry Committees to the Legal Affairs Committee on the 11th of July 2017.²⁸

If the final version of the directive established a clearer and stronger link between Article 13 and the rights to information and to fair remuneration of authors and performers under Articles 14 and 15, the increased output coming from user generated content could be viewed as an equivalent of the right to equitable remuneration that the aforementioned amendments seek to introduce in the domain of on-demand content deliveries. Even though the structure of the two rights would be substantively different, both proposals aim at creating an obligation to remunerate copyright holders that would be particularly important for individuals and small companies having no or little bargaining power vis-à-vis the online platforms and the on-demand content suppliers. As far as online platforms are concerned, as we have seen, the draft directive seeks to place authors and performers in a position to better negotiate and licence their rights, also through their respective collecting societies. According to the proposed directive, contractual remedies will have to be made available each time the originally agreed remuneration of authors and performers proves to be disproportionately low in comparison to the (transparent) revenues generated by the exploitation of their works. As regards on-demand services, instead, the amendments proposed by the Culture and Industry Committees aim at codifying a EU-wide right to remuneration to be enforced against the providers of such services and to be administered by collecting societies of authors and performers, in both the music and audiovisual sectors.

Critical remarks

The proposal to enact the provision of Article 13 has been widely criticized in the current debate in so far as it would stifle innovation and user participation in online environments and would oblige platforms to implement technologies in sectors where content identification is flawed

and unreliable.²⁹ Someone has also blamed the Commission for having inserted this provision in the directive having just one company and business in mind, i.e. Google's.³⁰ A brief reflection on the aforementioned critical remarks seems to be useful:

1. *Innovation and user participation*: in an environment where a high level protection of copyright is mandated under all copyright directives and regarded as an intrinsic guarantee for the creation of professional content, interpreting the duty to remunerate authors and producers of the content a business relies upon is a misconception of what intellectual property is about. It is true that the platforms that have started their activities and developed in the last decade have taken advantage of an unclear legal framework and of a loophole in widely using copyright works for free. However, this has come with a price, which is the erosion of the commercial value of creative works and the frustration of online remuneration opportunities for professional content creators. It seems obvious to me that the value of professional content should be protected as a crucial element of the 'Digital Single Market' strategy.
2. *Accuracy of content identification*: in certain sectors (music, for instance) content identification technologies are more developed than in others, depending also on the availability of databases copyright holders place at the disposal of online platforms to facilitate fair and proportionate filtering mechanisms.³¹ The fact that in other sectors, such as photography, such databases and technologies are not equally available is, in my view, a further reason to introduce the provision of Article 13, which would give platform devisers and rights holders an incentive to co-operate and to improve filtering and content identification technologies.
3. *Re-allocation of responsibilities*: as it has been pointed out above, the value gap provision entails a different regulatory treatment for a kind of intermediation in digital content distribution which is characterised by the active role of the platform and considers the opportunities of content identification and nuanced filtering mechanisms which has become available recently. The e-Commerce Directive and notice-and-takedown procedures would still matter and remain applicable in their own sphere of application.
4. *Freedom to do business online*: the technological measures required under the value gap provision would have to be fair and proportionate and should not cause 'over-blocking' or restriction of free and legally unprotected materials made available by the platform users.
5. *Addressees of the provision*: it is paradoxical that the initiative of the Commission might have been taken as a measure to be enacted just against the provider of one user generated platform, i.e. YouTube, and not also as a tool to foster copyright clearance activities on multiple platforms. YouTube's deviser, i.e. Google, was actually a pioneer in the development of content identification technologies and it is probably the platform that is best suited to achieve a well-functioning marketplace for copyright works on its platform. Due to such advancement of YouTube on content identification, it is evident that the enactment of the value gap provision would be more costly and demanding for other companies and platforms where licensing agreements and copyright enforcement measures have been poor or non-existing. The problem of the provision is actually the opposite, if one considers that the obligation to filter copyright works might end up being applicable to non-commercial user-generated platforms such as Wikipedia. In this respect, an amendment of Article 13 aimed at excluding non-for-profit platforms from the scope of application of the new provision could be a suitable solution.

Conclusion

After having briefly explained the rationale and policy objectives of Article 13 of the proposal for a directive on 'Copyright in the Digital Single Market' (the so-called 'value gap' provision), this paper has provided a brief reflection on the nature of the obligation to filter and make unauthorized copyright works inaccessible on user-generated content platforms. In particular, the

²⁶ The Commission pointed out that the transparency obligations which are currently in force under national laws are either too generic or applicable just to certain sectors: see Impact assessment, p. 176.

²⁷ The Commission believes that this set of new measures would provide creators with practical tools to negotiate and obtain appropriate remuneration for online uses of their works: see Impact assessment, pp. 190-191.

²⁸ See Society of Audiovisual Authors (SAA), *European Copyright: Parliament Committees vote for an unwaivable right to fair remuneration for audiovisual authors*, 11th of July 2017, available at <http://saa-authors.eu>, and AEPO-ARTIS, *Statement of Fair Internet Coalition in reaction to ITRE and CULT votes on 11 July 2017*, which welcomed the introduction of such an unwaivable right. The opinions of the two committees will be examined by the leading committee on the file (Legal Affairs) in September 2017.

²⁹ Open Letter, p. 1.

³⁰ See Agustin Reyna, 'A tale of two industries: the "value gap" dilemma in music distribution', *Internet Policy Review*, 8th of August 2017.

³¹ For instance, a content identification technology provider such as Audible Magic has indicated positive identification rates that exceed 99%: see <http://audiblemagic.com/why-audible-magic/>.

paper has taken the current situation of individual creators and small-size independent content producers into specific consideration, pointing out that the online distribution of their works triggers a 'lose-lose' situation. On the one hand, the excessively burdensome and costly nature of notice-and-takedown mechanisms do not place these right-holders in a position to effectively enforce their rights when unauthorised users makes them available on online platforms. On the other hand, such rights-holders have no contractual freedom under standard terms and conditions of use of these services to licence and effectively monetize their own creations when they decide to join online platforms and social networks and to create their own, official accounts. The paper suggests that the provision of Article 13 could have a much stronger justification if its goal to fill a gap in the value chain of online content were more closely linked to the codification of a right to fair remuneration to be achieved through effective rights and remedies (i.e. a right to information about the levels of remuneration and the modes of online exploitation; a right to contractual redress in case of disproportionately low remuneration) that the 2016 draft directive embodies under Article 14 and 15.

Form and Substance in the Value Gap Proposal¹

Tito Rendas²

In September 2016, the European Commission published a copyright reform package, including a new Directive on copyright in the Digital Single Market. One of the Directive's most controversial aspects is the so-called "value gap proposal" provided in Article 13 and accompanying recitals.

This proposal suffers from a number of fundamental problems, of both a formal and substantive nature. From the formal point of view, the proposal (i) includes normative provisions in the recitals, (ii) lacks basic clarity, and (iii) uses trivially vague language. On the substantive side, if passed into law the proposal will (i) thwart digital innovation and (ii) disproportionately restrict the fundamental rights of Internet users and platform operators.

Given the seriousness of these flaws, the EU institutions should consider deleting or, at least, significantly rewriting the proposal.

Introduction

In September 2016, the European Commission published a copyright reform package³. The most controversial instrument in this package⁴ is the Directive on copyright in the Digital Single Market⁵ (draft Directive). The main reason behind the controversy, along with the proposed right for press publishers⁶, lies in the so-called "value gap proposal" provided in Article 13 and Recitals 37 to 39.

Over the last few years, rightholders and their representatives have been floating the idea that there is a value gap in the online content marketplace that is in need of closing. In their lobbying efforts, the value gap⁷ has come to replace piracy as the main digital threat to the survival of the creative industries⁸. The idea is that rightholders face difficulties when seeking to license and be remunerated for the online distribution of their works⁹. With the evolution of digital technologies, platforms of user-uploaded content (think of YouTube, Dailymotion and Vimeo) have become important vehicles for such distribution. According to rightholders, these platforms inappropriately invoke the "hosting safe harbour" laid down in Article 14 of the E-Commerce Directive in order to argue that they are under no obligation to conclude licensing agreements. Rightholders claim that, as a result, they are not always able to obtain a fair remuneration from platforms of user-uploaded content. The unfairness, they add, is made evident by the difference between the remuneration paid by these (typically ad-funded) platforms and that paid by subscription services, such as Spotify Premium and Deezer¹⁰.

¹ The title of this contribution borrows from the title of one of the most influential American law review articles of the late twentieth century: Kennedy (1976).

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³ With the fundamental purpose of "modernising" EU copyright rules for the digital age, the package comprises one Regulation on copyright and related rights for online transmissions and retransmissions of television and radio programmes and one Directive on copyright in the Digital Single Market, as well as two other instruments dedicated to implementing the Marrakesh Treaty into EU law.

⁴ The number of amendments submitted by MEPs – almost 1,000 – may serve as an illustration of the degree of controversy. See <http://en.euractiv.eu/wp-content/uploads/sites/2/2017/05/JURI-copyright-amendments.pdf>.

⁵ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final.

⁶ Criticising the introduction of a new right for press publishers, see, e.g., Hugenholtz (2016); Kretschmer et al. (2016); Peukert (2016); Ramalho (2017); and Geiger et al. (2017).

⁷ The expression "transfer of value" is sometimes used instead of "value gap". See, e.g., Lucas-Schloetter (2017).

⁸ See, e.g., the petition at <http://www.makeinternetfair.eu>.

⁹ See Recital 37.

¹⁰ See IFPI (2015), p. 23.

Grounded on this rationale, Article 13 and Recitals 37 to 39 of the draft Directive attempt to address this gap, by reinforcing the position of rightholders to negotiate and be remunerated for the online use of their works by platforms of user-uploaded content¹¹.

Article 13(1), the proposal's centrepiece, reads as follows:

Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

Since the Commission released the draft Directive, numerous independent academics have raised their voices against the value gap proposal¹². With the present contribution, I merely reinforce the chorus of critics, by discussing those that are, in my view, the major problems with the proposal.

These problems are of a twofold nature: formal and substantive. Formal problems and substantive problems are naturally intertwined, in that poor drafting choices often affect the provision's substance. For clarity of exposition, nonetheless, I will treat these problems separately. The problems that arise from the way in which the Commission chose to formulate the proposal, even where these choices have substantive repercussions, are treated under the section "formal problems" (1.). On the other hand, the problematic nature of some of the options made by the Commission is purely material and independent from the exact formula employed in the text of the Directive. I address these shortcomings under the section "substantive problems" (2.).

1. Formal problems

1.1. The proposal includes normative provisions in the recitals

The departure point of the proposal seems to lie in Recital 38, which starts by stating that online platforms, in storing and providing public access to protected content uploaded by their users, perform an act of communication to the public. Abruptly, though at the same time stealthily, a significant change to the copyright *acquis* is proposed: if the text of Recital 38 is approved as it stands, *all* platforms of user-uploaded content, in providing their services, will be *prima facie* liable for communicating works to the public.

It is important to note that Recital 38 is not merely codifying a CJEU-developed construction¹³.

On the one hand, throughout a long line of case law, the CJEU has shaped a complex concept of communication to the public, composed of many interdependent criteria. None of these criteria, nor the way in which they interact with each other, are reflected in the value gap proposal. Instead, Recital 38 simply states that platforms go beyond the mere provision of physical

facilities and violate the right of communication to the public, leaving no room for further considerations related to the nature of the platform's intervention or to its profit-making intention – considerations that the CJEU has found essential in recent case law¹⁴.

On the other hand, when the draft Directive was published there was no clear indication in the copyright *acquis* that the concept of communication to the public within the meaning of Article 3(1) InfoSoc covered the activities of platforms of user-uploaded content. Arguably, some such platforms would nonetheless be found liable on grounds that they exerted an "indispensable intervention" in providing access to protected works¹⁵. This was made clearer in the recent *Pirate Bay* judgment, in which the CJEU held that an online search platform that indexes, categorizes, deletes and filters content may actually engage in acts of communication to the public¹⁶. But the nature of the intervention of BitTorrent websites like The Pirate Bay differs from that of other platforms that store and provide public access to user-uploaded content. This CJEU "precedent" could well be found inapplicable to platforms that do not show as high a degree of editorial intervention as The Pirate Bay¹⁷.

The Commission therefore (mis)uses Recital 38 of the draft Directive to reshape the concept of communication to the public, extending its coverage to new situations. As is common knowledge among jurists, in general, and among those interested in EU law matters, in particular, recitals are (supposed to be) interpretative tools. According to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, "[t]he purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. *They shall not contain normative provisions or political exhortations*"¹⁸. The CJEU has also acknowledged that recitals should not perform a normative role, holding that "the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question"¹⁹.

In agreeing that recitals should not assume the role of their act's operative part, EU institutions show a palpable concern with legal certainty and with the protection of the expectations of legal subjects. In the draft Directive, the Commission grossly neglects these values, by including a crucial normative development of the copyright *acquis* in Recital 38²⁰. Assuming such a development is to be adopted at all, it should be included in the operative part of the Directive and subject to the corresponding scrutiny.

1.2. The proposal lacks basic clarity

Legal norms, if they are to give their subjects any guidance, must be clear. "The desideratum of clarity", in the words of a celebrated legal theorist, "represents one of the most essential ingredients of legality"²¹. The value gap proposal fails to achieve that desideratum. In fact, Article 13(1), read together with Recital 38, is a remarkably confusing provision²².

As seen, Recital 38 determines that online platforms that store and provide public access to protected content uploaded by their users perform acts of communication to the public. These platforms are thus obliged to conclude licensing agreements with rightholders, *unless* they are eligible for the hosting safe harbour provided in Article 14 E-Commerce. How a platform's liability for communicating works to the public relates to the protection conferred by the safe harbour is not made entirely clear. Is the hosting safe harbour supposed to work as a defence

14 See CJEU, *GS Media*, C-160/15, paras. 47–55, and CJEU, *Filmsteil*, C-527/15, paras. 41–53.

15 See Rosati (2016), p. 20.

16 See CJEU, *The Pirate Bay*, C-610/15, in particular para. 38. See also Rosati (2017), p. 15, noting that this recent judgment brought CJEU case law closer to the Commission's legislative initiative.

17 See Angelopoulos (2017), p. 32.

18 Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, para. 10 (emphasis added). Similarly, see Interinstitutional Style Guide, <http://publications.europa.eu/code/en/en-120200.htm>, stating that "[r]ecitals set out the reasons for the contents of the enacting terms (i.e. the articles) of an act".

19 CJEU, *Nilsson*, C-162/97, para. 54.

20 In the words of Angelopoulos (2017), p. 31, "[f]or a nonchalant statement hidden in a recital, this represents a dramatic development of EU copyright law".

21 Fuller (1964), p. 63.

22 See Angelopoulos (2016) and European Copyright Society (2017), p. 7, deeming the provision's language "ambiguous"; and CREATe (2017), stating that the proposal is "poorly drafted".

11 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market', COM(2016) 592 final, p. 8.

12 See Stalla-Bourdillon et al. (2016a); Stalla-Bourdillon et al. (2016b); Angelopoulos (2016); Angelopoulos (2017); European Copyright Society (2017); Max Planck Institute for Innovation and Competition (2017); and CREATe (2017). Scholars dispute the very existence of a "value gap". See, e.g., Frosio (2017), p. 7 (arguing that the "value gap" rhetoric is "fabricated" by rightholders and "scarcely concerned with empirical evidence"), and CREATe (2017), p. 6 (claiming that "[t]he idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis").

13 Such a codification of judge-made law would not be unprecedented. For instance, Article 4(2) of the InfoSoc Directive codified the rule of exhaustion of the distribution right developed by the CJEU in *Deutsche Grammophon*, C-78/70.

against primary liability, in the sense that if the platform acts neutrally²³ its liability for infringing the right of communication will be negated? Or is the platform's non-neutrality (*i.e.*, its active role) a requirement for it to be considered as performing an act of communication? Who bears the burden of showing what?

In any case, proceeds the recital, *regardless* of whether platforms are protected by the safe harbour, they need to take measures to guarantee the protection of content, so as to ensure the functioning of licensing agreements... agreements which, as stated in the very same recital, protected platforms do not need to conclude. Imposing on platforms that are immunised by the hosting safe harbour an obligation to ensure the functioning of licensing agreements that they need not have concluded is, at best, puzzling. For the sake of analysis, however, let us consider the case of a platform that provides its service non-neutrally, being thus ineligible for the safe harbour, and that therefore undoubtedly needs to license the content it hosts (at least according to Recital 38).

In that case, Article 13(1) kicks in, imposing two alternative obligations upon the platform, in order to try and close the value gap: the platform should (a) take measures to ensure the functioning of agreements concluded with rightholders for the use of their content; or (b) take measures to prevent the availability on their services of content identified by rightholders through the cooperation with the service providers.

The first obligation – when interpreted in light of Recital 38, which uses similar language in its third paragraph (“ensure the functioning of any licensing agreement”) – translates into an obligation to take appropriate and proportionate measures to ensure the protection of content, such as implementing “effective technologies”. These technologies, judging by the second sentence of Article 13(1), Article 13(3) and Recital 39, can be no other than content recognition technologies.

Alternatively, platforms should take measures to prevent the availability on their services of content identified by rightholders. What are the precise measures that platforms should take? The suggestion that Article 13(1) makes, yet again, is that platforms use “effective content recognition technologies”. The question then becomes: How, in practical terms, does preventing infringement (second obligation) differ from ensuring the protection of content (first obligation)? Are they truly alternative – and, by necessity, *different* – obligations? A combined reading of Recital 38 and Article 13(1) indicates that the two (supposedly alternative) obligations laid down in the latter are, in reality, one and the same obligation – and a rather worrying one²⁴: that online platforms implement content recognition technologies. But it may well be that the Commission intended to give online platforms a true choice. What that choice is, though, remains unclear.

In sum, as I hope to have successfully showed, several parts of Article 13(1) and Recital 38 lend themselves to importantly diverging interpretations. This lack of clarity is possibly the product of a difficult, compromise-ridden drafting process. Understandable as that is, it is safe to anticipate that the proposed formulation will result in different transpositions by Member States, thus fostering disharmony and legal uncertainty.

1.3. The proposal uses trivially vague language

Vague words are words that have borderline cases, *i.e.* cases in which “one just does not know whether to apply the expression or withhold it, and one's not knowing is not due to ignorance of the facts”²⁵. Typical examples of vague words are gradable adjectives like “bald”, “rich” and “mature”. We all know people that are clearly bald and people that are clearly not bald, but we also know people that are borderline bald (I would count myself as one such person). Legislators tend to avoid employing these trivially vague terms. For instance, in establishing the legal

capacity to vote, legislators set an age of majority, instead of stipulating that “mature citizens” are entitled to vote²⁶. And if legislators want to tax rich people more heavily, they usually do so by reference to a numerical level of income, instead of imposing a higher rate on “rich people”²⁷.

Sometimes, however, vagueness in the law is useful or simply unavoidable. The most notable examples of vagueness in the law are cases of extravagant vagueness²⁸. Every jurist is familiar with examples of legal norms deploying this type of language, such as norms exempting the “fair use” of protected works from liability or norms requiring adherence to a standard of “reasonable care”. In certain circumstances, the situations that ought to be covered by a norm are so diverse that vague language allowing for a multi-dimensional evaluation is needed. One scholar offers “child neglect” as an example of a situation where a myriad of factors need to be taken into account: “[y]ou just cannot stipulate that, say, leaving a child unattended for *n* hours would constitute neglect”²⁹.

in defining its subjective scope of application, Article 13(1) uses a vague adjective. The provision applies to information society service providers that store and provide to the public access to “large amounts” of content uploaded by their users. “Large”, like “rich” or “mature”, is a trivially vague word – the type of vagueness that the law normally tries to avoid. In most cases, instead of resorting to this sort of language, the law defines a more or less precise threshold for its application. The exercise of defining such a threshold is, of course, fairly arbitrary; but there are very good reasons for doing it, namely legal certainty and efficiency.

