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Sent: Wednesday, June 15, 2016 7:02 PM

To: CNECT CONSULTATION COPYRIGHT

Subject: EURIMAG - Legal Paper on why "A Neighboring Right for Publishers is not Conform with International Legal Obligations and EU law"

Dear Madam, Sir,

On behalf of EURIMAG, the association of the IT Imaging and Printing Industry in Europe, and in addition to our input to the online consultation on the role of publishers in the copyright value chain, please find enclosed our legal paper on why "*A Neighboring Right for Publishers is not Conform with International Legal Obligations and EU law.*"

Please do not hesitate to contact us in case you have any questions.

Kind regards,

[REDACTED]

Kevin Vindevogel
Associate Director



Rue d'Arlon 25
B - 1050 Bruxelles

Tel: +32 22 34 61 53

GSM: + [REDACTED]

Fax: +32 22 34 61 71

[REDACTED]

[REDACTED]



A Neighboring Right for Publishers is not Conform with International Legal Obligations and EU law

Brussels, 15 June 2016

Conclusion

Even if the Commission or individual EU member states may wish to set a new neighboring right in favor of publishers, there are a number of legal barriers preventing such granting, including:

- (1) international legal obligations assumed by the EU and member states in the field of copyright (including the Berne Convention, the WIPO Copyright Treaty (WCT) and the TRIPS Agreement), and
- (2) the constitutional rules of the EU, in particular:
 - (i) rules dealing with free circulation of goods (art 34 and 36 TFEU), and
 - (ii) the Charter of Fundamental Rights of the EU.

In case there is a political aim for securing that publishers can enjoy originally (and not derivatively, as is the case today) certain exclusive rights or, at least, a right to receive compensation for certain acts, either at a EU or member state level, there is no need to provide them with ancillary rights additional to those granted to authors, but protection of publishers may result either (1) from attributing them the condition of author of certain works, or (2) from existing legal protection of databases.

Reprobel
Case
(copyright
exceptions)
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Out of
scope

1. A neighboring right for publishers is not conform with international legal obligations

1.1. Overview

If individual EU member states, as is apparently proposed in some member states such as Belgium and Germany, pass national legislation granting ancillary copyright to publishers that is either (i) equivalent to those attributed to authors of either short extracts of newspaper articles or, more generally, literary works (including books and academic journals), or (ii) restricted to certain remuneration rights, such legislation would be contrary to their international obligations as set out in the Berne Convention (as revised lastly in 1971) and the WIPO Copyright Treaty (WCT, 1996) and raise their liability.

Any similar initiative at EU level would also raise the direct liability of the EU under the WCT¹ and under the laws of the World Trade Organization (WTO), as the creation of ancillary rights to the benefit

¹ Whereas all the EU member states are contracting parties to both the Berne Convention and the WIPO Copyright Treaty (WCT), the European Union is a signatory of just the WCT.

of publishers would also raise the issue of the conformity of these new rights with Art. 9(1) of the TRIPS Agreement (1994), which requires its contracting parties to apply Articles 1 - 21 of the Berne Convention.²

Further, if some Member States or the European Union introduced neighbouring rights to publishers in isolation – i.e. without considering the obligations stemming from international copyright law - the enactment of such rights would inevitably expose the whole EU or its Member States to the risk of being targeted and sanctioned for the infringement of international trade rules under the WTO legal framework.

Reprobel Case
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1.2. Detailed Examination

The proposed creation of an ancillary right for publishers may infringe on international legal obligations as set out below.

As pointed out below, the exclusivity and primacy of the rights of authors under the current system of international copyright law restricts both the EU and its member states from creating separate rights to the benefit of publishers which would affect the protection of copyright or deprive the rights of authors of a part of their value.