While in some cases the flexibility provided by vague language is needed, the situation regulated by Article 13 is far from being one such case. If online platforms are to comply with an obligation to implement certain exacting measures, they need a high degree of guidance. They need to know, at the very least, if they are subject to that obligation or not. It is beyond doubt that YouTube and Dailymotion are platforms hosting “large amounts” of user-uploaded content. But what should be said about the Portuguese platform Sapo Vídeos or the German tape.tv? Do these platforms host large or non-large amounts of content? Where and how should the line be drawn?

2. Substantive problems

2.1. The proposal thwarts digital innovation

By now, you hopefully agree that the value gap proposal is not an example of good legal drafting. Still, you may be tempted to downplay the criticism: after all, form is not substance and substance trumps form. On the substantive front, however, the value gap proposal does not fare any better.

As seen, in what regards the measures for copyright protection that should be adopted by platforms hosting large amounts of user-uploaded content, the only suggestion given by Article 13(1) and the cited recitals is the implementation of content recognition technologies.

This suggestion, if transposed by Member States as a mandatory requirement, has the potential to seriously threaten innovation in the digital economy. Requiring online platforms to use such technologies entails erecting a market entry barrier that is very costly to overcome. Google, for example, reported that, by 2016, it had invested more than \$60 million on its ContentID system³⁰. An obligation to filter user uploads would discourage investment in the development of this type of platforms, with indirect adverse effects on user creativity.

The fact that the requirement may be imposed only upon hosts of “large amounts” of content does not eliminate the problem. At a certain point in their growth (a point that Article 13 leaves indeterminate), smaller platforms will be forced to invest in technology the development and

26 See Endicott (2011), p. 17.

27 See Marmor (2014), p. 87.

28 The term “extravagant” associated with these instances of vagueness is attributable to Timothy Endicott. See, e.g., Endicott (2011), p. 17.

29 Marmor (2013), p. 5.

30 See Google (2016), p. 6.

23 The requirement to act in a neutral manner was developed by the CJEU as a threshold condition for accessing the defence provided in Article 14 E-Commerce. See CJEU, *Google France*, C-236/08, para. 114, and CJEU, *L'Oréal v. eBay*, C-324/09, para. 113.

24 See *infra* 2.1. and 2.2.

25 Grice (1989), p. 177.

maintenance of which is said to be “unattainably expensive”³¹. The requirement that online platforms install such an expensive technology for copyright enforcement purposes would always amount to an intolerable constraint upon their operators’ right to freely pursue an economic activity³². Even if the operators of smaller platforms manage to license some reasonably effective technology, instead of developing their own, this cost will hinder their capacity to compete with the larger incumbents³³. As noted by the European Copyright Society, “[t]he unforeseen effect of the provision may, therefore, be locking in YouTube’s dominance in the EU”³⁴.

2.2. The proposal disproportionately restricts fundamental rights

Several commentators have shown a concern with the proposal’s compatibility with Article 15 E-Commerce, which establishes a prohibition on general monitoring obligations. In fact, the use of content recognition technologies necessarily involves such monitoring. And, again, the fact that the proposal applies only to some platforms is not enough to save it: the covered platforms, however few they may be, will have to monitor *all* of the new content that is uploaded onto them³⁵. Christina Angelopoulos puts the point metaphorically: “[t]he chaff cannot be separated from the grain without the thrashing of all the harvested wheat”³⁶.

But the proposal’s incompatibility with the E-Commerce Directive is not, in and of itself, a decisive argument against the requirement of using content recognition technologies. A conflict between Article 13 of the draft Directive and Article 15 E-Commerce would be solved by the well-known meta-rule *lex posterior derogat legi priori*. EU institutions may well want to amend the *acquis*, in which case the later rule, introducing an exception to the general rule prohibiting monitoring obligations, would prevail³⁷.

But the commentators’ concern runs deeper than this. The conflict with Article 15 is particularly worrying because it is, simultaneously, a conflict with the Charter of Fundamental Rights of the EU. As hinted by the CJEU, the prohibition against general monitoring obligations is rooted in Articles 8 (protection of personal data), 11 (freedom of expression and information) and 16 (freedom to conduct a business) of the Charter³⁸.

In the name of safeguarding the interests of rightholders, an obligation to implement content recognition technologies would disproportionately restrict the Internet users’ right to the protection of their personal data, as well as their freedom of expression and information. First, content recognition technologies would necessarily involve the “identification, systematic analysis and processing of information” connected with the profiles of individual users, allowing them to be identified³⁹. Second, these technologies are not infallible: they often fail to adequately distinguish between lawful and unlawful content, taking down uses that may be protected by copyright exceptions⁴⁰. Not long ago, it must be noted, the European Parliament invoked these rights when rejecting the adoption at the EU level of enforcement strategies based on a three-strikes policy (the so-called “graduated response systems”)⁴¹.

In addition, as suggested above, the obligation to use content recognition technologies would gravely affect the platform operators’ freedom to conduct their business, since it would require them “to install a complicated, costly, permanent computer system at [their] own expense”⁴².

Contrary to what is stated in its Recital 45, the draft Directive *does not* respect the fundamental rights enshrined in the Charter. The value gap proposal fails to strike a fair balance between, on the one hand, (i) the users’ right to the protection of their personal data, (ii) the users’ free-

dom of expression and information, and (iii) the online platform operators’ freedom to conduct their business, and, on the other hand, the intellectual property rights of creators, protected by Article 17(2) of the Charter. If enacted without the necessary amendments, Article 13 may be struck down by the CJEU on grounds of violations of the foregoing rights⁴³.

Conclusion

The value gap proposal, as provided in Article 13 and Recitals 37 to 39 of the draft Directive, suffers from a number of fundamental problems. From the formal point of view, the proposal (i) includes normative provisions in the recitals, (ii) lacks basic clarity, and (iii) uses trivially vague language. On the substantive side, if passed into law the proposal will (i) thwart digital innovation and (ii) disproportionately restrict the fundamental rights of Internet users and platform operators.

Given the seriousness of these flaws, the EU institutions should consider deleting or, at least, significantly rewriting the proposal. The amendments put forward by former rapporteur Therese Comodini Cachia address some of the mentioned flaws and could form the basis of a possible rewrite. Nevertheless, the amended provisions fail to give targeted platforms guidance regarding the appropriate and proportionate measures they should take, while preserving a risky reference to content recognition technologies in Recital 39. At this stage, and considering the extent of the necessary amendments, it should be kept in mind that it may be better to pass no text than to pass a text that promotes legal uncertainty and threatens innovation in the digital economy.

31 Urban et al. (2016), p. 58.

32 See *infra* 2.2.

33 See Angelopoulos (2017), pp. 37-38. See also Husovec and Leenes (2016), pp. 47-48, reporting on the costs behind the implementation of filtering technologies.

34 European Copyright Society (2017), p. 7.

35 I thus disagree with von Lewinski (2017).

36 Angelopoulos (2017), p. 36.

37 In any case, such a change should be made clear in the enacting terms of the Directive, rather than left tacit.

38 See CJEU, *Scarlet*, C-70/10, paras. 46-50, and CJEU, *Netlog*, C-360/10, paras. 44-48.

39 See CJEU, *Scarlet*, C-70/10, para. 51, and CJEU, *Netlog*, C-360/10, para. 49.

40 See CJEU, *Scarlet*, C-70/10, para. 52, and CJEU, *Netlog*, C-360/10, para. 50.

41 See European Parliament, Resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, para. 11.

42 See CJEU, *Scarlet*, C-70/10, para. 48, and CJEU, *Netlog*, C-360/10, para. 46.

43 Although the CJEU has been assessing the validity of EU legislation against fundamental rights for some time now, it has been more open to engaging in such close scrutiny since the Charter became legally binding. See, notably, CJEU, *Digital Rights Ireland*, C-293/12, in which the CJEU annulled the Data Retention Directive, on grounds of violation of Articles 7 and 8 of the Charter.

References

- Angelopoulos C (2016) EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence. <http://kluwercopyrightblog.com/2016/10/06/eu-copyright-reform-outside-safe-harboursintermediary-liability-capsizes-incoherence/>
- Angelopoulos C (2017) On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800
- CREATe (2017) Copyright Reform: Open Letter from European Research Centres. <http://bit.ly/2loFISF>
- Endicott T (2011) The Value of Vagueness. In: Marmor A, Soames S (eds) *Philosophical Foundations of Language in the Law*. Oxford University Press, New York, p 14
- European Copyright Society (2017) General Opinion on the EU Copyright Reform Package. <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>
- Frosio G (2017) Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy. Northwestern University Law Review Online (forthcoming). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912272##
- Fuller L (1964) *The Morality of Law*. Yale University Press, New Haven
- Geiger C et al. (2017) The Introduction of a Neighbouring Right for Press Publishers at EU Level: The Unneeded (and Unwanted) Reform. *EIPR* 39(4):202
- Google (2016) How Google Fights Piracy. <https://drive.google.com/file/d/0BwxyRPFduTN2cl9ILXJ0YjY5SjA/view>
- Grice PH (1989) *Studies in the Way of Words*. Harvard University Press, Cambridge
- Hugenholtz PB (2016) Say Nay to the Neighbouring Right!. Kluwer Copyright Blog. <http://copyrightblog.kluweriplaw.com/2016/04/14/say-nay-to-the-neighbouring-right/>
- Husovec M, Leenes R (2016) Study on the Role of Online Intermediaries – Summary of the Public Consultation. Prepared for the European Commission, Directorate-General of Communications Networks, Content & Technology. SMART number 2015/0084
- IFPI (2015) IFPI Digital Music Report 2015: Charting the Path to Sustainable Growth. <http://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf>
- Kennedy D (1976) Form and Substance in Private Law Adjudication. *Harvard Law Review* 89:1685
- Kretschmer M et al. (2016) The European Commission's Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society. *EIPR* 38(10):591
- Lucas-Schloetter A (2017) Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13): An Appraisal. <http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf>
- Marmor A (2013) Varieties of Vagueness in the Law. USC Legal Studies Research Paper No. 12-8. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039075
- Marmor A (2014) *The Language of Law*. Oxford University Press, New York
- Max Planck Institute for Innovation and Competition (2017) Position Statement on the Proposed Modernisation of European Copyright Rules. <http://www.ip.mpg.de/en/research/intellectual-property-and-competitionlaw/position-statement-modernization-of-european-copyright-rules.html>
- Peukert A (2016) An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis. Research Paper of the Faculty of Law, Goethe University Frankfurt am Main No. 22/2016. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888040
- Ramalho A (2017) Beyond the Cover Story – An Enquiry into the EU Competence to Introduce a Right for Publishers. *IIC* 48(1):71
- Rosati E (2016) Why a reform of hosting providers' safe harbour is unnecessary under EU copyright law. CREATe Working Paper 2016/11. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830440
- Rosati E (2017) The CJEU Pirate Bay judgment and its impact on the liability of online platforms. *European Intellectual Property Review* (forthcoming). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006551
- Stalla-Bourdillon S et al. (2016a) Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society. <https://ssrn.com/abstract=2650483>
- Stalla-Bourdillon S et al. (2016b) A brief exegesis of the proposed Copyright Directive. <https://ssrn.com/abstract=2875296>
- Urban JM et al. (2016) Notice and Takedown in Everyday Practice. UC Berkeley Public Law Research Paper No. 2755628. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628
- von Lewinski S (2017) Comments on the 'value gap' provisions in the European Commission's Proposal for a Directive on Copyright in the Digital Single Market (Article 13 and Recital 38). Kluwer Copyright Blog. <http://copyrightblog.kluweriplaw.com/2017/04/10/comments-value-gap-provisions-european-commissions-proposal-directive-copyright-digital-single-market-article-13-recital-38/?print=pdf>

Copyright on Data

Introduction

On 10 January 2017, the European Commission issued its Data Economy Package, which includes a Communication on building the European data economy¹ and an accompanying Commission Staff Working Document on the free flow of data and emerging issues of the European Data Economy,² followed by a Public Consultation. The initiative reveals the growing importance of non-personal, machine generated data. It is grounded on the need for market players to have access to large and diverse datasets in the context of the emergence of a data economy, as well as on the goals of incentivizing the sharing of data, ensuring the free flow of data, protecting investments and assets, and minimizing lock-in effects.³ The number of market players involved in data trading as a means to develop new business models or to open up additional revenue streams is expected to grow exponentially.⁴

Personal data is excluded from the scope of the communication,⁵ even though the Commission recognises that some market players deal with datasets that contain both personal and non-personal data⁶ (this would be the case, for example, of wearables that function as health and fitness trackers). The data under consideration in the Communication are both non-personal (either naturally non-personal, or turned non-personal through the process of anonymization) and machine-generated (i.e., created without human intervention, through e.g. computer processes or applications).⁷ Arguably, the exchange and access to this type of data is limited, with many companies that de facto own the data generated by their products or services usually preferring not to share it, and, according to the Commission, even preventing the user who owns the data-generating device from authorising use of the data by other companies.⁸

The Commission puts forth several possibilities to increase access to and sharing of data, such as e.g. setting up default data contract rules, fostering the development of technical solutions for reliable identification and exchange of data, developing a framework based on FRAND (fair, reasonable and non-discriminatory) principles to provide access to data against remuneration, or creating a data producer's right. This contribution will analyse the latter solution. As the Commission rightly points out, raw machine-generated data are not protected by any intellectual property rights, and their economic exploitation and exchange is frequently ruled by contract.⁹ Indeed, typically, IP rights are granted at the innovation (or expressed creativity) level. By contrast, the production of data happens at an earlier stage in the data value chain, prior to any innovation.¹⁰

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Building a European Data Economy", COM(2017) 9 final, 10.1.2017 [hereinafter, "Communication"]

2 Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, SWD(2017) 2 final, 10.1.2017. [hereinafter, "SWD"]

3 Communication, at 4.

4 SWD, at 13, citing a Report from Consultancy IDC, "Europe's Data Marketplaces - Current Status and Future Perspectives", 2016, available at <http://www.datalandscape.eu/data-driven-stories/europe%E2%80%99s-data-marketplaces-%E2%80%99s-current-status-and-future-perspectives> (last accessed 17 August 2017).

5 Legislative initiatives concerning personal data have already been undertaken separately, see e.g. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), or the review of the e-Privacy Directive (which resulted in a proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications, COM(2017) 10 final, 10.1.2017)

6 Communication, at 9.

7 Communication, at 9.

8 Communication, at 9-10. See also SWD, at 15-16, where the Commission points to a notable exception to the alleged non-sharing trend: the bank BBVA shares anonymized and aggregated statistical data from millions of transactions that can convey consumer's habits or demographics.

9 Communication, at 10.

10 H. Zech, "A legal framework for a data economy in the European Digital Single Market: rights to use data", *Journal of Intellectual Property Law and Practice* 2016, 11(6), 460, 461.

The question therefore becomes whether the creation of a data producer's right is an adequate solution. The next section will briefly describe the contours of the proposed right. The following sections will focus on the merits of the right and analyse respectively its powers, perils and pitfalls.

The data producer's right

As devised in the Commission's Communication, the subject matter of the data producer's right is non-personal or anonymised machine generated data, including metadata on the data. The Commission stresses that the data covered by the right should be at the syntactical, not the semantic, level, and that care should be taken to ensure that ideas and information remain free.¹¹ This means that the object of protection is at the level of signs (such as sequences of 0 and 1), not at the level of content of the information.¹²

The owner of the right would be the data producer (i.e., the owner or long-term user of the device), who would then have the exclusive right to use and authorise the use of the data (e.g. through licensing). According to the Commission, this would include "a set of rights enforceable against any party independent of contractual relations thus preventing further use of data by third parties who have no right to use the data."¹³ The right would be limited by exceptions granting access to the data by others, namely the manufacturer of the device (who, besides having a commercial interest in the data, might be obliged by national law to monitor the product) or public authorities (for, e.g., statistical information or urban planning).¹⁴ The Commission further envisages that, in certain cases, there might be a public interest in making the data available for other private actors, such as sharing smart metering information for purposes of fully enabling smart homes or care institutions.¹⁵ Along the same lines, an exception to the right could also be established to ensure access for research that is entirely or mostly funded by public resources.¹⁶

The right addresses a controvert question in the data economy – who owns the data? As pointed out by the Commission, given the regulatory gap in this regard, the (de facto) owner of the data is the company whose devices generate the data. The data producer's right would shift the (de facto) data ownership from the company that supplies the machines or devices to the user/owner of the device, allowing the latter to contract with other data-based service- and device providers. This is connected to the objectives of the right, which are "clarifying the legal situation and giving more choice to the data producer, by opening up the possibility for users to utilise their data and thereby contribute to unlocking machine generated data."¹⁷ Presumably, clarifying the legal situation by attributing exclusive rights would avoid conflicts over ownership, and giving more choice to the producer would contribute to fostering data access and sharing (and thereby the data economy).

Powers

Most EU legislative activity so far has occurred in the field of personal data. Non-personal data had been largely overlooked until now. The objectives of the Commission's proposals are laudable and include the improvement of access to non-personal machine-generated data, the facilitation of its sharing, and the protection of investment that also takes into account a fair sharing of benefits with other players.¹⁸

The Commission is also well aware of potential risks that the current situation might bring to the development of a sound data market. In fact, it should be noted that, in most cases, manufacturers or service providers de facto own the data, which could in theory lead to unfair contractual terms of access to the data. The problem of access to data is – rightly – at the centre of the Commission's line of action,¹⁹ and even if the data producer's right is in the end an exclusive right over data, it is also mainly thought of as a way to ensure access, rather than as a way to generate income from further uses of the data.²⁰

Perils

Even though the intentions of creating a new data producer's right might be commendable, such right would also have its shortcomings. Perils or immediate dangers include the fact that creating a new right will add an *extra layer of rights* to be cleared, which in turn can work against one of the other objectives of building a data economy – the free movement of data.²¹ Moreover, the right becomes especially problematic if one considers that non-personal data becomes most valuable when used in large amounts (big data). Giving exclusive rights over small amounts of data will hinder big data analytics (since the analysis would require acquiring lots of exclusive rights held by different owners), with potentially negative effects to the data economy.

Furthermore, in practice, the manufacturer of the device could just resort to contracts to *regain control of the data* (e.g. through an exclusive license), in which case de facto control becomes legal control. Put it differently, an IP right would not solve the problem of the de facto control, since the manufacturer of the device will typically be in a stronger negotiating position and can contractually acquire the rights (a better solution for a situation of de facto control could be, e.g., competition law).²²

Yet another peril is the risk of *information lock-ins* due to the difficulty in distinguishing the syntactical from the semantic level. The value of the data comes from the information it can convey, and from the insights that can be derived from it (i.e., the semantic level); but the information at the semantic level can be transformed into data (at the syntactic level), which means that protection of one can entail protection of the other.²³

Pitfalls

Mismatch between IP rationales and the data producer's right

The first pitfall, or source of potential danger, is the mismatch between justifications or rationales for IP protection, on the one hand, and both the subject matter of the data producer's right (machine generated, non-personal data) and the objectives underlying the protection of non-personal data, on the other hand. This mismatch could dictate the inadequacy of the right to achieve the goals it is supposed to achieve.

¹⁹ Stakeholders have also highlighted that the main issue is access: see SWD at 35.

²⁰ J. Drexler et al., "Position statement of the Max Planck Institute for Innovation and Competition of 26 April 2017 on the European Commission's 'Public consultation on Building the European Data Economy'", 2017, at 8, available at http://www.ip.mpg.de/fileadmin/ipm/pg/content/stellungnahmen/MPI_Statement_Public_consultation_on_Building_the_EU_Data_Eco_28042017.pdf (last accessed 24 August 2018).

²¹ As pointed out by the Commission in the Communication, at 3, 5 *et seq.*

²² On the use of competition law in this context, see W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", 2016, at 17, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858171 (last accessed 23 August 2017); and, at length, J. Drexler, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", 2016, at 41 *et seq.*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862975 (last accessed 23 August 2017).

²³ W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", at 18. Also highlighting the difficulty in distinguishing the syntactic from the semantic level, J. Drexler, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", at 13.