1.2.1. International Legal Obligations:

As the next sections show, the enactment of a new set of exclusive rights in all types of the literary works they publish (or in short extracts from newspaper articles or press products) or a narrower exclusive right for the benefit of publishers make the EU and/or its member states infringe the following international obligations and principles:

1. *Exclusivity of the rights of authors in their writings set out under the Berne Convention* (cf. Art 1, 2(6), 8 and 9(1) Berne Convention; Art. 6, 7, 8 WCT)
2. *Primacy of authors' rights over the rights related to copyright (or "neighbouring rights")*
3. *Mandatory character of the quotation exception under Article 10 Berne Convention*
4. *Enforcement of intellectual property rights in a way that is conducive to social and economic welfare and to a balance of rights and interests* (Art. 7 TRIPS Agreement)
5. *News, facts and mere items of press information should remain unprotected (and free to use) under Art. 2(8) of the Berne Convention*

1. Exclusivity of the rights of authors under the Berne Convention

The Berne Convention, which remains the main pillar of international copyright law, obliges all the members of the Berne Union, and therefore also all the member states of the EU as contracting parties

² All the EU member states and the European Union itself are members of the World Trade Organization (WTO) and contracting parties to the TRIPS Agreement. As recently pointed out in the Opinion of Advocate General Campos Sanchez-Bordona in C-169/15 (*Montis Design v Goossens Meubelen*), par. 15, the WTO membership of the European Union matters also from the perspective of the Berne Convention, whose provisions are directly binding for the EU as a result of Article 9(1) of the TRIPS Agreement.

to this agreement, to shape their national protection of literary and artistic property in a way that only 'authors' can be granted the economic rights of translation and reproduction of their works and be regarded as original holders and beneficiaries of such rights (cf. Art 1, 2(6), 8 and 9(1) Berne Convention).

The enactment of ancillary rights would not conform to one of the main principles of the Berne Convention (cf. Article 2(6)), according to which copyright protection should operate solely for the benefit of "*authors or their successors in title*". This provision of the Berne Convention explicitly obliges the members of the Berne Union to provide authors with exclusive rights in their literary and artistic works they can dispose of through contract.

The scope of the rights of authors was expanded significantly by the WCT (1996), which was concluded as a special agreement under Article 20 of the Berne Convention³ and should be regarded as an extension of the Berne Convention itself. The institutional purpose of the WCT was to adapt copyright to the digital environment through the express recognition of additional exclusive rights such as the rights of distribution, rental and communication to the public of their works (cf. Art. 6, 7, 8 WCT).

Under the Berne Convention the rights of authors are shaped as prerogatives of only one category of rights-holders in relation to one single layer of ownership and protection: the 'authors' and their 'literary and artistic works'. The TRIPS Agreement, which was adopted at the time of the establishment of the World Trade Organization (WTO, 1994), restates and makes even more effective the centrality and uniqueness of the rights of authors by providing under Article 9(1) that all the WTO members, as a result of their membership, must comply with Articles from 1 to 21 of the 1971 version of the Berne Convention, and in particular with its 1, 8 and 9(1).

Even though international copyright law instruments do not provide for an express definition of 'authorship', Article 2 of the Berne Convention embodies a non-exhaustive list of copyright-protected works in a way that authors can be easily identified in relation to each distinct category of work. For instance, as regards literary works, the fact that the Berne Convention mentions 'books, pamphlets and other writings' as well as 'lectures' means that writers, novelists, researchers and lecturers can be regarded as authors of such works.

Whereas the Berne Convention contemplates the possibility for its members of granting the status of author on the grounds of the (shared) merits of the creative process - as it happens in the domain of films - the Convention is very clear in affirming the *uniqueness* of the rights of authors as well as their *transferability*.

The Convention is very clear in obliging its contracting parties to shape their laws in a way that the systems of protection of literary and artistic works benefit just the "*authors or their successors in title*" (cf. Article 2(6)). Such an explicit reference to the original entitlements of authors and the subsequent ownership of the same titles by third parties shows that the Berne Convention intends to ensure the creation of exclusive rights that authors of literary and artistic works can freely dispose of. According to this provision, the rights of authors can either be inherited or transferred through contract. For this free transferability to be ensured, as the Convention requires, there is no alternative to the creation of exclusive rights of authors than acquisition of those rights by third parties on a derivative basis.