¹¹ SWD, at 34.

¹² W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", 2016, at 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858171 (last accessed 23 August 2017); H. Zech, "Data as a Tradeable Commodity", in A. De Franceschi (ed.), *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution*, Intersentia, 2016, at 53-54.

¹³ SWD at 33.

¹⁴ SWD at 35-36.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Communication at 13.

¹⁸ Communication, at 11.

Several theories compete regarding the justifications or rationales for intellectual property rights. Each of them is conducive to a different analysis of the same IP policy, but new exclusive rights should be viewed from the perspective of all of them before they are introduced in the legal order.²⁴

The personality rights theory, for which mainly the philosophers Kant and Hegel are responsible, holds that the work is worthy of protection because it is an expression of the personality or self of its creator.²⁵ Not all types of intellectual property can be justified by this theory; rather, only those that entail some level of personality or self-expression (such as copyright).²⁶ This connection to the personality of the creator is at odds with the very nature of the subject-matter of the data producer's right (non-personal data).

The labour theory, formulated by the British philosopher John Locke in the 17th century, implies that every man should be the proprietor of the product of his labour. This theory suggests the idea of "reward", as it would seem fair that whoever uses his or her intellectual labour to create or to invent should have a right over the ensuing product.²⁷ Non-personal, machine generated data does not fit this construction, as there is no intellectual labour in the production of such data. There might be intellectual labour involved in creating devices and sensors for the production of data – and those devices and sensors could be protected by an IP right if conditions are met – but not in the further production of data itself.

Finally, the utilitarian theory considers that IP rights are necessary to promote or incentivize creative/inventive activity,²⁸ but also the efficient use and commercialization of the creation or invention after it has been produced.²⁹ Under this theory, IP rights are positive rights (as opposed to natural rights), granted with the goal of furthering societal welfare. In other words, IP rights are granted to creators and inventors with the goal of promoting further creation and inventive activities, and the dissemination of the outcomes from said activities (namely, through licensing). It is doubtful that the utilitarian rationale, based on the idea of incentive, can justify the creation of an IP right in data. Data is produced independently of incentives; there is no underproduction of data that needs to be remedied (in fact, quite the contrary is true).³⁰ It is not because of the existence of an exclusive right over data that users of devices that generate data will start producing more data. Likewise, a new exclusive right will also not facilitate access or sharing, as firms are able to trade data without having exclusive rights on it (mainly relying on their de facto control).³¹ The incentive rationale for the creation of an IP right in data is thus not present either.

It should be noted however that other rights, such as the sui generis right for databases or some neighbouring rights, have a slightly different justification – the protection and/or promotion of investment.³² It is the case, for instance, of the neighbouring right of the film producer³³ or the sui generis right of the database maker.³⁴

It is doubtful that a data producer's right could be devised as a neighbouring right as such. Neighbouring rights is an umbrella category that encompasses rather different subject matter, but generally they aim to protect activities somehow related to copyright. Their object is the dissemination – not the creation – of works which are often literary and artistic works.³⁵ Raw data which is machine-generated does not fall under copyright, which means that the link between a (possible) neighbouring right and copyright is not present in the case of a data producer's right. This makes it difficult to justify the use of a neighbouring right for the case of non-personal machine generated data.

The last possibility available would be to have a sui generis right for data producers, which would have as its main justification the protection and/or promotion of investment. However, if the data producer's right is designed as a "one size fits all", it should also be considered whether all investments (from owners or long-term users of devices) are worth protecting. This problem is connected to another issue: as the Commission rightly notes, it is hard to identify clear patterns across different sectors, with usage rights being dependent on context and the particular service provider.³⁶ The specific relation at stake – B2B or B2C – also plays a role when it comes to the importance of non-personal data to the data producer. Arguably (and on average), the consumer who generates non-personal data through his or her fitness tracker will be less interested in questions of (non-personal) data ownership than the owner of a smart factory's machinery; the former will also have invested less in acquiring the device/machine than the latter. This means that a legislative solution designed as a "one size fits all" measure may in any case be inadequate and premature, regardless of its legal form. Moreover, most of the stakeholders that participated in a study about the European Data Market are satisfied with current arrangements (mainly contractual) for the exchange of data, conveying that the current levels of data exchange and re-use do not seem to cause problems to the market efficiency.³⁷ In its Staff Working Document, the Commission further notes that stakeholders consider it more relevant to define rights of access to data than to define ownership rights.³⁸ Altogether, it is doubtful that there is an investment worth protecting in every case where a data producer's right would be applicable.

Moreover, IP rights, including neighbouring rights or the sui generis right of databases, share one common trait – they stem from human creativity or effort (be that effort financial or intellectual), to a greater or lesser degree. Machine-generated data seems to be one step further than that – it can be generated automatically, without any human intervention (apart from the

24 As proposed by R. Spinello & M. Bottis, *A Defense of Intellectual Property Rights*, Edward Elgar, 2009, at 171-172.

25 J. Hughes, "The Philosophy of Intellectual Property", 77 *Georgetown Law Journal*, 287, 330 and W. Fisher, "Theories of Intellectual Property", available at <http://www.law.harvard.edu/faculty/fli/hst/iptheory.html> (last accessed 22 August 2017).

26 R. Spinello & M. Bottis, *op. cit.* at 166.

27 See also R. Spinello & M. Bottis, *op. cit.*, at 155 *et seq.*; Hughes *op. cit.* at 296; Fisher *op. cit.*

28 R. Spinello & M. Bottis, *op. cit.*, at 166.

29 See e.g. regarding patents J. Kesan, "Economic rationales for the patent system in current context", *George Mason Law Review* 2015, 22(4), 897, 902-903.

30 W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", 2016, at 8-9, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2859171 (last accessed 23 August 2017).

31 W. Kerber, "Governance of Data: Exclusive Property vs. Access", IIC 2016 (7), 759, 761. The same author, in "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis" points out at 14: "First analyses about the problems of [data] markets do not indicate that legal questions about data ownership (...) are the main impediments to a faster development of data markets. Rather, the problems are seen to lie in an insufficient demand for data (...)". See also, at length, J. Drexel, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access*, at 33-34

32 This is true for some neighbouring rights – such as the rights of producers – but not for others – such as the rights of performers. Protection for the latter is based on social objectives and natural rights arguments, as well as on utilitarian arguments – see M. van Eechoud et al., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*, Wolters Kluwer, 2009, at 186-194.

33 Recital 5 of Rental Right Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), O.J. L 376, 27 December 2006): "(...) the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of (...) recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned."

34 Recital 12 of the Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J. L 77, 27 March 1996): "(...) an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases."

35 C. Colombet, "Major principles of copyright and neighbouring rights in the world: a comparative law approach", 1987, at 87, available at <http://unesdoc.unesco.org/images/0007/000750/075056eo.pdf> (last accessed 23 August 2017).

36 SWD, at 16. Also pointing out the problems with the "one size fits all" approach, J. Drexel, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", at 40.

37 IDC and Open Evidence, *European Data Market SMART 2013/0063 Final Report*, 1 February 2017, at 139, available at <http://www.datalandscap.eu/study-reports> (last accessed 22 August 2017).

38 SWD at 35.

initial one of, e.g., setting up the sensors). The fact that the subject matter of protection is machine-generated is, in and of itself and independently of the concrete IP right at issue, at odds with the essence of IP.³⁹

On a general note, it should be recalled that the underlying justifications for a data producer's right are to clarify the legal situation and to foster data access and sharing. It can be questioned whether an exclusive, IP-type of right is the best way to achieve this. There are other options that can clarify the legal situation (thereby also avoiding potential conflicts of ownership over data). Indeed, the Commission lists a few, such as developing a framework based on fair, reasonable and non-discriminatory (FRAND) terms of access, or setting default contract rules,⁴⁰ which would seemingly be more compliant with the principle of proportionality.⁴¹ In addition, as mentioned above, a potential data producer's right would be applicable throughout a wide variety of industries, which have different business models. Deciding upon an initial allocation of rights to the data producer disregards the specific governance structures of different businesses and can turn out to be the economically wrong allocation.⁴² Moreover, new exclusive rights typically lead to conflicts and litigation.⁴³ As to the goal of fostering data access and sharing, as explained above, granting exclusive rights over data does not necessarily give an incentive to share. In theory, an exclusive right over a particular subject matter, coupled with broad, mandatory limitations, might offer more access to said subject-matter than e.g., a sole reliance on contracts; however, there are alternatives to this route, namely, regulating access (and thereby trumping potential unfair/one-sided contracts).⁴⁴ To sum up, not only do IP rationales not support the introduction of an IP-type of right for data producers, but also the objectives of the data producer right could not be achieved through the grant of an IP-type of right.

Relationship with the database directive

The Database Directive grants a sui generis right to the database maker who has made a substantial investment, quantitative or qualitative, in obtaining, verifying or presenting the contents of the database (article 7 of the Database Directive). Databases are defined in the Database Directive as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means" (Article 1(2)).

In principle, the new right would cover a gap of protection left by the Database Directive: the period before the data is collected (i.e., "obtained") by the database maker. The Database Directive states clearly that the sui generis right should not give rise to a new right in data.⁴⁵ The object of protection of the sui generis right – the database, or the investment made in the database – is thus different than the object of protection of a data producer's right, which concerns raw, machine-generated data itself.

It should be noted that investment in obtaining data is not akin to investment in creating data. The CJEU has clarified this question in several cases. The resources used to "seek out independent materials and collect them in the database"⁴⁶ amounts to an investment in obtaining the data, and this activity can thereby give rise to a sui generis right; but the resources used for the creation of such data are outside of the scope of the sui generis right. This interpretation results in many sole-source databases going unprotected, thus addressing competition concerns.

The creation of data left outside the scope of the sui generis right includes in principle data generated by machines. In any case, at least in theory, many businesses could have (an aspect of) non-personal data protected via the Database Directive if they so wished, because e.g. they invest in the presentation of the contents via an app. Admittedly, however, this is not in the interest of all de facto owners of data, with some preferring to keep the data to themselves (for purposes of product improvement, for instance). More importantly, it can be difficult to differentiate investment in creating or producing the data (for example, through sensors) and investment in obtaining or collecting it⁴⁷ (which in the case of machine generated data could be, e.g., assembling the data from several devices into files). Where it is not possible to distinguish between creating and obtaining the data, or where the activity of obtaining the data is "indivisibly linked" to the creation of data, the CJEU has considered that there is no independent investment in obtaining the data (thus denying protection to the database on those grounds).⁴⁸

Moreover, depending on how a potential data producer's right is designed, conflicts might arise due to the fact that the database and the machine-generated data (which might later go in the database) have different owners: the owner of the former will be the database producer, while the owner of the latter will be the user who owns or is in possession of the device. Even though the manufacturer would have a non-exclusive access to the data, determining potential infringement by third parties could be challenging.

Drawing the line between personal and non-personal data

In some devices such as wearables, personal and non-personal data are intertwined, and it might be difficult to draw the line between them. Importantly, such line must be drawn, as personal data is subject to its own specific regime in the EU. Personal data concerns information where a natural person is identified or identifiable, including personal data that have undergone pseudonymization but that could be attributed to a natural person by using additional information.⁴⁹ In the assessment of whether a person is identifiable, account should be taken of the means used to do so, such as singling out, including its cost and amount of time required for identification.⁵⁰ According to Article 4(1) GDPR, a natural person is identifiable by reference in particular to "a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person". The CJEU has added to this list an IP address.⁵¹ The Court has also stressed that, in order to treat information as personal data, it is not necessary that that information alone allows the data subject to be identified.⁵² The definition of "personal data" is thus by no means straightforward. In addition, the nature of data is dynamic and subject to change. Anonymous data can be deanonymized, for example, by matching it with other datasets and applying some probability theory.⁵³ This makes the distinction between personal and non-personal data a moving target.

Conclusion

Enhancing data sharing and access and doing away with legal uncertainty in data markets are in themselves praiseworthy objectives. The solution of achieving them through introducing in the legal order a new property, IP-type of right is however not the best course of action.

39 See however, as an exception to this, Section 9(3) of the Copyright Designs and Patents Act of the United Kingdom, which vests protection of computer generated works in the person by whom the arrangements necessary for the creation of the work are undertaken.

40 Communication at 12-13.

41 A proportionality check involves the evaluation of three factors: the suitability of the measure for the attainment of the objective; the necessity of the measure; and the proportionality of it vis-à-vis the restrictions that might be thereby involved, or proportionality *stricto sensu*. See inter alia case C-331/88 *Fedesa*, para. 13, and case C-210/00 *Käserer Champignon Hofmeister*, paras. 59-67. For a detailed explanation of the factors, see X. Groussot, *General Principles of Community Law*, Europa Law Publishing, 2006, at 146-152; J.H. Jans, "Proportionality Revisited", *Legal Issues of Economic Integration* 2000, 27(3), at 240 *et seq.*, and references therein.

42 W. Kerber, "A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis", at 15-16.

43 J. Drexli, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", at 35.

44 J. Drexli, "Designing Competitive Markets for Industrial Data – Between Propertisation and Access", at 36.

45 Recital 46 Database Directive.

46 Case C-46/02 *Oy Veikkaus*, at 34; case C-203/02 *British Horseracing Board* at 31; case C-338/02 *Svenska Spel*, at 24; case C-444/02 *OPAP*, at 40.

47 E. Derclaye, *The Legal Protection of Databases. A Comparative Analysis*, Edward Elgar, 2008, at 94-96. M. Davison & P.B. Hugenoltz, "Football Fixtures, horseraces and spin offs: the ECJ domesticates the database right", *E.I.P.R.* 2005, 27(3), 113, 113-115.

48 *Oy Veikkaus*, at 44; *Svenska Spel* at 33; *OPAP* at 49.

49 Recital 26 of the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC), O.J. L119, 4 May 2016.

50 *Ibid.*

51 In case C-582/14 *Breyer*, the CJEU has considered that in cases where the IP address is capable of sufficiently identifying a natural person (because the provider has means to identify the person with additional data) such address amounts to "personal data" (see para. 49 of the decision).

52 *Breyer*, para. 41.

53 M. Thomas, "Big Data: The Broken Promise of Anonymisation", 2016, available at <https://www.gresham.ac.uk/lectures-and-events/big-data-the-broken-promise-of-anonymisation> (last accessed 22 August 2017). See also, underlining this dynamic nature of data, S. Stalla-Bourdillon & A. Knight, 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927945 (last accessed 22 August 2017).

The fabric of a data economy is not compatible with exclusive, crystallised IP rights: a data producer's right would add an extra layer of rights to the legal order, which could hinder the free flow of data; rights over small datasets would be at odds with the big data analysis that underlies the data economy; and exclusive rights over data could also lead to information lock-ins.

None of the justifications for having IP rights are fulfilled in the case of a right over data. There is no connection to the personality of the creator, nor to its intellectual labour. No incentives are needed to produce or disseminate data. Even the case for a *sui generis* right is weak, since there is no investment worthy of protection or promotion (at least not in all cases where a data producer's right would be applicable).

The interaction of the data producer's right with existing regimes, namely the *sui generis* right for databases and the protection of personal data, could also lead to conflicts and result in legal uncertainty.

The objectives of the Commission would thus be better achieved through other options mentioned in its Communication, which sound both more efficient and realistic. Such is the case, for instance, of the implementation of an obligation to license the re-use of data under fair, reasonable and non-discriminatory terms (FRAND), or developing guidelines to incentivise businesses to share non-personal data. These and other options should be better explored and take precedence over a data producer's right, always bearing in the mind that the main focus of any option taken should be fostering access to data.

Text & Data mining Issues

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Text & Data mining arise several types of issues, some of which are related to intellectual property rights whereas some depends on infrastructures or bargaining power. Since those questions cannot totally be ignored in order to delineate a proper regime for TDM. But as the purpose of this meeting is to reflect about the copyright rules, we will mostly focus on the possible solutions related to the use of the protected subject matter in the process of TDM (**part II**), after having quickly defined the core elements of the discussion (**part I**).

Part I. What is TDM ?

Definitions of TDM that can be found in the studies or in the existing laws (Japan, UK, Ireland, France) may vary according to the social use of the process. Some are restricted to certain kinds of subject-matter, for example, written texts because the first process of mining occurred in the field of scientific research that mostly relies on publications. But the potential technical application of TDM is wider and encompasses any sort of works/contents as long as it is in a digital format. So images, video, music but also "pure" information can be subject to mining whenever there is a possible "use" of the results of the process. Some definitions also limit the TDM to certain uses or purposes – such as research or journalism... – because, here again – it is in those fields that the practice and the claims have emerged. But the ongoing debate shows that the applications of such processes can cover industrial developments, leisure...

Such a contextual approach of TDM does not seem to be the proper starting point to address the issue in the forthcoming directive because the technical evolution and the orientation of the market that cannot be fully anticipated may extend the scope of TDM beyond the existing pattern. Therefore, the first step will consist in finding permanent criteria that sketches the skeleton of TDM, regardless of the actual practices. This structural definition being achieved, then comes the time to discuss the opportunities to welcome this process or not when it conflicts with other legitimate interests, which is a matter of policy.

The first invariable criterion is the digital format of the source subject to the process of mining, the second is the existence of a process involving specific tools, the third is the purpose for which the process of the element is being made (*animus*), the fourth is the constitution of a result of the process that is new/different from the source mined.

In order to actually realize TDM, it is necessary to have access to the "source" (the mine) and to the tools allowing the process (the picks and shovels); to search something and to have a reasonable expectation of the results that may derive from the searching activity (the opportunities of exploitation of the ore).

Many of the elements required to achieve TDM are irrespective of copyright issues such as the need for technical infrastructure and investment allowing the miners to dig, the market opportunities for the results of mining. If TDM is considered to be encouraged for social benefit, policy makers might therefore take into consideration these various needs and eventually intervene in order to build the necessary foundations in case the market does not provide for – investing in digitization, establishing norms for formats, facilitating open or broad availability of the content and the technical tools, developing storage, cloud computing facilities... It is also noticeable that access to information is not always locked by IP rightholders but may be the mere results of contractual practices and/or technical control of access of individual or companies regardless of any IP consideration.

Therefore, solving the copyright issues that may conflict with TDM will not be the only key for suddenly developing the market of the applications of TDM in Europe, this will also be a matter of education, investment, interoperability, open data policy.

Some publisher's opponents to the TDM exception point out that they don't face an important demand for TDM license when required (hardly few licenses a year) and that they easily come to an agreement in this case. Many reasons may explain why they experience such a situation (people don't ask permission because they don't know they have to, they know but they fear to

ask because they don't know how to and what will be the cost, they don't want to ask on behalf their freedom of action) but societal and infrastructure impediments may also be an explanation.

This is not to say that copyright questions don't matter but that the potential conflict with copyright rules and the TDM will not solve the whole problem. In balancing the pro & cons of the limits to copyright rules, the policy maker shall also take into consideration the reality of the social benefit of the TDM.

Part II. Which are the problems with mining vis-à-vis copyright issues?

Going back to the “bony” definition of TDM, TDM uses may encroach on Intellectual property rights.

The “source” of the TDM might be protected by different rights – copyright, neighbouring rights, sui generis rights on databases-. So access to the source may – in certain circumstances – trigger the application of IP rules.

The type of tool used to mine may also raise questions of IP when it comes to the acts of exploitation involved in the process or compliance thereof with the digital right management.

The assessment of the purpose/intent may also be taken into account when considering the balance between the claim for exclusive right on the one hand and the claim for accessing to and processing the content. At this stage, this shall be limited to a conflict of principles- who is entitled to mine with which project against the legitimacy of the rightholder position.

Finally, the opportunities of “exploitation” of the result of the mining may also be balanced according to the competing interest of the rightholder to benefit from its property.

2.1. Mining a “protected” material

This paper will not detail the famous distinction between the “form” of expression that is the subject protected by copyright rules and the mere information or ideas that are outside of the scope. We shall only insist on the fact that the distinction is legally and practically fragile. Even if one might find some traces of the distinction in the international and European “acquis” such as the article 9.2 of TRIPS agreement or article 2 WCT and more specifically in the computer program directive article 1.2 (Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.)

It is still complicated to draw a line between the form and the information whenever access to information supposes reproduction of the form in which this information has been expressed. (Information comes from the latin in formare). Even if the word “data” refers to raw material – less structured than information – the reference to the “text” as the potential scope of application of the process of mining applies both to non-protected elements and to protected works. When both elements are so intertwined that they cannot be separated, it is somewhat artificial to claim that such can be the case for TDM.

Besides, many copyright rules do cover the use of the information/idea/content. The value of the work is also linked to the amount of information it provides to the public – see the newspaper-; the content is indirectly covered by the copyright protection when an authorization is required for the adaptation of a novel into the movie: it is the story, the characters that matter here and not the choice of a specific sentence. When considering moral right to integrity, distorting the “spirit” of the work may amount to an infringement before certain jurisdictions. Furthermore, the form/information dilemma has less echo in the realm of neighboring rights and sui generis rights for databases. Even if the 1992 directive remain quite silent on the definition of the subject-matter (phonogram, film...), of the producer or performer rights the ECJ and the recitals of the various directives seem to acknowledge that the justification for protection lies in the investment made by the producer, just as the maker of the databases for the sui generis right, whereas the performers rights are covering the performance and its fixation. If access to the data contained in this “material” supposes any process of copying of the file, this might trig-

ger the protection because investment has been protected. According to the rules governing the relationship between copyright and related rights, it would be paradoxical to consider that the use of the data in the work is free because of the form/information dichotomy whilst the use of the data in the related right is not. If TDM is to be enhanced because of its social function, it is questionable to dissociate its regime according to the various regimes of the sources.

Yet, if we stick to mere copyright consideration, it could be argued in order to limit the conflict between the claim for free use and the exclusive right that TDM does not access to and/or use a “work” per se, according to a “functional” conception of what a work is. For example, in France some decisions (see example in France: *Etre et Avoir / Place des Terreaux*) have considered that there was no reproduction of the work “as such” when the public could see it (architectural work or drawing) in the frame of a wider image or in a film but that the work was not the subject of this image. Instead of relying on a legal exception to the exclusive right (namely panorama and ancillary copy that was not existing in the law) the judges answered at the upper level and decided that the work as a legal concept was not sufficiently “present”; therefore, that there was no infringement of the copyright. It is the **metaphor of the puzzle**: even if all the pieces of the puzzle are present, the recombination of all of them do not amount to the same source.

Consequently, one of the first answer that could mitigate the conflict between TDM and copyright would consist in defining the works subject to protection in the *acquis* – when this definition only exists for computer programs, databases – and/or determining the situations when the work would not be protected because the function of copyright has not been harmed. Accordingly, all the works would not be protected and some could be explicitly excluded from the scope of copyright and the protection of the work would not be absolute but may depend on the function provided for in the copyright legislation. Still even in introducing in the directive the distinction between expression and information, or establishing that the protection is limited to work “as such” it is rather unsure that it would provide enough legal security and fulfil the objective of harmonization of the situations within the different Member States.

One can also think of relying on the concept of originality and consider that the threshold of protection is not met in certain cases. This question has been addressed by the Court of Justice in the famous *Infopaq* case (rendered about clipping practice of the press aggregators) and the judges held that reproduction of small pieces of the work – extracts of 11 words – was to be considered according to the originality criterion. The decision has been interpreted as acknowledging the originality of the pieces but I think that we can also see it the other way round like establishing the possibility that the originality threshold is not sufficiently fulfilled in certain cases and that the judges have to control the existence of the originality of the “pieces”. It would not be sufficient for the rightholder to prove that the source as a whole was original to prevent the use of the pieces, since it should also be demonstrated in this case that the pieces are also – as such- original. So legislative intervention could consist in defining a general threshold of originality.

Still, even if defining what a “protected work” means as regards EU law would certainly be needed in the broader perspective of a coherent copyright code, and may help to delineate when a “work” is used, it does not seem to match the short-term perspective of the ongoing harmonization.

2.2. Mining as an act covered by IP rights

Besides, as regards TDM, the difficulty lies in the fact that the process involves technical reproduction of works and that the Infosoc Directive cover any kind of reproduction by an exclusive right (art. 2) (Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part). This very broad definition of the reproduction right has been heavily criticized by many authors in France because our definition (still) requires an act of communication to the public of the work (Article L. 122-3 Code de la propriété intellectuelle: Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way.)

According to this requirement, it can be argued that some acts of reproduction are not covered by the definition of the exclusive right since they don't permit to the communication to the *public* of the work. What is communicating the work to the public? I don't refer here to the flimsy definitions provided for by the Court of Justice in its numerous case-law but to a "sensitive" perception of what is an act of communication towards human being. Is a work communicated to the public when the recipient cannot perceive, recognize it? When considering copyright infringement, the judge compares the resemblances between the work and the copy: it is a "human" appraisal of where the work has been reproduced. So keeping a broad definition of the right of reproduction covering any kind of reproduction – even individual, temporary, transient, partial, automatic- may, at the end of the day, be inconsistent with the assessment of the infringement.

So an answer to TDM but also to other issues (linking, transient copies) may consist in introducing a condition of **human identification of the work**. Copyright protection would only be involved as far as the work is perceptible, recognizable by a human (and not a mere machine): the material presence of the work would not be sufficient to infringe copyright if this presence is not somehow perceptible by the public. Article 5.1. of the Infosoc directive establishing the transient exception relies somehow on this assumption of human perceptibility when saying that the reproduction which is necessary to the transmission of work in a network is "exempted" from the reproduction right. But instead of establishing positively the condition in the definition of the exclusive right, it is in the rationales for a mandatory exception.

Being a pragmatic person, and though I regret it, I don't believe that the legislator will have the courage to introduce such a "perceptibility" condition in the definition of the exclusive rights but will overcome the difficulty with exceptions. This requirement would indeed - in the present context of value gap - deprive the rightholders from the possibility to be associated to the value deriving from the automatic processing of their work, which appears to be a very promising market. Yet, it is my belief that mass digitization of works - whatever the purpose is: linking, mining, crawling- implies other answers than the mere individual exclusive right and that establishing a differentiated regime of protection depending on the existence of a "sensitive" contact of the human being with a work at the end of the process would be a solution.

As to TDM, art 5.1. provides a part of the answer and may cover most of the reproduction acts involved in the process of mining. This appears in the directive proposal, where it is recalled that the future exception has to be combined with the former one. This "distributive" approach is nevertheless a complicated one. Many of the operations involved in the mining can be covered by article 5.1. exception, and it can be argued that a specific exception for TDM is not required. Yet, the pro TDM exceptions consider that some conditions - temporary copy, absence of economic significance - as interpreted by the Court (*Infopaq*, *Meltwater*...) may nevertheless impede certain activities. This has to be scrutinized because for example, the absence of economic significance condition has not been an obstacle to the commercial exploitation of a service subsequent to transient copies as long as it is not the exploitation of the work itself.

Consequently, providing for a supplementary exception is only meaningful if it extends the scope of the free uses to certain activities that have a legitimate interest to be balanced with the legitimacy of copyright protection.

2.3. Mining as a legitimate reason to cope with (social value)

Considering that, in some situations, there is a need for a specific regime of TDM that goes beyond the transient exceptions, the acts that exceed the scope of this exception shall be assessed in the perspective of the social interest and value of the project that grounds the TDM. Answers may also vary according to the social value of the activity and to the context of the project: individual authorization, collective management, exception. In this perspective, the legislator shall address several questions:

Are all intent, purposes equally valuable? If not, the TDM project may be assessed according to the social need: scientific research, collecting news (subjective approach). We see the opposition between the commission proposal and the Comodini report that extends the scope of the exception irrespective of the quality of the institution and to "innovation". Is innovation as

such a social value that justify to overcome the protection of innovation by intellectual property rights? Is there not a risk that the second "innovator" would claim exclusivity over its own innovation after having deprived the first innovator from its protection?

Shall the means-process be related to the genuine project? If yes, has the framework of the TDM to be determined *ex ante* and the proportionality of the extraction to be assessed in consideration of the project? (De minimis approach) ? Shall the legislator "force" the access to the data and overcome the contractual/technical barrier? Shall we apply the essential facilities doctrine *ex ante* ? *ex post* ?

Shall the destination of the mining be subject to any form of control? Springer, for example, requires to know who is mining what. Is it legitimate? What are the opposite interests that justify that such a control would be forbidden (either in an exception or in the licensing framework) ?

What are the types of acts necessary to fulfill the legitimate purpose (copying, storing, displaying?). The Comodini report expressed concern about the possibility to verify the reliability of source, which supposes a storage capacity and the organization of the access to the data set. Such a concern may not be as justified for other purposes than scientific research.

2.4. Exploiting the results and the fair share of revenues

Once all these elements have been discussed, one might also take into account the "value gap" issue.

Here again many questions may be answered to:

Does TDM compete with the normal exploitation of the work? If yes is an answer, then the legislator cannot adopt an exception because it would not be consistent with the three-step-test. The solution would may be consist in providing a reasonable frame for licensing (but the experience of License for Europe makes this rather uncertain).

If there is no such competition, is there an economic prejudice suffered by the rightholders that shall trigger a fair compensation? To which extent mining content harms the rightholder economic rights? Is it different if the exploitation of the result of the mining is commercial or not?

If there is a specific investment by the rightholder (formats, accessibility of the dataset), shall this be taken into account in a licensing framework or in the realm of the exception?

Data Property: Unwelcome Guest in the House of IP

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1. Introduction

With the incessant growth of the 'data-driven economy' have come calls for the introduction of a novel property right in data. Apparently in response to demands from the automotive industry,² and encouraged by a number of German lawyers and scholars,³ the European Commission has in its 2017 Communication on 'Building a European data economy' tentatively advanced the idea of creating at EU level a 'data producer's right' that would protect industrial data against the world.⁴ The movement for 'data property' (in German *Dateneigentum*) has its champion in European Commissioner Günther Oettinger, who until 2016 led the directorate general that is responsible for the Communication, DG Connect. An op-ed published by Mr. Oettinger in the *Frankfurter Allgemeine Zeitung* reveals some of the thinking and the powerful forces behind this revolutionary legal concept. Data, writes Oettinger, are the "gold of the future", principally in the automotive sector where modern sensor-equipped cars automatically generate and collect large amounts of data – on traffic and road conditions, engine performance, etc.⁵ These machine-generated sensor data have enormous value, for example, for developing self-driving automobiles. But – writes Oettinger – it is as yet unclear who owns these data: the automobile manufacturer; the car owner; the producer of the sensor equipment; or no one at all? What we need, concludes the Commissioner, are rules at EU level that establish data ownership.⁶

Apparently inspiring this call for protecting industrial data is the fear – common to other recent policy initiatives – that valuable European assets are being misappropriated by large American companies. The specter of Google 'stealing' European news has already led to an ongoing EU initiative towards a neighbouring right for news publishers, following comparable rules previously introduced in Germany and Spain.⁷ The sui generis database producer's right introduced in Europe in 1996 was similarly inspired by European fears of dominance by the US database industry.⁸

Although the contours of the 'data producer's right' being contemplated by the European Commission are sketchy, as are its economic underpinnings, such a right would most likely bring the protection of industrial data in the EU to a much higher level than the – much-maligned and still

1 OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being* (2015).

2 Christiane Schulzki-Haddouti, 'Wem gehören die Daten im Auto?', *VDI Nachrichten*, 15 April 2016, available at <http://www.vdi-nachrichten.com/Technik-Gesellschaft/Wem-gehoren-Daten-im-Auto>. The German industry coalition BDI (Bundesverband der deutschen Industrie) does not however support the idea of a property right in data. See BDI, 'Industrie 4.0 – Rechtliche Herausforderungen der Digitalisierung Ein Beitrag zum politischen Diskurs', November 2015, available at https://bdi.eu/media/presse/publikationen/information-und-telekommunikation/201511_Industrie-40_Rechtliche-Herausforderungen-der-Digitalisierung.pdf. See also heise online, BDI spricht sich gegen neues Eigentumsrecht an digitalen Daten aus', available at <https://www.heise.de/newsticker/meldung/BDI-spricht-sich-gegen-neues-Eigentumsrecht-an-digitalen-Daten-aus-3697626.html>.

3 See, inter alia, T. Hoeren, 'Big Data and the Ownership in Data: Recent Developments in Europe', [2014] *European Intellectual Property Review* 751-754; A. De Franceschi & M. Lehmann, 'Data as tradable commodity and new measures for their protection', 1 *Italian Law Journal* (2015) 51-72; H. Zech, 'A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data', 11 *Journal of Intellectual Property Law & Practice* (2016) 460-470.

4 European Commission, 'Building A European Data Economy', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 10 January 2017, COM(2017) 9 final, 13. See in particular: European Commission, 'Staff Working Document on the free flow of data and emerging issues of the European data economy', Brussels, 10 January 2017, SWD(2017) 2 final, 33-38.

5 The German automobile association ADAC has conducted tests showing that modern automobiles produce, process, store and forward vast amounts of machine-generated data; available at https://www.adac.de/infotestrat/technik-und-zubehoer/fahrerassistenzsysteme/daten_im_auto/default.aspx.

6 G. Oettinger, 'Wem gehören die Daten?', *Frankfurter Allgemeine Zeitung*, 14 October 2016.

7 European Commission, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, art. 11 (Protection of press publications concerning digital uses).

8 P.B. Hugenholtz, 'Something Completely Different: Europe's Sui Generis Database Right', in: Susy Frankel & Daniel Gervais (eds.), *The Internet and the Emerging Importance of New Forms of Intellectual Property* (2016), 205-222.

controversial – database right. Whereas database right protects data on the double condition that the data are structured in a ‘database’ and the database is the result of ‘substantial investment’, the novel right would directly protect machine-generated data without any material prerequisite.

As this article argues, introducing such an all-encompassing property right in data would seriously compromise the system of intellectual property law that currently exists in Europe. It would also contravene fundamental freedoms enshrined in the European Convention on Human Rights and the EU Charter, distort freedom of competition and freedom of services in the EU, restrict scientific freedoms and generally undercut the promise of big data for European economy and society. In sum, it would be a very bad idea.

This article starts (in Section 2) by briefly examining the background and stated aims of the proposed new right: why would there be a need for creating a property right in industrial data? And what would be its subject matter and scope? Section 3 looks at existing intellectual property regimes, inquires to what extent these extend to data, and speculates how a data property right in data might affect these regimes. Section 4 thereafter scrutinizes the data right from the broader perspective of fundamental rights and freedoms. Section 5 concludes.

Although creating a property right in data surely has additional ramifications outside these fields, in particular for the right of informational privacy (personal data protection), the focus of this article will be on the law of intellectual property. We will therefore not examine whether the law of data protection might already imply a property right in personal data.⁹ Nor shall we query whether the civil law concept of private property might be extended – or already extends – to (recorded) industrial data, and thus offer alternate protection to data sets.¹⁰ We shall also avoid discussing other doctrines in potential support of ‘data property’,¹¹ such as criminal law¹² or trade secret law¹³, and stay away from the contract and consumer law related issues of ‘trading’ personal data for services, which have become moot in the light of the proposed EU Digital Content Directive.¹⁴

Finally, a general caveat is in order. Whereas the European Commission has now posited the issue of ‘data property’ as worthy of serious discussion, the policy arguments advanced in favor of introducing such a right are underdeveloped, and its contours remain sketchy at best. Criticizing a right of data property is therefore taking aim at a moving target.

2. Quid data property?

The arguments advanced by proponents of introducing a right of ‘data property’ can be roughly summarized as follows. First, it is pointed out that industrial data represent enormous economic value. For example, according to the European Commission, “the value of the EU data economy was estimated at EUR 257 billion in 2014, or 1.85% of EU GDP. This increased to EUR 272 billion in 2015, or 1.87% of EU GDP (year-on-year growth of 5.6%). The same estimate predicts that, if

9 See N. Purtova, *Property Rights in Personal Data. A European Perspective* (2012), reviewed by E.J. Dommering, [2012] *Maandblad voor Vermogensrecht* 22-26.

10 See H. Zech, ‘Daten als Wirtschaftsgut – Überlegungen zu einem „Recht des Datenerzeugers“’, [2015] *Computer und Recht* 137-146.

11 See for a comprehensive overview of possible doctrines M. Dorner, ‘Big Data und „Dateneigentum“’, [2014] *Computer und Recht* 617-628; Osborne Clarke LLP, *Legal study on Ownership and Access to Data*, Study prepared for the European Commission DG Communications Networks, Content & Technology (2016), <https://bookshop.europa.eu/en/legal-study-on-ownership-and-access-to-data-pbKk0416811/>.

12 T. Hoeren, ‘Dateneigentum: Versuch einer Anwendung von § 303 a StGB im Zivilrecht’, [2013] *Multimedia und Recht* 486-491.

13 See J. Drexel, ‘Designing Competitive Markets for Industrial Data – Between Propertization and Access’, Max Planck Institute for Innovation & Competition Research Paper No. 16-13 (2016), 22-24.

14 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final. See A. Metzger, ‘Dienst gegen Daten: Ein synallagmatischer Vertrag’, 216 *Archiv für die civilistische Praxis* (2016) 817-865.

policy and legal framework conditions for the data economy are put in place in time, its value will increase to EUR 643 billion by 2020, representing 3.17% of the overall EU GDP”.¹⁵ Studies by the OECD and the European Commission present similarly mind-boggling figures.¹⁶

The rapidly increasing value of machine-generated data is attributed to a variety of factors: the rise of ‘smart manufacturing’, which involves real-time exchanges of massive amounts of data between machines and robots; the economic potential of ‘mining’ Big Data (i.e. extracting information by way of sophisticated large-scale data analysis);¹⁷ and the promise of the *Internet of Things*, the magical world where machines quasi-independently communicate and exchange data directly with other machines, such as the ‘intelligent’ energy meter that sends usage data to the energy company, or the axiomatic refrigerator that automatically orders milk and coffee from the online supermarket. As in Commissioner Oettinger’s op-ed, many of the examples used in the literature are taken from the automotive sector, where data have become essential input and valuable output in manufacturing and navigation.¹⁸ The specter of Google’s self-driving car potentially out-competing the European car industry is never far away.

Having thus demonstrated that data have tremendous and increasing value, proponents go on to point out that current legal regimes, such as traditional civil-law based property right and existing intellectual property regimes, do not, or do not adequately, protect these data. Admittedly, non-property regimes such as contracts and trade secret protection might occasionally do the job, as would technical protection measures that create de facto ownership positions. However, these regimes do not create rights *erga omnes*, so valuable data are at risk of being misappropriated and a market for using and trading (i.e. licensing) raw data will not develop.¹⁹ Ergo, what is needed is a novel property right that protects industrial data as such. As the European Commission tentatively suggests in its Communication, as one of six policy options presented for “building a European data economy”, “[t]his approach would aim at clarifying the legal situation and giving more choice to the data producer, by opening up the possibility for users to utilise their data and thereby contribute to unlocking machine-generated data”.²⁰

In light of these radical contentions, it is surprising to see how little economic evidence is brought forward in support of a property right in data. According to standard economic analysis, there are two main justifications for the creation of a new IP right: (1) solving the public good problem by creating an economic incentive for the production of data; and (2) facilitating the use and trade of data. As to the first rationale, Prof. Kerber, a leading German economist, sees “no evidence that there are generally too few incentives for producing and analyzing data in the digital economy”.²¹ Indeed, much machine data production occurs (nearly) automatically, often as a by-product of industrial production or services, and it is hard to see why a legal incentive in the form of a data property right would enhance it.²²

As to the second argument, Prof. Kerber observes: “Although it cannot be ruled out that the market for trading and licensing data can suffer from market failure problems, and empirically data markets are still developing and need more scrutiny, it seems that so far data producers and holders have sufficient possibilities for commercializing their data. The potentially most important market failure problem that the first buyer might resell data seems to be solvable through either contractual and technical restrictions or through the strategy of selling services based upon these data.”²³ Prof. Kerber concludes: “there are no convincing economic argu-

15 European Commission, ‘Building A European Data Economy’ (n. 4), 2.

16 OECD (n.1); European Commission, ‘Towards a thriving data-driven economy’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2 July 2014, COM(2014) 442 final, 2.