3 Article 20 of the Berne Convention (*Special Agreements Among Countries of the Union*) reads as follows: "*The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.*"

Moreover, this means that publishers are already protected under the Berne Convention as *derivative* rights holders. Two provisions of the Berne Convention uphold the derivative character of the rights of publishers:

- Firstly, Art. 3(3) of the Convention defines ‘published works’ as “works published *with the consent of their authors*, whatever may be the means of manufacture of the copies [...]” (emphasis added).
- Secondly, Art. 15(3) provides that the publisher of an anonymous work is deemed to represent the author and therefore may directly invoke the rights of the author.

These provisions show that the Berne Convention was aware of the prerogatives and roles of publishers and purposely granted them limited protection, mainly as *derivative* right holders.

Considering the centrality of the author as an exclusive holder and beneficiary of the economic rights specified under the Berne Convention and the WCT, the exclusivity of these rights should also be interpreted as entailing that a *duplication of entitlements* covering the same or a too similar subject matter would not be permissible under the laws of the countries of the Berne Union, since it would overlap with the “exclusive” rights of authors, which will not be any longer “exclusive” of the author, and dramatically increase legal uncertainty about rights ownership, to a great detriment of authors.

If a neighbouring right were granted to publishers under national law or at EU level, the right of the publisher would create an additional layer of protection of literary works in which writers or novelists already have exclusive rights. These rights are traditionally transferred or assigned to a publisher in exchange for a fee or a royalty. The subject matter of the original rights of the authors and of that of a hypothetical right of the publisher, and their respective layers of protection, would be identical or too similar for them to coexist and make them preserve their value, which would inevitably be diluted. If publisher rights were enacted, even in a more limited way, with regard to mere portions of text or press products, it would be hard or impossible to keep such right distinct from the author's rights. Would the right of the publisher depend on the previous acquisition of the author's right under a traditional publishing contract? Would not the main feature of exclusivity be lost? This is precisely what the structure of authors' rights under the Berne Convention does not allow.

2. The primacy of authors' rights over the rights related to copyright (or “neighbouring rights”)

The fact that the rights of other categories of creators or persons who contribute to the creative process could not be accommodated under the Berne Convention is historically proven by the adoption of separate agreements that codified and aimed at protecting so-called “neighbouring rights” at international level. The contracting parties to the Berne Convention were regarded as not allowed to grant “neighbouring rights” without entering into additional international agreements that, with the consent of the other contracting parties, would have complemented the protection granted to authors under the Berne Convention while leaving intact and in no way affecting the protection of authors' rights.

The first and most important of such agreements was the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations (1961). Article 1 of the Rome Convention explicitly states that the rights of performers, producers of phonograms and broadcasting organizations (cf. as defined under Art. 2 and 3) should “[...] *in no way affect the protection of copyright in literary and artistic works* [...]”. This means that no provision of the Rome Convention can be

interpreted as prejudicing the protection of authors.⁴

An identical approach was followed in 1996 by the WIPO Performances and Phonograms Treaty (WPPT, 1996: cf. Art. 1(2)), which adapted the subject matter of the rights of performers and phonogram producers to the new digital environment.

The adoption of sector-specific conventions for the enactment of neighbouring rights shows that, for the granting of ancillary rights to publishers at national or at EU level, what would be required is not only a new international treaty – such as the 1961 Rome Convention - but also an amendment of the existing legislative instruments and, in particular, a substantive revision of all the provisions where the Berne Convention and the WCT which identify ‘authors’ as the “exclusive” right holders of copyright-protected works.

As pointed out above, if some Member States or the European Union introduced neighbouring rights to publishers in isolation – i.e. without considering the obligations stemming from international copyright law - the enactment of such rights would inevitably veer away from the mandatory prescriptions of the Berne Convention and of the WCT. Considering also the incorporation of the Berne Convention into the TRIPS Agreement, legislative initiatives aimed at creating ancillary rights would expose the EU member states or the whole EU to the risk of being targeted and sanctioned for the infringement of international trade rules under the WTO legal framework.

The aforementioned Rome Convention and the 1996 WPPT define the neighbouring rights of performers and phonogram producers to ensure that these prerogatives cover distinct contributions and distinct layers of creative works with the explicit purpose of avoiding an overlap of neighbouring rights with the subject matter of authors’ rights. For instance, in the music sector, a performance of a copyright song, its fixation and its incorporation into a phonogram are objectively distinct and separate, in terms of subject matter, from the underlying musical composition that is fixed in a music sheet.