17 In addition, Big Data analysis may have numerous social benefits; see Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), 5-8.

18 See A. Wiebe, ‘Protection of industrial data – a new property right for the digital economy?’, [2016] *GRUR Int.* 878.

19 H. Zech, ‘Information as a tradable commodity’, in: A. De Franceschi (ed.), *European Contract Law and the Digital Single Market* (2016) 51-79; see also M. Dorner, ‘Big Data und „Dateneigentum“’, [2014] *Computer und Recht* 617-628.

20 European Commission, ‘Building A European Data Economy’ (n. 4), 13.

21 W. Kerber, ‘A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis’, [2016] *GRUR Int.* 989, 997.

22 See P.B. Hugenholtz, ‘Program Schedules, Event Data and Telephone Subscriber Listings under the Database Directive The ‘Spin-Off’ Doctrine in the Netherlands and elsewhere in Europe’, Paper presented at Fordham University School of Law Eleventh Annual Conference on International IP Law & Policy New York, 14-25 April 2003, available at <https://www.ivir.nl/publicaties/download/spinofffordham.pdf>.

23 Kerber (n. 21), 998. See also Drexel (n. 13).

ments for the introduction of such a new IPR".²⁴ A more recent, and more elaborate study by the Joint Research Centre of the European Commission is somewhat less skeptical,²⁵ recognizing that legal uncertainty regarding data ownership rights might negatively affect the efficiency of data markets. However, this study too concludes that there are, at present, no compelling economic arguments to advise regulatory intervention.

This article will, however, not further engage in economic analysis of a possible data property right, but focus instead on its consequences for the existing system of intellectual property. In order to so, it is important to gain some preliminary understanding of what such a right might entail. Drawing from the sketch presented in the Staff Working Paper that underlies the European Commission's recent Communication,²⁶ which seems to be largely based on the work of Prof. Herbert Zech,²⁷ we assume the features of a *data producer's right* to be roughly as follows. The right would create a *right in rem* (i.e. a property right enforceable against the world) in respect of "non-personal or anonymised machine-generated data". It would encompass "the exclusive right to utilise certain data, including the right to licence its usage. This would include a set of rights enforceable against any party independent of contractual relations thus preventing further use of data by third parties who have no right to use the data, including the right to claim damages for unauthorised access to and use of data."²⁸

Whereas the Commission remains vague on the issue of initial ownership, according to Prof. Zech, the right would initially vest in "the economically responsible operator of equipment that generates the data (data producer)".²⁹ As the European Commission concedes, thus allocating the right might be highly problematic in practice, since data-generating machines are often owned and operated – and corresponding investments done – by numerous different actors.³⁰

In view of its stated aims, the right would have to be fully transferable.³¹ As to the term of protection, the Commission is silent, but according to Prof. Zech "[a] short term of protection seems to be appropriate since using data by analysing them can be done relatively quickly".³² The Commission excludes from the scope of the new right personal data, "as the protection of the latter is a fundamental right in itself under which natural persons should have control of their own personal data".³³ Otherwise, the Commission's proposal seems to encompass all sorts of machine-generated data.

As to its precise subject matter, Prof. Zech proposes: "A well-defined subject matter would be machine-readable coded information that is defined only by its representative characters (bits) irrespective of its content (data delimited on the syntactic level)".³⁴ This distinction is reflected in its intended scope. "The scope of protection would in particular include use by carrying out statistical analyses, but not the re-creation of the same data by independent measurement."³⁵ The Commission seems to embrace this distinction, perhaps in the hope that such a limitation might prevent undue information monopolies.³⁶ We shall examine the distinction between syntactic and semantic data in the following section.

In sum, both in terms of its intended subject matter (data, an immaterial good) and its scope of protection (reproduction and use of data by third parties), the proposed data producer's right would probably qualify as a right of intellectual property.

²⁴ Kerber (n. 21), 989. See also Dorner (n. 10), 625; Drexl (n. 13), 30 ff., 66.

²⁵ European Commission, Joint Research Centre (N. Duch-Brown, B. Martins & F. Mueller-Langer), 'The economics of ownership, access and trade in digital data', JRC Digital Economy Working Paper 2017-01.

²⁶ European Commission, Staff Working Document (n. 4).

²⁷ Zech, 'Information as a tradable commodity' (n. 19), 74–76.

²⁸ European Commission, Staff Working Document (n. 4), 33.

²⁹ Zech, 'Information as a tradable commodity' (n. 19), 75.

³⁰ European Commission, Staff Working Document (n. 4), 35.

³¹ Zech, 'Information as a tradable commodity' (n. 19), 76.

³² Ibidem.

³³ European Commission, Staff Working Document (n. 4), 33. Note that applying this distinction in practice will not be easy. For example, much machine data generated by automobiles is related to a person, and will therefore qualify as 'personal data'; see ADAC Study (n. 5).

³⁴ Zech, 'Information as a tradable commodity' (n. 19), 74.

³⁵ Zech, 'Information as a tradable commodity' (n. 19), 75.

³⁶ European Commission, Staff Working Document (n. 4), 34.

3. Data in the system of intellectual property

Before further scrutinizing the proposed data right and its possible impact on the system of intellectual property law, we first need to examine how existing legal regimes in the EU deal with machine-generated data. This section will focus on relevant laws of intellectual property, and not discuss other possibly relevant legal mechanisms, such as tangible property, contract and trade secrets. While the focus of this section will be on the two IP regimes most closely associated with protecting data structures, copyright law and sui generis database right, we shall also make a brief excursion into the field of neighboring rights.

3.1 Copyright in data

Is there copyright in data? The textbook answer is a resounding *no*. As U.S. Supreme Court Justice Warren Brandeis famously stated in his dissent in the *INS* case, "[t]he general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions and ideas – after voluntary communication to others, are free as the air to common use".³⁷ This axiom reflects what is called the *idea/expression dichotomy*: the dividing line between, as European copyright scholars prefer to say, protected form and unprotected content(s). The rule is generally codified in the U.S. Copyright Act (S. 102 (b)), as well in the TRIPs Agreement (art. 9(2)) and the WIPO Copyright Treaty (art. 2). In EU law we find a similar rule, albeit limited to computer software, in the Computer Programs Directive (art. 1(2)). Although these provisions do not expressly mention 'data', it is generally assumed, and uncontroversial – either on the basis of the 'dichotomy' or by way of direct application of copyright's requirement of authorship and creativity – that there cannot be copyright in data per se.³⁸

Whereas data as such are thus excluded from copyright protection, copyright's treatment of data compilations is more complex. The Berne Convention protects "collections of literary or artistic works such as encyclopaedias and anthologies" (art. 2(5)), but does not mention collections of mere data, and expressly denies copyright to "news of the day or to miscellaneous facts having the character of mere items of press information" (art. 2(8)). The TRIPs Agreement (art. 10(2)) more broadly protects "compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations". The WIPO Copyright Treaty (art. 5) contains similar language. In line with these modern conventions the EU Database Directive instructs Member States to provide copyright protection to "databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation" (art. 3(1)).

In *Football Dataco and others* the Court of Justice clarified that the test of 'the author's own intellectual creation' (in short, originality) implies that the selection or arrangement of the data is the result of creative choices. Applying art. 3(1), 2nd sentence ("No other criteria shall be applied to determine their eligibility for that protection"), the Court held that merely investing significant amounts of skill and labour does not justify a finding of originality. In other words, the Directive's originality standard preempts any (quasi-)copyright protection for databases that is merely based on investment or other criteria.³⁹ The Court's decision has brought to an end not only the United Kingdom's long-standing practice of according copyright protection to compilations of data based on 'skill and labour' (investment), but also similar doctrines in other Member States. For example, the Dutch protection of non-original writings ('geschriftenbeschermt') that existed for over a century in the Netherlands as a vehicle for protecting non-original writings and compilations, was formally abolished in 2014 following *Football Dataco*.⁴⁰

Football Dataco also rules out copyright protection for data compilations that are generated by machines without any human intervention. This is in line with the general rule that copyright requires acts of human authorship. Note however that the U.K. Copyright, Design and Patents Act

³⁷ J. Brandeis, diss. opinion, *International News Service v. Associated Press*, 248 U.S. 215 (1918).

³⁸ P.B. Hugenholtz, *Auteursrecht op informatie* (1989).

³⁹ *Football Association Premier League Ltd and Others v QC Leisure and Others; and Karen Murphy v Media Protection Services Ltd*, ECJ 4 October 2011, joined cases C-403/08 and C-429/08, ECR [2011] I-9083.

⁴⁰ See P.B. Hugenholtz, 'Works of Literature, Science and Art', in: P.B. Hugenholtz, A.A. Quaedvlieg & D.J.G. Visser (eds.), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (2012) 54. See also P.B. Hugenholtz, 'Goodbye, Geschriftenbeschermt!', Kluwer Copyright Blog, March 6, 2013, available at <http://kluwercopyrightblog.com/2013/03/06/goodbye-geschriftenbeschermt/>.

appears to extend copyright protection to machine-created works: "in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken".⁴¹ Whether this rule can co-exist with *Football Dataco* remains to be seen. According to the European Court there is no originality "when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom".⁴²

Both TRIPs and WCT caution that copyright in compilations of data "not extend to the data or material itself". Similarly, the Database Directive (art. 3(2)) warn that database copyright "shall not extend to their contents", thus ruling out copyright protection for the data compiled in a database. The scope of database copyright protection is limited to the original structure (selection or arrangement) of the database (Database Directive, recital 15). Extracting (parts of) the contents of the database without appropriating the selection or arrangement does not infringe the copyright in the database.⁴³

3.2 *Sui generis database right*

Art. 7(1) of the Database Directive supplements the Directive's copyright regime by obliging Member States to protect databases that result from substantive – qualitative or quantitative – investment. This is the *sui generis* database right that has made the Directive internationally (in) famous. The substantial investment is to be made "in either the obtaining, verification or presentation of the contents" of the database (art. 7(1)). 'Obtaining' is the act of gathering the data, works or other materials to be included in the database. 'Verification' relates to the checking, correcting and updating of data already existing in the database. 'Presentation' concerns acts such as digitizing (scanning) analogue files, or creating a thesaurus. A decision by the German Federal Supreme Court suggests that the standard of 'substantial investment' is not very hard to meet. Any investment in a database that "viewed objectively [...] is not wholly insignificant and easy to be made by anyone" would suffice.⁴⁴ The European Court of Justice has yet to opine on the level of this threshold criterion.

In four landmark cases concerning the unauthorized use by betting companies of sports events schedules ('fixtures') the European Court held that database right does not protect investment in generating the data or other contents of a database. According to the Court, "investment in the obtaining of the contents" (of a database) "refers to the resources used to seek out existing materials and collect them in the database but does not cover the resources used for the creation of materials which make up the contents of a database."⁴⁵ The main argument for this distinction, as is transparent from the decision, is that the Database Directive's economic rationale is to promote and reward investment in database production, not in generating new data. According to the Court, "[t]he purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database."⁴⁶

Thus investment in 'creating' data does not count towards investment. However, the European Court's epistemological distinction between 'creating' and 'obtaining' data is not self-evident.⁴⁷ While the Court ruled out from *sui generis* protection such 'invented' data as horse racing schedules and football fixtures, the Court of Appeal of England and Wales in a subsequent decision held that facts observed – such as the scoring of a goal in football – are not 'created'

data.⁴⁸ But where in this spectrum between purely synthetic data and data 'observed' should we place machine-generated data? The answer depends on the type of data that the machine processes. For example, sensor data produced by a radar system or observation satellite are likely to qualify as data 'observed', and concomitant investments may thus be taken into account when applying the database right. Conversely, computer-generated airline schedule data squarely falls under the rubric of 'created' data excluded by the European Court.

Whereas the *sui generis* right comes close to a property right in aggregate data – and has been justly criticized for its potential of creating harmful information monopolies⁴⁹ – the Directive's recitals admonish that the *sui generis* right "does not in any way constitute an extension of copyright protection to mere facts or data" (recital 45) and "should not give rise to the creation of a new right in the works, data or materials themselves" (recital 46).

Indeed, the database right comes with several statutory limits in order to prevent the right from extending to the data in the database per se. The *sui generis* right protects database producers against 'extraction' and 'reutilization' of the whole, or a substantial part, of the database (art. 7). In other words, non-substantial takings of data are permitted without authorization. Moreover, as the European Court clarified in *British Horseracing*,⁵⁰ *sui generis* protection does not extend beyond misappropriation of data (contents) that result from substantial investment. In other words, the database right tolerates takings of (potentially valuable) data that are not the product of substantial investment.

Another delimiting factor is the notion of 'database'. Art. 1(2) of the Directive defines this as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means". While the Explanatory Memorandum generally describes the contents of the database as "information" in the widest sense of that term,⁵¹ the compiled data or materials must be 'independent', that is to say, "materials which are separable from one another without their informative, literary, artistic, musical or other value being affected".⁵² Therefore an audiovisual, cinematographic, literary or musical work or a sound recording does not qualify as a database, even if it can be perceived as a representation of data (recital 17). This reflects a clear intention on the part of the European legislature to avoid extensive overlaps between the database right and existing copyright and neighbouring rights.⁵³

Finally, according to art. 1(2) of the Database Directive, the individual elements of the database must be "arranged in a systematic or methodical way". This squarely rules out protection – whether by copyright or by database right – of (collections of) raw machine-generated data.

3.3 *Phonogram protection*

In addition to copyright and database right, the phonographic right – one of the four neighbouring rights recognized at EU level – merits brief consideration. The rights of phonogram producers are harmonized by the Rental Right Directive (currently Directive 2006/115/EC) and the Information Society Directive (Directive 2001/29/EC). These Directives leave defining the notion of 'phonogram' to the WIPO Performances and Phonograms Treaty (WPPT) of 1996. According to the WPPT (art. 2) 'phonogram' means "the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incor-

41 Copyright, Design and Patents Act, U.K. 1988 (c. 48), c. 1, s. 9(3); see M. Perry and T. Margoni, 'From Music Tracks to Google Maps: Who Owns Computer-generated Works?', 26 *Computer Law & Security Review* (2010) 621-629.

42 *Football Dataco* and others (n. 39).

43 *The Newspaper Licensing Agency & others v Meltwater & the PRCA*, High Court of Justice (Chancery Division), 26 November 2010, [2010] EWHC 3099.

44 Bundesgerichtshof (Federal Supreme Court), 1 December 2010, case I ZR 196/08.

45 *Fixtures Marketing Ltd v Oy Veikkaus Ab*, ECJ 9 November 2004, case C-46/02, ECR [2004] I-10396; *British Horseracing Board v William Hill Organization*, ECJ 9 November 2004, case C-203/02, ECR [2004] I-10415; *Fixtures Marketing Ltd v Svenska Spel AB*, ECJ 9 November 2004, case C-338/02, ECR [2004] I-10497; *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)*, ECJ 9 November 2004, case C-444/02, ECR [2004] I-10549.

46 *British Horseracing* (n. 45), para. 31.

47 M.J. Davison & P.B. Hugenholtz, 'Football fixtures, horseraces and spin-offs: the ECJ domesticates the database right', [2005] *European Intellectual Property Review* 113-118.

48 *Football Dataco & Others v Stan James Plc & Others and Sportradar GmbH & Others*, Court of Appeal (Civ. Division), 6 February 2013, [2013] EWCA Civ 27.

49 See J. H. Reichman, 'Database Protection in a Global Economy', [2002] *Revue Internationale de Droit Economique* 455-504.

50 *British Horseracing* (n. 45).

51 Explanatory Memorandum, Proposal for a Council Directive on the Legal Protection of Databases, 19.

52 *Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE (OPAP)* (n. 45).

53 On the other hand, the European Court has held that the geographical data in topographic map are sufficiently 'independent' to for the map to qualify as a protected 'database'. According to the Court, "geographical information extracted from a topographic map by a third party so that that information may be used to produce and market another map retains, following its extraction, sufficient informative value to be classified as 'independent materials' of a 'database' within the meaning of that provision." *Freistaat Bayern v Verlag Esterbauer GmbH*, CJEU 29 October 2015, Case C-490/14.

porated in a cinematographic or other audiovisual work". By including 'other sounds' and 'a representation of sounds' this definition apparently encompasses raw audio data stored ('fixed') on a digital medium.

Whether there is a threshold criterion for the phonographic right that might delimit both the substance and scope of the right, is as yet unsettled under EU law. In its 2008 *Metall auf Metall* decision the German Bundesgerichtshof extended neighbouring rights protection to every single recorded note of a sound recording, because the record producer's investment is reflected in every – even very minor – part of the recording.⁵⁴ This suggests that no threshold criterion (no investment minimum) would apply. In a follow-up decision the German Constitutional Court has however held that a phonographic right of unlimited scope, as contemplated by the Federal Supreme Court, may collide with the 'freedom of art' that is constitutionally guaranteed in Germany (art. 5 of the Basic Act). Most recently, the Bundesgerichtshof has referred questions regarding the scope and limitations of the phonographic right to the EU Court of Justice.⁵⁵

3.4 Assessment: impact of data property on the system of intellectual property law

As this section shows, both copyright and database right do not extend to data per se. Both regimes do conditionally offer protection to data compilations that result from creative selection and arrangement (copyright) or substantive investment (database right). Both regimes deny protection to machine-generated, raw data. For copyright, this follows from the axiom that only acts of authorship conducted by human beings are protectable. For database right, this is a consequence of the sui generis right's categorical delimitation: only data structured in a 'database' qualify for protection. Moreover, the sui generis right's substantial investment test sets an – admittedly fairly low – minimum threshold. If operating a machine that records sensor data does not require substantial investment (for example, a low-cost digital weather station or a bicycle computer), then this will not result in a protected database. The CJEU's 'Fixtures' decisions pose an additional hurdle to sui generis protection for machine-generated data by excluding 'created' data from protection, thus ruling out machine-generated synthetic data.

In sum, introducing a right in raw, machine-generated industrial data, as envisaged in the Commission's Communication, would go far beyond the main intellectual property regimes presently existing in Europe in the field of data and information, copyright and database right.

Disruptive overlaps

How would this affect existing intellectual property law? In the first place, creating a new layer of rights in machine-generated data would cause broad and disruptive overlaps with copyright and sui generis right in productions made with the aid of digital machines. For example, a film shot with a digital camera would qualify not only as a work protected by copyright, but also as machine-generated (sensor) data subject to a 'data producer's right'. Similarly, the aggregate stock market data in a financial database would be protected both by sui generis right and 'data producer's right', since the data are recorded automatically by the computerized stock exchange.

Whereas the EU legislature has clearly intended to prevent the database right from spilling over into the realms of copyright and neighbouring rights, the 'data producer's right' would lead to extensive overlaps. As a consequence, the new right might give rise to multiple competing claims of ownership in the same content. To continue with our first example, while the creators of the film (e.g. the director, screen writer, and other creators of the film) could claim authorship in the cinematographic work, the owner or operator of the camera might claim 'data property' in the photographic data (i.e. the digital representation of the film) – surely, to the unpleasant surprise of the film's producer. Similar examples might be given with regard to digital photographs or e-books. In the second example, the database producer might be confronted with 'data property' claims of the stock exchange, or the exchange's computational services company.

Another consequence of this wide-ranging overlap would be that statutory limitations and exceptions under copyright, neighbouring rights or database right are 'trumped' by data producer's right. For example, both copyright and database right in the EU presently allow users to copy or extract data from databases for non-commercial research purposes. Unless, the 'data producer's right' would replicate all relevant existing exceptions, it would undercut these essential user freedoms.

This is especially true for *data mining*. Strangely, while the Commission's Communication on 'Building a European data economy' ponders the introduction of an exclusive right in machine-generated data, one of the highlights of the DSM Directive proposal that is currently being debated in the European Parliament is a mandatory exception, both under copyright and database right, for text and data mining by non-commercial research organisations.⁵⁶

In line with Prof. Zech's suggestions, the European Commission in its Staff Working Paper attempts to alleviate concerns of wholesale overlap by distinguishing *syntactic* from *semantic* data. The proposed 'data producer's right' would be conceived in such a way that "only the syntactical level of information is protected, not the semantic level"⁵⁷ What is probably meant here is that the raw data would be protected only as regards its digital representation (the machine-readable bits and bytes, the 'ones and zeros' in the digital file), not the informational content that these data convey. Thus, the European Commission hopes, the new right would not extend to ideas and information, and the new right would not become a "super-IP right".⁵⁸

But would such a distinction really prevent the new right from extensively overlapping with existing IP rights? I do not believe so. The problem here is that digital data are commonly coded and interpreted following standardized rules and protocols. In other words, there usually will be a one-on-one relationship between the (syntactic) data substrate and the (semantic) content layer. Returning to our example of the digitally produced film, any copy of the film's digital file (the syntactic data) would by necessity also reproduce the copyright protected work (the semantic layer). Thus, the new data right could be invoked against any digital copying (or streaming) of the digitized copyright work. For the same reason, the new right would broadly overlap with database right, even if its scope were confined to the syntactic layer. The phonographic right discussed above illustrates this point. Whereas its subject matter, like the proposed 'data producer's right', is limited to the recorded signal (i.e. syntactic audio data), its scope extends into the semantic realm. Reproducing a cd recording of a musical performance will, by necessity, result in the reproduction of the underlying musical work and performance.

The only way to prevent the data right from becoming an all-encompassing 'super-IP right' would be to categorically exclude all data that (possibly) represent subject matter protected under traditional IP regimes: not just copyright, database right and neighbouring rights, but also design right and perhaps even patents. But even a non-overlapping data right would have seriously corrosive effects on the system of intellectual property, for various reasons. First, it would undermine the economic incentives that underlie IP rights. For example, the main rationale of the sui generis right is to promote and reward investment in the building of databases from pre-existing data and other materials. This incentive is clearly undercut if a lower-tier, no-threshold right in machine-generated data were to exist in parallel. Second, and more importantly, it would compromise the general principle of intellectual property – whether utilitarian or grounded in natural law theory – that protection be reserved to creation, innovation or otherwise meritorious investment. A data right in all data produced by machines might, on occasion, protect assets of considerably economic value, but nothing of merit. This has ramifications, in particular, at the political level. With intellectual property laws under increasing fire, legislatures – at EU and national level – need powerful and convincing arguments to defend existing regimes and introduce new rights. In this volatile political climate proposing a data producer's right with the

56 European Commission, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Brussels, 14 September 2016, COM(2016) 593 final. Art. 3(1) of the proposed Directive provides: "Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research."

57 Zech, 'Information as a tradable commodity' (n. 19), 74, European Commission, Staff Working Document (n. 4), 34.

58 European Commission, Staff Working Document (n. 4), 34.

54 *Metall auf Metall*, Federal Supreme Court, 20 November 2008, case I ZR 112/06, *GRUR* 2009, 403; German Constitutional Court, 31 May 2016, case I BvR 1585/13 of, *GRUR* 2016, 690.

55 *Metall auf Metall III*, Federal Supreme Court, 1 June 2017, case I ZR 115/16.

sole aim of (better) protecting the economic assets of the automotive (or any other) industry will surely backfire. Not only is such an initiative likely to fail in the legislative process, but it will also (re)ignite broader discussions on the legitimacy of intellectual property law.

No legal certainty

Another, more mundane objection against a property right in data lies in its inherent lack of legal certainty. Although it is still not fully conceptualized, it is difficult to imagine a data right sufficiently stable in terms of subject matter, scope and ownership to be admitted to the ranks of intellectual property. As to subject matter, if the right vests in data generated by machine processes, which data would it protect? All the data that the machine produces within a given time frame (e.g. an hour, a minute or a second)? Or all the data that result from a finite machine process (e.g. all the data gathered by a satellite that sensors the earth)?

Admittedly, the sui generis database right has already raised similar questions. With data in a database constantly being updated, what exactly constitutes the protected database? But in database law the definition of 'database' and requirement of substantial investment create at least some measure of permanency in the subject matter and scope of the right. This stability is, however, completely absent from the data producer's right. The problem here is that industrial data generation mostly occurs in real time. The 'velocity' – the dynamic nature – of big data makes it very difficult, if not impossible, to identify a stable object of protection.⁵⁹ The subject matter of the right is simply too fluid. If this is to become a full-fledged right of intellectual property that is enforceable against the world, it should be possible to ascertain its subject matter – and, by implication, its scope of protection – with sufficient legal certainty.

A related problem is allocating ownership of the right. Since the right would be sparked by machine operations, no causal ownership connection with a natural person as, for instance, in copyright, exists. As Prof. Zech and the European Commission suggest, ownership might be vested in the person owning or operating the machine that generates the data. This, however, is hardly a reliable rule. As the OECD points out in its groundbreaking study on 'big data', multiple actors/stakeholders might claim ownership to the data, both upstream and downstream in the process of generating and processing data.⁶⁰

In sum, the proposed 'data producer's right' would most likely seriously affect, or even distort, existing copyright and database right, and its underlying incentives. Moreover, in the absence of clear and predictable rules circumscribing its subject matter, scope and ownership, it would lead to gross legal uncertainty. This conclusion in itself justifies serious restraint on the part of the EU legislature, even without considering the adverse effect the new right might have on the free flow of information, one of the cornerstones of the emerging information society.

4. Data property and the free flow of information

The exclusion of data per se from the scope of existing intellectual property regimes is not merely ontological. Although old-school author's right scholars might argue that data are not copyright works, *because data are not 'created'*, this is at best a partial explanation for this exclusion.⁶¹ Rather, IP law's abhorrence of protecting data reflects implicit or explicit information policies not to protect data. These policies are, in turn, informed by a variety of public interest values and concerns. In the first place, of course, freedom of expression and information – the fundamental freedom enshrined in the European Convention on Human Rights (art. 10 ECHR), and the EU Charter (art. 11).

As case law and doctrine regarding the Convention teach, this fundamental freedom is to be interpreted broadly. Article 10 ECHR is phrased in media-neutral terms and thus applies to old and new media alike. The term 'information' (in French: 'informations') comprises, at the very least, the communication of facts, news, knowledge and scientific information. It also, undoubtedly, extends to syntactic data; the scope of article 10 is not limited to (semantic) speech, but extends to the means used for communication purposes. To what extent the article's protection

⁵⁹ Drexel (n. 13), 15.

⁶⁰ See OECD (n.1), 195-196; Drexel (n. 13), 6, 39.

⁶¹ See generally P.B. Hugenholtz, *Auteursrecht op informatie* [Copyright in information] (1989).

extends to *commercial* speech has been a matter of some controversy. However, the European Court of Human Rights has made it clear that information of a commercial nature is indeed protected, albeit to a lesser degree than political speech.⁶²

Article 10 ECHR prevents states from creating restrictions to the free flow of information unless such restrictions "are prescribed by law and are necessary in a democratic society [...] for the protection of the [...] rights of others". From this perspective data and information must flow freely, uninhibited by property rights or other state-created restrictions, unless a compelling societal need for protection ("necessary in a democratic society") can be established. Freedom of expression and information, in other words, makes intellectual property rights in data the exception to the default rule of freedom.⁶³

This brings us back to the question of expediency. The EU legislature would bear the burden of proving that a property right in machine-generated data is a socially and economically justifiable ('necessary') interference in the freedom of European citizens and companies to freely access and reutilize machine-generated data. In light of the abundant praise in political literature of 'big data'⁶⁴ and big data mining as drivers of progress and prosperity, and the absence of convincing evidence supporting a property right in machine-generated data, this burden of proof would be difficult to surmount.

In particular, freedom of expression and information militates strongly against any new right of intellectual property that would restrict scientists' access to data – a freedom that the EU legislature expressly wishes to preserve as regards 'text and data mining' by non-commercial research institutions. Note that this freedom finds additional support in art. 13 of the EU Charter ("The arts and scientific research shall be free of constraint. Academic freedom shall be respected"). Another area where a data right would patently conflict with freedom of expression and information is journalism, where mining data has become an essential tool for investigative reporting.⁶⁵

A second over-arching policy consideration underlying intellectual property law's reluctance to protect data per se is freedom of competition (enshrined in art. 16 of the EU Charter as the "freedom to conduct a business"). This economic freedom traditionally sets limit to intellectual property rights and is one of the rationales underlying the idea/expression dichotomy. As the literature on the economic potential of 'big data' demonstrates, machine-generated data are both input and output to innovative manufacturing processes and value-added services, and thus a major driver of economic growth. This calls for measures promoting access to data and fostering data mining rather than commodification of data by creating property rights in data. Unless equipped with wide-ranging exceptions and safety valves, introducing a new property right in data might create undesirable data monopolies that could impede, rather than foster, competition in this rapidly evolving European 'data market' place.⁶⁶ At the global level, introducing data property rights in the EU might well lead to anti-competitive distortions as well, in cases where European data users are obliged to purchase licenses for usage of data freely available to their competitors in the United States.

⁶² See e.g. Hertel v. Switzerland, ECHR 25 August 1998, Publications of the ECHR, Reports 1998-VI.

⁶³ See (for copyright) Ashby Donald and Others v France, European Court of Human Rights 10 January 2013, No. 36769/08; ECLI: 2013:0110JUD00367690.

⁶⁴ OECD (n. 1); see also European Commission, 'A Digital Single Market Strategy for Europe', Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 6 May 2015, COM (2015) 192 final, p. 14: "Big data, cloud services and the Internet of Things are central to the EU's competitiveness." I. Hargreaves a.o., *Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining*. Report from the Expert Group to the European Commission (2014), doi:10.2777/71122.

⁶⁵ See Dammann v. Switzerland, ECHR 25 April 2006, no. 77551/01. The Court opines that "the gathering of information was an essential preparatory step in journalism and an inherent, protected part of press freedom". Surprisingly, data mining for journalistic purposes seems to be overlooked in the proposed TDM exception of the DSM Directive.

⁶⁶ Max Planck Institute for Innovation and Competition, 'Data Ownership and Access to Data', Position Statement of the Max Planck Institute for Innovation and Competition, Max Planck Institute for Innovation & Competition Research Paper No. 16-10 (2016), 2.

Finally, a novel data right would also create new barriers to the freedom of services, one of the four freedoms of the EU Internal Market. In its Communication on 'Building A European Data Economy', the European Commission interprets this freedom, together with the freedom of establishment, as implying a "principle of free movement of data within the EU".⁶⁷ It is hard to see how a novel property right in machine-generated data would square with this freedom.

5. Conclusion

This article makes the case against introducing a data property right. As we have seen, there are abundant reasons to reject this idea. A 'data producer's right' in machine-generated data would ride roughshod over the existing system of intellectual property. It would violate one of the IP system's main maxims that data per se are "free as the air for common use", and that only creative, innovative or other meritorious investment is protected. It would corrode IP's mechanism of incentives by creating an underlayer of rights that automatically protects all data produced with the aid of machines. This parallel layer of rights would, most likely, extensively overlap with other IP regimes, and thus create undue impediments for the exploitation of existing rights, such as copyright and database right, and endanger user freedoms guaranteed under these regimes. It would also give rise to gross legal uncertainty, since the 'velocity' of real-time data generation makes it difficult, or even impossible, to circumscribe its subject matter, scope of protection and ownership. More generally, a property right in machine-generated data would contravene freedom of expression and information, and pose new obstacles to freedom of competition, freedom of services and the 'free flow of data'.

The great promise of big data – for the economy, for science, for society at large – is that this resource may be freely exploited. Introducing a 'data right' preventing unauthorized access to big data would directly contradict this. Indeed, it is hard to understand how the proposed new right would square with the text and data mining proposed by the European legislature in the current EU copyright reform package.

If, as the European Commission rightly believes, "big data, cloud services and the Internet of Things are central to the EU's competitiveness"⁶⁸, one would have expected supporters of a novel data producer's right to present powerful and convincing arguments in support of this revolutionary proposition. So far, the case for a property right in machine-generated data has yet to be made. As Prof. Drexler and others have pointed out, the existing toolkit of trade secret protection, contract and technological protection measures offers data producers ample means of securing de jure or de facto exclusivity.⁶⁹ Rather than wasting time and effort on inventing a data producer's right, the focus of the European Commission's possible interventions should be on fostering access to big data.⁷⁰

Fortunately, the possible introduction of a 'data producer's right' is only one of several policy options currently being contemplated by the Commission in its 'European Data Economy' initiative. As this article has shown, there are innumerable reasons for the European Commission not to go down this road. If nothing else, Europe's experience with the sui generis database right should give reason for extreme caution. In 2005, less than ten years after it was introduced at EU level, the European Commission published its first review of the Database Directive, a remarkably self-critical assessment. According to the Commission, "[t]he economic impact of the 'sui generis' right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases".⁷¹ The Commission's report also suggests that the sui generis right has not helped the European industry to overcome its productivity gap vis-à-vis the United States.⁷² It points to several other deficiencies of the sui generis right, such as its uncertain contours, and its proximity to a property right in data that might negatively affect innovation and growth. The report

⁶⁷ European Commission, 'Building A European Data Economy' (n. 4), 7.

⁶⁸ DSM Strategy, p. 14.

⁶⁹ Drexler (n. 13), 66.

⁷⁰ See Drexler (n. 13), 41 ff; Max Planck Institute Position Statement (n. 66); see also European Commission, Staff Working Document (n. 4), 36 ff.

⁷¹ European Commission, 'First evaluation of Directive 96/9/EC on the legal protection of databases', DG Internal Market and Services Working Paper, Brussels, 12 December 2005, p. 5.

⁷² European Commission, 'First evaluation of Directive 96/9/EC on the legal protection of databases', DG Internal Market and Services Working Paper, Brussels, 12 December 2005, p. 22-23.

juxtaposes the legal situation in the EU with that in the United States, where since the Supreme Court's landmark *Feist* decision⁷³ no legal protection for 'sweat of the brow' based databases exists. Nevertheless, as the Commission wryly observes, "there has been a considerable growth in database production in the US, whereas, in the EU, the introduction of 'sui generis' protection appears to have had the opposite effect."⁷⁴

The 2005 evaluation report concludes by offering four possible ways forward: (1) repeal the whole Directive; (2) withdraw the sui generis right, (3) amend the sui generis to clarify its scope, and (4) maintain the status quo. Despite these harsh conclusions, the database right has yet to be amended or repealed. The problem is that removing (parts of) a directive is, politically and legislatively, even more complex than substantive harmonization. Repealing the database right would require a new directive not only rescinding major parts of the existing Directive, but also – absurdly – instructing Member States to *abolish* sui generis database protection. Unsurprisingly, the only option that has so far materialized from the Commission's assessment is no. 4: "do nothing".⁷⁵

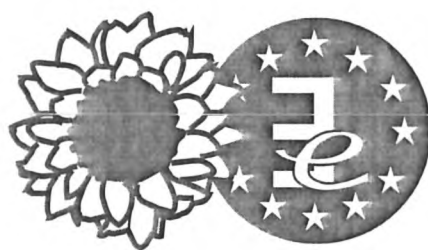
The lessons of the EU's database experiment⁷⁶ are not to be forgotten. Introducing a novel right of intellectual property should never be done in the spur of the moment. Any new right should be contemplated only after conducting thorough economic, evidence-based research that demonstrates a real need for the right and predicts its consequences for information markets and society at large. Assuming a convincing case in support of the right might indeed be made, this should then be followed by systematic legal analysis of the new right's contours and scope, and of its impact on the existing system of intellectual property. The two-tiered structure of the Union does not allow for legal experimentation at the EU level. Like the database right, a 'data producer's right' would be here to stay – a most unwelcome guest in the house of European intellectual property.

⁷³ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

⁷⁴ European Commission, 'First evaluation of Directive 96/9/EC on the legal protection of databases', DG Internal Market and Services Working Paper, Brussels, 12 December 2005, p. 24.

⁷⁵ Note that the European Commission has launched a public consultation on a possible review of the Database Directive on 24 May 2017, see <https://ec.europa.eu/digital-single-market/en/news/commission-launches-public-consultation-database-directive>.

⁷⁶ S.M. Maurer, P.B. Hugenoltz & H.J. Onsrud, 'Europe's database experiment', 294 Science 789-790.



The Greens | EFA
in the European Parliament

From: [REDACTED]
Sent: 19 August 2016 20:37
To: CAB GUENTHER OETTINGER CONTACT
Subject: Appeal concerning a clarification of EU-Copyright
Attachments: Appeal-Comm.Oettinger8.16.pdf

Personal data

Please find attached the pdf file of our appeal concerning a clarification of EU-Copyright with regard to the publishers' participation in CMO-Payments

Best regards,
 [REDACTED]

Personal data

[REDACTED]

[REDACTED]



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Vienna, August 10th, 2016

**Appeal concerning a clarification of EU-Copyright
with regard to the publishers' participation in CMO-Payments**

Personal data

Dear Commissioner Öttinger,

The transfer of rights for the purpose of commercial exploitation has always been accepted as granting rightholder status to publishers. This is clear from various pieces of EU legislation. The decision of the CJEU in the "HP/Reprobel"-case of November 12, 2015, has recently called this fundamental basis of the publishing business model into question due to a highly formalistic interpretation of the Copyright Directive 2001/29 (InfoSoc-Directive).

The CJEU interprets the Infosoc-Directive in a way that publishers are not rightholders in the sense of the Directive and cannot receive payments from Collective Management Organisations (CMOs). In its decision the CJEU does not at all consider publishers' ownership and states simply under section 47 of the ratio decidendi: *"However, publishers are not among the reproduction rightholders listed in Article 2 of Directive 2001/29"*.

In Germany, the Federal Supreme Court has already implemented the CJEU-Judgement by excluding publishers from CMO-Payments. German Publishers are, therefore, facing repayment claims for the past four years amounting to 300 Million Euros.

This situation was never intended by either European or national legislators. Only a clarification of European law can repair the damage to the well-established and mutually beneficial systems of collective management of authors' and publishers' rights. A clarification of EU legislation explicitly recognizing publishers as rightholders is required in order for CMOs and publishers to have legal certainty again.

It should be noted that for instance in Austria the rights of public libraries to allow photocopying and even digital lending have been expanded recently. The only compensation for publishers is organized through their participation in the recompensation by CMOs. Should under the jurisdiction of the CJEU publishers no longer receive any payments, the entire scientific copy-privilege could be considered as expropriation without compensation, which is against fundamental legal principles of the EU.

As a privately owned legal publisher in business for more than 90 years, we appeal to the European Commission to solve this problem by clarifying that publishers are rightholders and, as such in a position to participate in CMO-payments. This is a not only a problem for individual EU-memberstates but also for the EU as a whole and solving it is of great urgency.

Yours sincerely,

Personal data

From: [REDACTED] N [REDACTED] a [REDACTED] i [REDACTED] @europarl.europa.eu>
Sent: 03 March 2017 10:59
To: CAB ANSIP WEB
Subject: The Link Tax
Importance: High
Categories: [REDACTED]

Dear Mr Andrus Ansip, Vice President for Digital Single Market,

I am writing to you, on behalf of my constituents, about the EU Commission's proposed 'Link Tax'.

I have received hundreds of emails from concerned constituents all over my constituency of Wales regarding this proposal. I wanted to write to you directly to outline their concerns and to find out what the next steps are regarding this policy.

Like my constituents, I am concerned that hyperlinks shared in a personal capacity on social media sites will be subject to a fee. It seems that the interests of publishers are being put before the interests of ordinary people.

1. Firstly, if this disastrous policy is implemented, will it still apply to the UK in light of Brexit?
2. Secondly, what safeguards can you provide to my constituents that they will not be financially penalised for sharing hyperlinks on their social media accounts?
3. Thirdly, please can you provide the thinking behind this directive? Has this directive stemmed from any particular research or feedback, and what consultations have been done with citizens from EU Member States? In particular, I refer to the specific needs of my constituents here in Wales.