Under Article 1 of the Rome Convention and Article 1(2) of the WPPT, the rights related to copyright or neighbouring rights are clearly made subject to the effective protection of the rights of the author, which should in no way be affected by the existence of those additional layers of protection and rights ownership. This means that the acquiescence of the author is a prerequisite for performers, producers of phonograms and broadcasters to legitimately acquire their (distinct) rights in their respective creations. In the example mentioned above, whoever wished to perform a musical composition and incorporate such performance into a phonogram would have to acquire permission to do so from the author (i.e., the music composer), who is the sole direct beneficiary of the protection of literary and artistic property right granted under the Berne Convention.

Unlike the rights of performers and record producers, a hypothetical ancillary right granted to publishers in all literary works or in specific types of print works (e.g. newspapers, books or scientific journals) would inevitably have to cover the text (or a portion of text) of such writings, which is precisely the subject matter of the exclusive rights of writers, novelists and researchers.

The coexistence of rights granted to authors and publishers in the same texts and writings and the addition of publishers to the existing layers and categories of original rights-holders would inevitably trigger a clash between overlapping entitlements. As pointed out above, the system of protection of literary and artistic property based on the Berne Convention requires contracting parties to ensure

⁴ It is worth recalling that membership of the Berne Union for the Protection of Literary and Artistic Works was (and still is) a pre-condition to become a party to the 1961 Rome Convention (cf. Article 23 and 24(2)).

that the creation of additional rights related to copyright do not affect the value and the effectiveness of the rights of authors, while raising confusion with regard to their subject matter.

3. The mandatory character of the quotation exception under Article 10 Berne Convention

Granting ancillary rights to publishers at EU level would also end up disregarding provisions that make it mandatory for contracting parties such as EU Member States to permit quotations, which are shaped as a non-optional exception to the right of reproduction under Article 10 of the Berne Convention.

Article 10(1) of the Convention provides that quotations from a work should be permissible on condition that their making is compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. Article 10(3) also provides that the source and the name of the author of the referred work should be mentioned in the quotation. To pursue an objective of public policy, this mandatory provision expressly refers to newspaper articles and periodicals with a clear intent to enable quotations done for scientific, critical, informative or educational purposes.

If, in addition to the rights of authors (i.e., writers, journalist and researchers), exclusive or compensation rights were granted to publishers in relation to the use of books, academic papers or journals, newspapers or periodicals, the right of publishers to control and authorise extracts of text would either (i) prevent users from making quotations, in a legitimate way, from the aforementioned works or (ii) make users pay for extracts which are free under existing copyright exceptions. This outcome would be in sharp contrast with the mandatory exception under Article 10(1) of the Berne Convention and would inevitably conflict its public policy goal.

4. Social and economic welfare and balance of rights and obligations (Art. 7 TRIPS Agreement)

Granting publishers the right to control and license the use of their texts, irrespective of the author's right in the same writings, would also contradict the purpose of Article 7 of the TRIPS Agreement, which incorporates the Berne Convention as a result of its Article 9(1).⁵ As pointed out under Section B.3 above, the exception of quotation provided under Article 10 of the Berne Convention has a mandatory character and is deemed to be applicable in the digital environment and may be relied on to enable uses by news aggregators and online search tools.

If publishers were granted the right to control and restrict the use of headlines or fragments of text, the enforcement of this right against commercial and non-commercial users of such information (e.g. online news aggregators, search engines, individual Internet users) would lead to the prevention and/or obstruction of permitted uses of copyright works such as quotations. The scope of such an ancillary right would inevitably frustrate the purpose of the quotation exception, which is that of ensuring a better access to knowledge, an efficient dissemination of news also in the web-based media environment and, eventually, the strike of a fair balance between the protection of the interests of content distributors and the social and economic welfare of society at large. Granting such ancillary rights to content distributors such as book, journal or newspaper publishers would inevitably alter the aforementioned balance of interests by restricting the application of copyright exceptions in certain special cases that do not conflict with the normal exploitation of the copyright work and do not unreasonably prejudice the interests of the rights-holder (cf. the so-called 'three-step test' under Art.

⁵ Article 7 of the TRIPS Agreement (*Objectives*) reads as follows: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

9(2) of the Berne Convention and Art. 13 TRIPS Agreement). In a nutshell, if a separate, ancillary right were granted to publishers, such right would run contrary to the prescription of Article 7 of the TRIPS Agreement in so far as it stifled (instead of promoting) social and economic welfare and a fair balance of opposite interests.

5. *News, facts and mere items of press information should remain unprotected (and free to use), as provided under Art. 2(8) of the Berne Convention*

Finally, it should be considered that newspapers and other press products are subject to the provision of Article 2(8) of the Berne Convention, under which 'news of the day', 'miscellaneous facts' and 'mere items of press information' are *not* protected by copyright and remain free to be used without any restrictions. This exemption from copyright protection is justified by the so-called idea/expression dichotomy, which is relied on by the Berne Convention and explicitly mentioned under Article 9(2) TRIPS Agreement and Article 2 WCT.⁶ This principle aims to make it sure that copyright protection does not extend to ideas, procedures, methods of operation or mathematical concepts as such.

The exclusion of news and press items from copyright's scope is not general. Those newspaper articles such as editorials that because of their originality, qualify as literary or artistic works are not protected by copyright. The provision of Article 2(8) of the Berne Convention merely aims at making it sure, in the public interest that mere facts (i.e. news, items and data) remain unprotected and free for everyone to use them.

What characterizes the special form of copyright protection granted to newspaper articles and periodicals under the Berne Convention is the subjection to specific exceptions that seek to preserve the principle of free access to (unprotected) news and facts by limiting the right of the copyright holder to control and restrict access and certain uses of these types of works. In particular, while providing for the aforementioned mandatory exception of quotation, Article 10(1) specifies that this exception allows also for quotations and extracts from newspaper articles and periodicals in the form of press summaries. Moreover, Article 10-*bis* gives the members of the Berne Union the option to provide for an additional copyright exception allowing for the reproduction and communication to the public of newspaper articles and periodicals dealing with current economic, political and religious topics in their own legal systems provided that the source of these works is clearly indicated and the reproduction has not been expressly reserved by the copyright owner.

If an ancillary copyright consisting of a broad or narrow exclusive right (or a compensation right) granted to publishers for uses of their works and products were introduced in the EU, this right would easily encompass not only the works and/or portions of text protected by copyright, but also news and facts that, under articles 2(8) and 10 of the Berne Convention, should be kept in the public domain or remain freely available for purposes of news reporting in the form of press summaries and for the pursuit of broader informative goals.

The public policy objectives embodied in the provisions of Article 2(8), Article 10(1) and Article 10-*bis* of the Berne Convention would inevitably be stifled if the scope of an exclusive or compensation right granted to publishers in their articles or press products ended up extending protection to facts, ideas and information that the copyright system based on the Berne Convention leaves unprotected. In short, ancillary rights granted to publishers would unlawfully restrict the freedom of accessing and

⁶ Article 9.2 of the TRIPS Agreement (*Relationship to the Berne Convention*) reads as follows: "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"; similarly, Article 2 WCT (*Scope of Copyright Protection*) provides that "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

using news and facts that is ensured not only through the exemption under Article 2(8) but also through the specific exceptions under Article 10(1) and 10-bis. As pointed out above, facts or news should remain freely available for quotations compatible with fair practice in spite of the inclusion of such news and facts into newspaper articles and periodicals subject to copyright protection.

To finish, the fact that historically several attempts have been made at international level to enact a special protection against free riding to the benefit of press agencies and other suppliers of news services shows that under the current existing system of international copyright law, national law-makers are not entitled to offer such protection.⁷ The possibility of protecting the (potentially very high) commercial value of news products exists for EU member states *outside* of the realm of authors' rights, and in particular under Article 10-bis of the Paris Convention for the Protection of Industrial Property (Washington Revision of 1911). This provision gives the members of the Paris Union the option to assure to nationals of the Union effective protection against unfair competition, which could also consist of remedies specifically targeted at unfair commercial practices in the news sector. However, this provision excludes copyright as a legislative choice for the EU to (allegedly) enhance protection of publishers.