It seems to me that the impetus behind this proposal is to provide revenue to news publishers, who feel that in this new digital age, are missing out on their share of the profits.

This is another example of how the EU works with big business in a cosy corporate club. The EU Commission only works to serve the interests of big businesses and does not care about small communities and the interests of citizens.

Regards,
Mr Nathan Gill MEP for Wales



Personal
Data

From: [REDACTED] (FANDE) [mailto:[REDACTED]]
Sent: Thursday, January 25, 2018 2:53 PM
To: CAB GABRIEL CONTACT
Cc: [REDACTED] (CAB-GABRIEL); [REDACTED] (CAB-GABRIEL)
Subject: Contact with the International Publishing Distribution Association (IPDA)

Personal
data

Dear Ms. Gabriel

Hope you are doing well.

I would like to give you information about the International Publishing Distribution Association (IPDA), that joins the main European Publishing Distribution Digital Companies, as we would like very much maintain contact with your Cabinet in order to help and collaborate to the development of creative and content industries, and contribute to activities that turn digital research into a successful European innovation reality.

In that sense, I would like to give you some feedback about the main activity that IPDA organize regarding the Digital framework as is the **International Digital Distributors Meeting**. This meeting organized by IPDA each year in Madrid, during the first week of June, is the main international event on distribution of digital contents, with the participation of digital distributors, publishers, booksellers, librarians, journalists, bloggers, startup developers... from different countries (last edition was celebrated on 7th and 8th June with the participation of more than 900 professionals from 40 different countries, and include in a full week about Innovation on Readership and Publishing called Readmagine).

Presentations of #4IDDM are available at www.ipdaweb.org/projects-services/ and some videos about the event at: <https://www.youtube.com/watch?v=R0HcqRZ7W2Y> and <https://www.youtube.com/watch?v=wh6DOI3wu2M>

About IPDA: The International Publishing Distribution Association (IPDA) is the international umbrella organization for the associations and companies that develop its activity in the field of publishing distribution (books, magazines, newspapers... both on print and digital versions). IPDA aim is to further the interests of publishing distributors considering different lines of activity:

- Interchange of information and commercial opportunities between distribution company members.
- Coordination and collaboration with Publishers and Booksellers / Newsagents Associations at European and International level.
- Common representation of the Publishing Distribution sector, in terms of dialogue with Public Administrations and European / International Institutions.
- Organization of Publishing Distribution Events (Meetings, Round Tables, Congress, Think Tanks...), acting as a forum for discussion and cooperation.
- Development of working groups regarding the different areas of the situation and future of the publishing distribution sector (i.e. metadata, EDI, ecommerce, legislation on publishing business, taxation...)

The Digital Distribution companies actually members of IPDA are **Bookwire** (Germany), **BookRepublic** (Italy), **Vearsa** (Ireland), **DeMarque** (Canada), **Overdrive** (USA), **Numilog** (France), **Cyberlibris** (France), **Hipertexto** (Colombia), **Netizen** (México), **PocketBook** (Switzerland), **Tolino Media** (Germany), **Books on Demand** (Germany), **Trajectory** (USA), **StreetLib** (Italy), **Libreka** (Germany), **ArtaTech** (Poland), **Ingram** (USA), **Publit** (Sweden), **Viz Media** (Japan), **GiantChair** (USA), **Nextory** (Sweden), **CB** (The Netherlands)... (Apart from the main Spanish Distributors also members of the Association as **Librandia**, **Odilo**, **Lektu**, **Tagus**, **Digital Books**, **Bubok**.... You can access to the list of current members at www.ipdaweb.org/members

We would like very maintain contact with your Cabinet, collaborate in all the questions that you consider relevant for the distribution of Digital Publishing Contents, and offer our Association for present to the Publishing Distribution community the main objectives and projects developed regarding the Digital Single Market.

All the best,



Managing Director

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International
Publishing
Distribution
Association

Tel. 
www.ipdaweb.org

 Cuando imprima este correo, no olvide reciclarlo. Porque el papel es el soporte natural, renovable y reciclable de lo más humano: la palabra. www.graciaspapel.es

En cumplimiento de la Ley Orgánica de Protección de Datos 15/1999, le informamos que sus datos personales están incorporados en un fichero denominado TERCEROS con código de inscripción nº 2092520254, cuyo responsable es la Union de Distribuidores Nacionales de Ediciones, necesario para la gestión comercial. Puede ejercer los derechos de acceso, rectificación, cancelación y oposición enviando una solicitud por escrito haciendo constar la referencia "PROTECCIÓN DE DATOS", acompañada de una fotocopia de su D.N.I. a la dirección postal C/ Santiago Rusiñol, 8 - 28040 (MADRID).

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From: [REDACTED] on behalf of ANSIP Andrus (CAB-ANSIP)
Sent: 27 January 2017 12:36
To: CAB ANSIP ARCHIVES
Subject: FW: European Copyright Society Opinion on Copyright reform
Attachments: ECS opinion on EU copyright reform jan17.pdf; ECS letter on EU copyright reform Ansip.pdf

Categories: [REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, January 27, 2017 11:42 AM
To: ANSIP Andrus (CAB-ANSIP)
Cc: [REDACTED]
Subject: European Copyright Society Opinion on Copyright reform

Personal data

Dear Commissioner Ansip,

The European Copyright Society is a European platform of Copyright law professors that aims at providing independent and critical scholarly thinking on copyright. The ECS has just released its opinion on the copyright reform package that you will find attached to this email.

The opinion is also available [here](#)

The members of the European Copyright Society would be pleased to discuss this letter with you or your staff if you would so desire.

Respectfully,

On behalf of the European Copyright Society

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[REDACTED]
Chair of ECS

--
Professor
Law School, SciencesPo Paris
-->

European Copyright Society

General Opinion on the EU Copyright Reform Package

24 January, 2017

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law¹. Its members are renowned scholars and academics from various European countries, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholder.

The members of the ECS have carefully examined the European Commission's proposals on copyright reform released on September 14th, 2016. In this opinion, we are pleased to submit our comments, observations and suggestions.

The current package of proposals incorporates several issues and policies that have already inspired responses by our Society:¹

- In our Society's response to the Public Consultation on the review of the EU copyright rules of March 2014, we suggested a number of improvements to the existing (harmonized) EU rules on copyright law.
- In our opinion of 13 October 2014 we stressed the importance of exceptions and limitations in facilitating creativity and securing a fair balance between the protection of and access to copyright works, and underlined the need to reach full harmonization or unification in this area of EU copyright law.
- In our letter of 19 December 2014 to the European Commission, we encouraged the Commission to take further steps towards true unification of EU copyright law.
- In our response to the European Commission's Public Consultation on the Review of the EU Satellite and Cable Directive of 15 November 2015, we suggested expanding the SatCab Directive's country of origin approach to content services offered online, subject to certain reservations.
- In our answer to the EC Consultation on the 'panorama exception' of 15 June 2016, we recommended that the current art. 5.3 (h) of the Information Society Directive should not be amended.
- In our answer to the EC Consultation on the role of publishers in the copyright value chain of 15 June 2016, we strongly argued against the introduction of a special neighbouring right for news publishers.

¹ All opinions of the European Copyright Society are available on its website, <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>.

The structure of this opinion is as follows. In the first part we make a number of overarching observations on the entire copyright reform package. Thereafter, we submit specific comments on a number of substantive issues addressed by the proposals.

Part 1. General observations

Introduction

We generally support the policy objectives of the reform package, as announced in the preamble to the proposed DSM Directive: 1) ensuring wider access to content, 2) adapting exceptions to a digital and cross-border environment, and 3) achieving a well-functioning marketplace for copyright. We therefore endorse the proposed mandatory exceptions on distance education, text and data mining and preservation of cultural heritage – subject to our reservations set out below. We also generally support the proposed rules enabling cross-border portability of online content services (as per the proposed Portability Regulation), the rules on the import of VIP-accessible copies (as per the proposed VIP Regulation) and proposed rules on ancillary online services of broadcasters (as per the proposed Regulation on online transmission of broadcasting).

We are pleased to see that the proposed copyright reform package addresses several of the weaknesses of the current *acquis* identified by our Society in previous opinions. In line with our recommendations, the proposed DSM Directive departs from the Information Society Directive's maximum (optional) exceptions approach, and proposes several exceptions that should become mandatory upon all Member States. This approach, in our view correctly, recognizes that exceptions in many cases reflect cultural and information policies and fundamental freedoms that are universal across the EU, and should therefore be uniformly implemented in all Member States. The introduction of mandatory exceptions would also, clearly, contribute to the Digital Single Market for creative content that the Commission has set as its ultimate goal. At the same time, the Commission's shift towards mandatory exceptions raises the question why many other exceptions that equally deserve universal implementation across the EU, such as those for the purposes of quotation and criticism, parody and personal use, should remain optional. The introduction of only a handful of mandatory exceptions, while the extensive 'shopping list' of art. 5(2) and (3) of the Information Society Directive is left intact, will do little for the Digital Single Market.

We are content to see that several of the Commission's proposals address the problems of EU market fragmentation caused by copyright's territorial nature. The proposals recognize that this is a structural problem that traditional copyright harmonization (i.e. approximation of national laws) cannot completely solve. We therefore laud the Commission's reform package for proposing pragmatic, albeit piecemeal, solutions to copyright territoriality, by way of a *country of origin* approach, as envisaged in proposed art. 4.3 of the DSM Directive, the Portability Regulation and the Online Broadcasting Regulation. In our view, such rules are an important intermediate step towards full unification of EU copyright law, which should remain the ultimate goal of EU copyright policies.

For the same reason, we praise the Commission for proposing directly binding regulations in lieu of

directives in some instances. Clearly, regulations are a much more effective legislative instrument for achieving the Digital Single Market. Furthermore, the adoption of regulations avoids the costs of complex and protracted national implementation procedures, and immunizes the EU copyright framework against diverging national interpretations, thus ensuring legal certainty and equality for all citizens of the EU.

The European Copyright Society does, however, have a number of general concerns about the copyright reform package.

Lack of ambition

Despite its ambitious overarching goal and key objectives, as stated (inter alia) in the preamble of the proposed DSM Directive, the Commission's reform package does not seem to reflect an overall vision of the future of EU copyright law, and fails to deliver on its promise of wholesale copyright reform. The copyright package proposes only piecemeal solutions, leaving the existing – already fragmented and partly outdated – copyright *acquis* intact.

This minimalist approach is apparent, for instance, in the proposed articles on the contractual protection of authors and performers; see our comments in Part 2 below. Lack of ambition also characterizes the proposed provisions on exceptions. The exception for text and data mining (art. 3) is limited to non-commercial research purposes, thus denying journalists, teachers and others the ability to engage in text and data mining of copyright works without permission. The exception for cultural heritage institutions (art. 5) seems only to cover acts of reproduction carried out for preservation purposes. This would include, as explained in recital 23, techno-obsolescence and risk of degradation. Whether the exception would allow mass-digitization of collections by libraries, archives or museums remains uncertain.

The introduction of the country of origin principle to 'ancillary online services' in the proposed regulation is to be welcomed, but it is not easy to understand why the principle should be limited to such services. Furthermore, given the ongoing controversy and conflicting court decisions regarding the concept of 'retransmission' in several European countries, it is incomprehensible that the Commission now proposes to extend the rights clearance regime for 'cable retransmission' to other kinds of 'retransmissions' without even trying to define the concept of retransmission beyond the very circular definition of Article 2(b) ('any simultaneous, unaltered and unabridged retransmission').

The proposed Directive also avoids addressing the proper scope of the economic rights that were harmonized in the Information Society Directive of 2001. In recent decisions of the CJEU, the rights of reproduction, of communication to the public and of distribution have been interpreted in ways that have further complicated the *acquis* and have left commentators and stakeholders unhappy and confused. There is now an urgent need for legal certainty on these crucial notions and for the scope of these rights to be brought more closely in line with economic and technological realities.

Finally, the minimalist approach of the current reform agenda is also apparent in the framework of the proposed Directive on certain aspects concerning contracts for the supply of digital content of 9 December, 2015. The proposed Directive seeks to harmonize contractual aspects of the supply of digital content, which in most cases will consist of copyright protected works, such as software,

music and movie files and streaming services, pictures, texts, databases. Our Society is concerned that the proposed Directive overlooks consumer rights that are directly linked to the supply contract but which find their legal basis in copyright law, namely the right to use legally acquired digital content without further authorisation of the right holder (e.g. by way of end user licence agreements). In our opinion, the proposed Directive should also answer the question whether legally acquired copies of digital content may be resold by the consumer.

Private ordering

Two of the three newly proposed mandatory exceptions are subject to private ordering. The proposed text and data mining exception (art. 3(1)) applies only where a research organization has "lawful access" to the database. Thus, the exception can effectively be denied to certain users by a right holder who refuses to grant "lawful access" to works or who grants such access on a conditional basis only. Moreover, this deference to private ordering allows publishers to price TDM into their subscription fees. However, many research organisations will not be able to acquire licences for all databases that are relevant for a TDM research project. Even more problematic is art. 4(2), according to which the availability of "adequate licences" alone may trump the exception for teaching activities, be it directly (denial of licence) or indirectly (by establishing excessive and unfair licensing terms that cannot be met by the teaching institution). As the German experience with such a provision (§ 52a UrhG) shows, even highly professional "educational establishments" like university libraries are unable to apply such a rule. Legal uncertainty prevents beneficiaries from relying on the exception and non-commercial teaching establishments tend to be risk-avoiding entities. Art. 4(2) also runs contrary to the idea of a mandatory exception, and should therefore be deleted. Exceptions reflect policy choices and values. Their benefit should not be dependent on the market decisions of copyright owners, particularly for exceptions grounded in fundamental rights or public interests like research and education.

Fragmented approach

The current copyright acquis already comprises no fewer than ten directives. These directives paint a fragmented picture of copyright law in the EU, with different and sometimes contradictory provisions. Instead of a revision of the existing framework that could have taken the form of a comprehensive revision or codification of the existing legislation, the Commission has chosen to propose two additional directives and two new regulations. This will inevitably lead to further fragmentation and inconsistency. For example, the new mandatory exceptions to be added by the proposed DSM Directive are intended to apply in parallel with the existing, partly overlapping exceptions of article 5 of the Information Society Directive.

The sharing economy

Notwithstanding the mandatory exceptions considered above, the proposed DSM Directive appears to be largely predicated on the idea that the dissemination of copyright protected content over the Internet is to be based on licensing agreements, subject to the right holder's complete control. This rather traditionalist perspective overlooks the sharing economy/culture that drives much of the content production and dissemination on the Internet today. In our opinion, any forward-looking copyright policy at EU level should reflect not only the economic needs and interests of traditional

TDM – preferably by way of a carve-out from the reproduction right – would be to ensure a level playing field with the United States, where companies engaging in TDM activities are likely to benefit from the fair use exemption.

Neighbouring right for news publishers (art.11 DSM Directive)

In our Society's response of June 15, 2016 to the Commission's consultation on the role of publishers in the copyright value chain, we presented a range of arguments against the introduction of a special neighbouring right for news publishers, as is now proposed in art. 11 of the DSM Directive.

Because of the fundamental role that news and information play in democratic society, and especially on the internet, any new rule creating intellectual property rights in news must be carefully balanced. However, unlike the corresponding German rule, the proposed right comes without any limitation.

An exclusive right to control the exploitation of press contents online will in our opinion not only negatively affect freedom of expression and information, but also distort competition in the emerging European information market. By raising the barrier of entry to the online news market, the proposed provision will ultimately privilege large incumbent (US-based) online news providers, such as Google, for whom the enhanced transaction costs of the proposed new right might not be prohibitive. Small (European) entities and startups will be prevented from entering this emerging market.

As indicated by its precedents in Germany and Spain, such a rule is also unlikely to achieve its intended purpose, i.e. actually to support the ailing newspaper industry. If the aim of the proposal is to promote licensing arrangements between newspaper publishers and content providers concerning the (re)use of journalistic content, then it is unnecessary since most if not all newspaper publishers already enjoy copyright protection – based on transfers or licences of the authors' rights of the journalists.

In sum, we believe the proposed measure will not in any way benefit the newspaper industry and will detract from other potentially more effective ways of promoting high-quality newspaper journalism and newspaper publishing, such as tax privileges.

'Reprobel article' (art. 12 DSM Directive)

Member States implementing limitations on the reproduction right under art.5(2)(a) and art.5(2)(b) of the Information Society Directive must ensure that right holders receive "fair compensation" for such reproduction. In its judgment in (C-572/13) *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, the Court of Justice held that, in the case of authorial works, Member States must ensure that such "fair compensation" is payable to authors or to their successors in title. As a result, it is not currently permissible for a Member State to establish a system under which a proportion of this compensation is payable to the publisher of the work. Art. 12 of the proposed DSM Directive effectively seeks to reverse the Court's Judgment in *Reprobel* by providing that: "Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses

of the work made under an exception or limitation to the transferred or licensed right.”

It is difficult to see how art.12 will promote the development of a fully harmonised set of copyright rules. In accordance with Reprobel, the full amount of “fair compensation” relating to the reproduction of authorial works under Arts 5(2)(a) and 5(2)(b) must currently be paid to the authors of those works. If art.12 were to be adopted, Member States would be able to introduce divergent regimes on the sharing of fair compensation between author and publisher.

Furthermore, our Society is concerned that the implementation of such a provision would be harmful to the interests of individual creators. The total sum of “fair compensation” payable under art. 5(2)(a) and (b) is determined in accordance with the “harm” suffered by right holders. If art. 12 is adopted, there is unlikely to be an increase in this total sum of compensation. As a result, if a state were to take advantage of the freedom to allocate a proportion of the compensation to publishers, the amount available for human creators will be correspondingly reduced. In our Opinion of 5 September 2015, we wrote that “[c]opyright law is linked to the freedom of the authors to create and should remunerate the creative authors in first instance. Therefore, copyright law should not grant rights ab initio to persons other than the individual creators. This principle (the “author principle”) applies to the exclusive rights within the copyright bundle. It also applies to any right to remuneration provided by law to compensate for the exempted uses of copyright-protected works.” The automatic allocation of a proportion of an author’s compensation to his or her publisher would violate this “author principle”.

Platform liability (art. 13 DSM Directive)

Our Society is puzzled by the rather ambiguous text of Article 13 of the proposed DSM Directive, and unsure of its application. Furthermore, we do not understand how the proposed text relates to the existing provisions of the E-Commerce Directive (Directive 2000/31/EC), notably art. 14 (safe harbour for hosting service providers) and art. 15 (no general obligation to monitor). What is particularly unclear to us, and would require clarification in the legislative process, is whether proposed art. 13 applies merely to cases mentioned in recital 38, in other words, where information society service providers engage in acts “going beyond the mere provision of physical facilities and performing an act of communication to the public”. In such cases of primary copyright infringement, in our opinion, the rights and remedies of the present *acquis* are generally sufficient for right holders to enforce their rights against these content providers, or to negotiate licensing deals that fairly remunerate authors, performers and other rights holders.

As with art. 11, we are concerned that proposed art. 13 will distort competition in the emerging European information market. The obligation for content platforms to implement “effective content recognition technologies” will privilege large incumbent platforms that have already successfully implemented such measures (such as YouTube), whereas entry to this market for newcomers may become all but impossible. The unforeseen effect of the provision may, therefore, be locking in YouTube’s dominance in the EU.

Fair remuneration in contracts of authors and performers (DSM Directive, art. 14-15)

While various studies commissioned by the European Commission have demonstrated that there is a

real and urgent need to improve the negotiating position of authors and performers – usually the weaker parties in contractual dealings with media companies and other users – and to protect creators against overbroad transfers of rights, inequitable remuneration and other unfair practices, we are afraid that the proposed provisions – the transparency obligation and the ‘best-seller’ clause – will remain largely ineffective. Both are mechanisms that can be employed only after a contract has been concluded. As authors are rarely in a position to litigate against their publishers or producers, for lack of financial means or for fear of being blacklisted, such provisions may be of limited use. In some cases, unwaivable remuneration rights and/or provisions that limit the freedom to transfer rights in future works or uses might provide more effective protection for creators.

In our view, more comprehensive and effective forms of protection are needed in order to provide authors and performers with sufficient independence in contractual negotiations and to shield them against those who exploit their creations. Authors and performers should be given the proper means to claim fair remuneration, modify or opt out of unfair contracts and control the benefits yielded by all exploitations of their works.

Signatories :

Prof. Valérie-Laure Benabou, Professor, University of Aix-Marseille, France
Prof. Lionel Bently, Professor, University of Cambridge, United Kingdom
Prof. Estelle Derclaye, Professor of Intellectual Property Law, University of Nottingham, United Kingdom
Prof. Graeme B. Dinwoodie, Director, Oxford Intellectual Property Research Centre (OIPRC), University of Oxford, United Kingdom
Prof. Dr. Thomas Dreier, Director, Institute for Information and Economic Law, Karlsruhe Institute of Technology (KIT), Germany
Prof. Séverine Dusollier, Professor, School of Law, Sciences-Po Paris, France
Prof. Christophe Geiger, Director, Centre d’Etudes Internationales de la Propriété Intellectuelle (CEIPI), University of Strasbourg, France
Prof. Jonathan Griffiths, Professor of Intellectual Property Law, Queen Mary University of London, United Kingdom
Prof. Reto Hilty, Director, Max Planck Institute for Innovation and Competition, Munich, Germany
Prof. Bernt Hugenholtz, Director, Institute for Information Law, University of Amsterdam, Netherlands
Prof. Marie-Christine Janssens, Professor Intellectual Property Law, University of Leuven, Belgium
Prof. Martin Kretschmer, Professor of Intellectual Property Law, University of Glasgow, and Director, CREATE, United Kingdom
Prof. Axel Metzger, Professor of Civil and Intellectual Property Law, Humboldt-Universität Berlin
Prof. Alexander Peukert, Goethe-Universität Frankfurt am Main, Germany
Prof. Marco Ricolfi, Chair of Intellectual Property, Turin Law School, Italy
Prof. Ole-Andreas Rognstad, Professor of Law, Department of Private Law, University of Oslo, Norway
Prof. Martin Senftleben, Professor of Intellectual Property, VU University Amsterdam, Netherlands
Prof. Alain Strowel, Professor, Saint-Louis University and UCLouvain, Belgium
Prof. Raquel Xalabarder, Chair on Intellectual Property, Universitat Oberta de Catalunya, Barcelona, Spain
Prof. Michel Vivant, Professor, School of Law, Sciences-Po Paris, France

European Copyright Society

Personal data

Members of the board:

Chair:

[Redacted]

Professor
SciencesPo Paris
France

[Redacted]
Director, CIPIL
University of Cambridge
United Kingdom

[Redacted]
Universitat Oberta de Catalunya
Barcelona
Spain

Mr Andrus Ansip

Commissioner for Digital Single Market, Digital
Economy and Society
European Commission
Brussels

27 January 2017

Subject: EU copyright reform package

Dear Mr. Ansip,

The members of the European Copyright Society (ECS) – the European platform for independent and critical scholarly thinking on copyright law – have carefully examined the Commission's proposals on copyright reform released on September 14th, 2016. We are pleased to herewith submit our comments, observations and suggestions.

The current package of proposals incorporates several issues and policies that already inspired previous responses by our Society:¹

- In our Society's response to the Public Consultation on the review of the EU copyright rules of March 2014, we suggested a number of improvements of the existing (harmonized) EU rules on copyright law.
- In our letter to you of 19 December 2014 we encouraged the Commission to take further steps towards true unification of EU copyright law.
- In our response to the European Commission's Public Consultation on the Review of the EU Satellite and Cable Directive of 15 November 2015 we suggested expanding the SatCab Directive's country of origin approach to content services offered online, subject to certain reservations.
- In our answer to the EC Consultation on the 'panorama exception' of 15 June 2016 we recommended not to amend current Art. 5.3 (h) of the Information Society Directive.
- In our answer to the EC Consultation on the role of publishers in the copyright value chain of 15 June 2016 we strongly argued against the introduction of a special neighboring right for news publishers.

Contact :

[Redacted]

¹ All opinions of the European Copyright Society are available on its website, <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>.

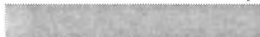
The members of the European Copyright Society would be pleased to discuss this letter with you or your staff if you would so desire.

Personal data



Sincerely,

On behalf of the European Copyright Society



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From: [redacted] on behalf of ANSIP Andrus (CAB-ANSIP)
Sent: 31 May 2017 13:44
To: CAB ANSIP ARCHIVES
Cc: [redacted]
Subject: FW: Letter to Mr. Andrus Ansip
Attachments: image2017-05-31-093407.pdf
Categories: [redacted]



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[redacted]

Subject: Letter to Mr. Andrus Ansip

Dear Mr. Ansip,

Attached, please find this letter from Christian Van Thillo.

Best regards,

[redacted]

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[redacted]
Personal Assistant to the CEO



De Persgroep nv
Brusselsesteenweg 347
1730 Asse (Kobbegein)



EPC

Mr Andrus Ansip
Vice-President of the European Commission, Digital Single Market
European Commission, office BERL 09/221
200 Rue de la Loi
B-1049 Brussels

30th May 2017

Dear Vice President,

Thank you for your time last week to meet with me in my capacity of Chairman of the European Publishers Council (EPC) and to exchange views on some of our priority issues under discussion at present.

With regard to **the neighbouring right for press publishers**

Art.
4(2)

on the concept of a press publisher's neighbouring right which does not expand the scope of copyright itself but rather puts us in line with other producers such as music, TV and film and that we both agreed the Rapporteur's proposal based on a presumption of rights is not practical or as straightforward as a neighbouring right.

As hyperlinks continue to stir up doubts in the discussions in both the Parliament and the Council working group, even though your proposal is clear, we would not oppose further clarifications explicitly to protect individual, non-commercial sharing of links including the posting of links by individuals to social media.

Data Mining (TDM).

Text and
Out of
scope

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EPC

Chairman >

Executive Director >



EPC

[REDACTED]

[REDACTED]

[REDACTED] draft ePrivacy regulation [REDACTED]

[REDACTED]

Our main concern with the ePrivacy proposal

[Redacted text block]

[Redacted text block]

[Redacted text block]

I look forward to our continued cooperation and hearing more about your future plans on the platforms including unfair contract terms, data ownership and access to data, portability of data and the freeing up of public sector data.

With kind regards,

Yours sincerely,



Chairman

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Out of scope



Annex on ePrivacy Amendments

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EPC

[Redacted text block]

[Redacted text block]

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[Redacted text block]

[Redacted text block]

From: REDA Julia [REDACTED]
Sent: 08 August 2017 10:13
To: CAB GABRIEL CONTACT
Cc: [REDACTED]
Subject: Copyright- academic studies overview

Personal data

Dear Commissioner Gabriel, dear Team,

following your discussion with Ms Reda, I'm sending you the academic studies evaluating different parts of the European Copyright reform proposal.

Kind regards,

***General - EU copyright reform**

An academic perspective on the copyright reform

Stalla-Bourdillon, Sophie, Rosati, Eleonora, Turk, Karmen, Angelopoulos, Christina, Kuczerawy, Aleksandra, Peguera, Miquel and Husovec, Martin

http://ac.els-cdn.com/S0267364916302394/1-s2.0-S0267364916302394-main.pdf?_tid=77e880e0-7b52-11e7-b15e-00000aabb0f26&acdnat=1502098158_4c1e2fb3827d46003b80f52612adeafc

***article 11**

****A publisher's intellectual property right implications for freedom of expression, authors and open content policies**

Prof. dr. Mireille M.M. van Eechoud, Institute for Information Law, Faculty of Law, University of Amsterdam

http://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf

****Is an EU publishers' right a good idea? Final report on the AHRC project: Evaluating potential legal responses to threats to the production of news in a digital era**

Dr Richard Danbury, Centre for Intellectual Property and Information Law, Faculty of Law, University of Cambridge

https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/danbury_publishers_right_report.pdf

****Neighbouring rights for publishers: are national and (possible) EU initiatives lawful?**

Eleonora Rosati, University of Southampton, School of Law

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798628

<https://link.springer.com/article/10.1007/s40319-016-0495-4>

****An EU related right for press publishers concerning digital uses. A legal analysis**

Alexander Peukert, Goethe University Frankfurt am Main

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888040

****The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law**

Raquel Xalabarder, Chair of Intellectual Property, Universitat Oberta de Catalunya

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596

The impact of introducing new article 32.2 of the Spanish Copyright Act

NERA Economic Consulting study commissioned by Spanish Association of Publishers of Periodical Publications

<http://www.aeepp.com/pdf/InformeNera.pdf>

***article 13**

****Why a reform of hosting providers' safe harbour is unnecessary under EU copyright law**

Eleonora Rosati, University of Southampton - School of Law

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830440

****On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market**

Dr Christina Angelopoulos, Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge

https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf

****Online platforms and the Digital Single Market: towards responsible policy-making?**

Aleksandra Kuczerawy, Centre for IT & IP Law , Faculty of Law of the University of Leuven

<https://www.law.kuleuven.be/citip/blog/online-platforms-and-the-digital-single-market-towards-responsible-policy-making/>

****Cut Out By The Middle Man: The Free Speech Implications Of Social Network Blocking and Banning In The EU**

Patrick Leerssen, Institute for Information Law (IvIR)

<https://www.jipitec.eu/issues/jipitec-6-2-2015/4271>

Personal data



Policy Advisor, Parliamentary Assistant to MEP Julia
Reda

European Parliament



Personal
data**From:** BAIO Luigi (CNECT)

From: Media publishers [redacted]
Sent: Monday, October 09, 2017 11:47 AM
To: [redacted]
Subject: Press release: Delegation presents open letter to EU policymakers

Personal
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Dear Mr. [redacted]

On 26 and 27 September, we, the Coalition of Innovative Media Publishers gathered in Brussels to meet with policy makers and present our open letter against a EU neighbouring right.

The aim of our delegation, represented by Karen Autret (Association of French independent news publishers Spiil), Matteo Rainisio (ANSO, Italian National Association of the online press) and Victor Sanchez Del Real (Spanish Association of Periodical Publishers AEEPP), was to raise policy makers' awareness of the consequences and the threats of potentially introducing **a EU-wide neighbouring right. In particular, how this can affect and threaten the futures of smaller, innovative, niche and regional publishers and lead to unfair competition as bigger media companies will benefit from barriers to entry and better access to platforms.**

Please find attached our press release with our key messages, and visit our website for further information.

Kind regards,

The Coalition of Innovation Media Publishers

Press Release: The Coalition of Innovative Media Publishers meets policy makers in Brussels to present its open letter against a EU neighbouring right.

On 25 September, the Coalition of Innovative Media Publishers sent an [open letter](#) to policy makers expressing its reservations against the introduction of a EU-wide neighbouring right for news publishers.

On 26 and 27 September, Karen Autret (Association of French independent news publishers [Spilil](#)), Matteo Rainisio ([ANSO](#), Italian National Association of the online press) and Victor Sanchez Del Real (Spanish Association of Periodical Publishers [AEEPP](#)), the coalition's spokespersons, gathered in Brussels to meet with members of the European Parliament, representatives of the European Council and with the Cabinet of Commissioner Mariya Gabriel to discuss their views, concerns and expectations regarding the copyright reform proposal.

The Coalition of Innovative Media Publishers believes that the introduction of a EU neighbouring right will threaten the futures of smaller, innovative, niche and regional publishers. Moreover, the proposed right will lead to unfair competition as bigger media companies will benefit from barriers to entry and better access to platforms.

As Jean-Christophe Boulanger, president of Spilil, highlights:

"Spilil promotes a fair ecosystem for the news media industry, to support independent and high quality journalism. We believe article 11 harms our industry for the following reasons:

- *it would worsen publishers dependence on platforms*
- *it would create another revenue incentive to create mass audience content, at the expense of quality and diversity;*
- *it would help bigger publishers, at the expense of smaller ones who will not have the resources to benefit from it."*

With respect to alternative options, such as the presumption of representation, Matteo Rainisio from ANSO said:

"It eases enforcement of publishers' existing rights without affecting the ecosystem and our business models. We would need more information on how the presumption would work in practice, and encourage policy makers to avoid any discrimination amongst types of newspapers".

While many policy makers support the idea of a publisher right, the coalition believes that its messages and open letter were well received by policy makers. Victor Sanchez de Real from AEEPP stressed the following:

"We see some movement from the status quo, with many from the group supportive of Article 11 also becoming more receptive to our concerns and arguments. We hope that our voice will be heard in the debate, and that a solution that takes into account the interests of innovative media publishers will be found."

Signed by Innovative Media Publishers

From: [REDACTED] EPC [REDACTED] Personal data
Sent: 10 October 2017 10:24
To: [REDACTED] (CAB-GABRIEL); [REDACTED] (CNECT)
Cc: [REDACTED]
Subject: RE: Suite réunion EPC - Empower Democracy: Taking responsibility for the future of a free and independent press

Dear [REDACTED]

Art.4(2)

<http://mediapublishers.eu/2017/10/09/press-release-delegation-presents-open-letter-to-eu-policy-makers/>

"On 26 and 27 September, Karen Autret (Association of French independent news publishers Spiil), Matteo Rainisio (ANSO, Italian National Association of the online press) and Victor Sanchez Del Real (Spanish Association of Periodical Publishers AEEPP), the coalition's spokespersons, gathered in Brussels to meet with members of the European Parliament, representatives of the European Council and with the Cabinet of Commissioner Mariya Gabriel to discuss their views, concerns and expectations regarding the copyright reform proposal."

Art. 4(2)

The two business models of licensing, and/or ad-share deals are not, of course, mutually exclusive, so it would be important for your Commissioner to know that by passing a neighbouring right into national law will not automatically co-opt them into some system of licensing, or force them to change any arrangements they have with Google in particular, that they do not want to pursue.

I hope this is helpful,

Kind regards,

Personal data

[REDACTED]
Subject: Suite réunion EPC - Empower Democracy: Taking responsibility for the future of a free and independent press

Personal data

[REDACTED]
Nous tenions à vous remercier de votre disponibilité aujourd'hui.

Comme convenu, voici en bas le courriel "Empower Democracy" qui est une lettre d'information régulière envoyée aux eurodéputés et aux Etats membres, sur la nécessité d'un droit voisin.

Dans cette dernière lettre d'information nous répondons aux allégations de la communauté scientifique/bibliothèques, car celle-ci vient de publier une lettre ouverte demandant la suppression des dispositifs articles 11 et 13 au nom de la science ouverte et d'"open access".

Le lien à la lettre ouverte: https://docs.google.com/document/d/1uuQOQzKtjJiH9DLh5GJreul4-mj3PyCGDu_IJFAzmWw/edit#heading=h.5z6k7n5et72d

Out of scope

[REDACTED]

[REDACTED]

[REDACTED] sur e-privacy.

N'hésitez surtout pas de nous contacter si vous avez des questions, ou bien si vous souhaitez d'avantage d'informations sur les différents sujet abordés.

Bien cordialement,

[REDACTED]

[REDACTED]

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Separation from fiction

TAKING RESPONSIBILITY FOR THE FUTURE OF A FREE AND INDEPENDENT PRESS

This autumn will mark an important milestone for publishing and a free and independent press in Europe. Leading on the EU draft copyright reform, the European Parliament's JURI committee is expected to vote in November. Their decision on whether or not to award press publishers a crucial neighbouring right will impact directly on the future of the free press and professional journalism, both highly valued in and essential to our democratic society. Member States will also be deciding on their national positions over the next few months and the Estonian Presidency expects to reach a common position by the end of this year.

The neighbouring right for press publishers would help create a fairer digital eco-system whereby consumers can access and enjoy our content 24/7 on multiple platforms and where tech companies and other businesses can use and distribute our content with permission and on mutually beneficial terms. The neighbouring right is crucial: in an era of fake news, publishers need to be economically viable to perform their essential role in society, providing eye-witness accounts, unearthing the truth, calling authorities to account and able to pay for quality investigative journalism.

We welcome the adoption of amendments to the draft directive by MEPs, at committee stage, which put the press publishers more closely on a par with other neighbouring rightholders so they benefit from all the EU harmonised rights relevant to publishers for both online and print publications. Furthermore, we are delighted that important amendments have been adopted to clarify that readers can continue to share or post links and articles for non-commercial purposes.

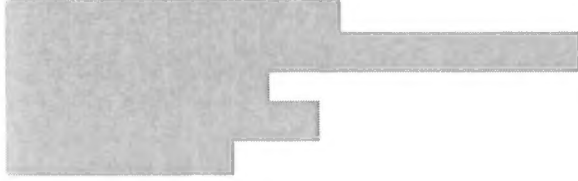
And, as for open access policies, suggestions by opponents to the reform that a publisher's right would get in the way of Open Access are ill-founded and misleading. Where a publisher agrees with the author to issue an open access publication, the neighbouring right would be licensed accordingly along the same principles.

Without a publisher's right, third parties will continue to be able routinely to exploit the lack of legal clarity, and to divert revenue-earning opportunities to their own platforms and services. Without a publisher's right, publishers' ability to innovate or negotiate terms and invest in professional journalism is severely undermined.

Please get involved in our initiative, www.empower-democracy.eu, **if you are committed to a democratic Europe with an independent and pluralistic media landscape.**

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European Publishers Council



Personal data

From: JUNCKER Jean-Claude (CAB-JUNCKER)
Sent: 21 December 2017 17:41
To: CAB JUNCKER ARCHIVES
Cc: [REDACTED]

Personal
data

Subject: FW: Question on studies on copyright
Attachments: Julia Reda - Letter Studies.pdf

Categories: Blue Category

[REDACTED]

From: REDA Julia [REDACTED]
Sent: Thursday, December 21, 2017 4:16 PM
To: JUNCKER Jean-Claude (CAB-JUNCKER)
Subject: Question on studies on copyright

Personal
data

Dear President Juncker,

as both Parliament and Council currently discuss the Commission's proposal for a Directive on copyright in the Digital Single Market, the paramount principles of this debate should be transparency and integrity. While political opinions on the proposals differ greatly, there should be a common understanding about the factual basis for these proposals.

Over the last few months, I have - through the invocation of Regulation 1049/2001/EC - obtained a series of studies commissioned or written by the European Commission on copyright which were unreleased, sometimes for several years. Among them is a study commissioned by DG MARKT ("Estimating displacement rates of copyrighted content in the EU") which was delivered to the Commission in May 2015.

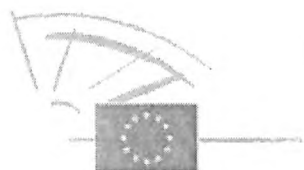
Yesterday I received another paper, drafted by the Commission's 'JRC and titled "The economics of online news aggregation and neighbouring rights for news publishers". The draft was shared with DG CNECT and other DGs in October 2016. In May 2017, DG CNECT ordered JRC "refrain from the publication" and referred to the hierarchy in lieu of a written explanation.

Even a neutral observer might be tempted to see a pattern appearing as well as the question whether the Commission is actively withholding findings that do not support its plans on copyright in general and on the ancillary copyright or the filtering obligations for platforms in particular.

I strongly urge the Commission to take a much more proactive role in the dissemination of its own findings and to abandon any attempts to withhold or distort such findings, regardless of whether they are considered supportive of the Commission's plans or not.

On a political level, the Commission should also abandon its attempts to introduce an ancillary copyright for press publishers, if not because the findings of the Commission's own research efforts recommend it, then on the grounds that a more effective and proportionate alternative is on the table in the form of the presumption rule

Kind regards,
Julia Reda



Julia Reda

Member of the European Parliament

21 December 2017

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 Dear Vice-President Ansip,
 Dear Commissioner Gabriel,

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Kind regards,

Julia Reda

[Redacted signature block]

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