As a conclusion, even if the Commission or individual EU member states may wish to set a new neighboring right in favor of publishers, international legal obligations assumed by the EU and member states in the field of copyright (including the Berne Convention, the WIPO Copyright Treaty (WCT) and the TRIPS Agreement) will prevent that.

2. EU and national copyright rules must comply with the rules of the TFEU on free movement of goods

Reprobel Case (copyright exceptions) - Out of scope



⁷ The most relevant of such attempts was a draft treaty prepared by a committee of experts convened by a non-Berne body, i.e. UNIDROIT (International Institute for the Unification of Private International Law), at Samedan (Switzerland) in 1939. This draft treaty dealt specifically with the protection of news or press information. This was part of a broader exercise that resulted in a number of draft treaties on the emerging subject of neighbouring rights (i.e. rights of performers, record producers and broadcasters). The text of the draft treaties, including the so-called 'Samedan draft', is reported in 10 *Le Droit d'Auteur* (1940).

⁸ See at http://publishingperspectives.com/2016/05/jessica-sanger-germany-copyright-court/#.V16_mE1PpaT

⁹ See Section 4.3 of this Annex A.

¹⁰ Case C-169/99 *Schwarzkopf* [2001] ECR I-5901, para. 37; Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, para. 27; Case C-47/90 *Établissements Delhaize frères et Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669, paras. 24-24; Case C-469/00 *Ravil SARL v. Bellon Import SARL and Biraghi SpA* [2003] ECR I-5053, para 86; Case C-12/00 *Commission v. Kingdom of Spain* [2003] ECR I-459, para. 97.

2.1. Quantitative Restrictions

Article 34 TFEU (ex Article 28 TEC) prohibits all quantitative restrictions on the free movement of goods and all measures having an equivalent effect.

The CJEU has interpreted Article 34 TFEU broadly and held that its prohibition covers all Member State measures that are “*capable of hindering, directly or indirectly, actually or potentially*” trade in goods among Member States.¹³ The Court has also made clear that the determining factor on whether a measure falls within Article 34 TFEU is its effect, potential or actual, on Community trade even if the measure is not intended to regulate trade in goods.¹⁴

Significantly, the CJEU has held that pecuniary measures may fall within the scope of Article 34 TFEU. More particularly in the area of copyright protection, the Court has held that a national law allowing a national copyright management society to object to the trade of goods for which no royalties had been paid constituted a measure falling within the scope of Article 34 TFEU. For example, in *GEMA*, the Court held that a German law allowing a copyright management society to claim payment of royalties on imported sound recordings for which royalties had already been paid in another Member State constituted a quantitative restriction falling within the scope of Article 34 TFEU (ex Article 28 TEC).¹⁵

This view is also in line with the case law suggesting that licensing systems requiring the payment of a fee constitute a quantitative restriction.¹⁶ The same results from recent jurisprudence of the CJEU contained in its *Football Association Premier League and Others* judgment,¹⁷ which is commented upon below in the context of the non-application of prohibition provided in Article 34 under the justifications available under Art. 36 TFEU.

Reprobel Case (copyright exceptions) - Out of scope

¹¹ Article 34 TFEU (ex Article 28 TEC) provides that “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

¹² Article 36 TFEU (ex Article 30 TEC) reads as follows: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

¹³ Case 8/74 *Dassonville* [1974] ECR 837, para. 5.

¹⁴ Case C-322/01 *Deutscher Apothekerverband eV* [2003] ECR I-4887, para. 67.

¹⁵ Case 55/80 *Musik-Vertrieb membran GmbH et K-tel International v. GEMA* [1981] ECR 147. Leading commentary on the EC rules on the free movement of goods suggests that those royalties themselves are the quantitative restrictions, and not the power of collecting society to prevent imports for which additional levies had not been paid (see Peter Oliver, *Free Movement of Goods in the European Community* (London: Sweet & Maxwell, 2003), pages 106 and 371).

¹⁶ Case C-189/95 *Franzen* [1997] ECR I-5909, paras. 68-71.

¹⁷ Joined cases C-403/08 and C-429/08, *Football Association Premier League and Others*.

2.2. Exceptions on Grounds of Protection on Industrial and Commercial Property

Trade restrictions falling within the scope of Article 34 TFEU (ex Article 28 TEC) may nevertheless be justified if they fall within one of the exceptions set forth in Article 36 TFEU (ex Article 30 TEC). In order to determine whether levies in favour of authors and/or publishers would be exempted by Article 36, they must (i) fall within the scope of protection of industrial and commercial property, and (ii) be necessary, proportionate and non-discriminatory.

To date, the CJEU has not been required to decide whether levies can be justified under the industrial property exception provided under Art. 36 TFEU¹⁹.

Reprobel Case (copyright exceptions) - Out of scope

2.2.1 The Scope of Protection of Industrial and Commercial Property

The CJEU has held that national legislation relating to copyright falls within the Article 36 exception for the protection of industrial and commercial property only where it “safeguard[s] the rights which constitute the ‘specific subject-matter’” of copyright.²⁰

The “specific subject-matter” of copyright under Article 36 TFEU (ex Article 30 TEC) include the exclusive rights of the author, and specifically the possibility to exploit these exclusive rights for remuneration. The “specific subject-matter” of copyright has been defined by the CJEU not only to include “the right to exploit commercially the marketing of the protected work, particularly in the form of licenses granted in return for payment of royalties”²¹ but also the protection of the moral and economic rights of their holders, and has made clear that those economic rights provide “for the means to exploit commercially the marketing of protected work, particularly in the form of licenses granted in return for payment of royalties”²² and in the case of films “the right of a copyright owner and his assigns to require fees for any showing of a film”²³.

18 Canon v. Belgian State Decision of the Belgian Council of State (Feb. 2, 2004).

19 Article 36 TFEU (ex Article 30 TEC) reads as follows: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

20 Case C-200/96, *Metronome Musik GmbH v. Music Point Hokamp GmbH*, [1998] ECR I-1953, para. 14 (“[W]hilst Article 36 of the EC Treaty allows derogations from the fundamental principle of the free movement of goods by reason of rights recognized by national legislation in relation to the protection of industrial and commercial property, such derogations are allowed only to the extent to which they are justified by the fact that they safeguard the rights which constitute the specific subject-matter of that property.”)

21 Cases 55 and 57/80 *Musikvertrieb* [1981] ECR 147, paras. 11-12.

22 Joined Cases 92/92 & 326/92, *Phil Collins* [1993] ECR I-5145, para. 20.

23 Case 62/79 *Coditel* [1980] ECR 883, at para 14.

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i) [REDACTED]

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24 Art. 5(2) a) and b) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 ("Copyright Directive").

25 Joint cases C-457/11 to C-460/11, *VG Wort and Others*, EU:C:2013:426, para. 37; case C-463/12, *Copydan*, EU:C:2015:144, para. 65-66.

26 Case 46/76 *Bauhuis v. the Netherlands* [1977] ECR 5, para. 12. See also case C-362/88 *GB-Inno v Confederation du Commerce Luxembourgeois* [1990] ECR I 667, para. 19.

27 The CJEU, in effect, is likely to look for guidance in the international agreements when assessing the "specific subject-matter" of copyright. See Case C-245/00, *SENA v. NOS* [2003] ECR I-1251 (for copyright); C-9/93, *IHT International Heiztechnik v. Ideal-Standard* [1994] ECR I-2789. (for trademark). See also Opinion of Advocate General Sharpston in Case C-306/05, *SGAE v. Rafael Hoteles SL* of 13 July 2006 (not yet reported).

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30 Case C-469/00 *Ravil SARL v. Bellon Import SARL and Biraghi SpA*. [2003] ECR I-5053.

31 Case 113/80 *Commission v. Ireland* [1981] ECR 442, para. 7.

32 Case C-23/99 *Commission of the European Communities v. French Republic* [2000] ECR I-7653, para. 43

33 Case C-200/96 *Metronome Musik GmbH v. Musik Point Hokamp GmbH* [1998] ECR I1953, para. 14; Case C-61/97 *Vista Home Entertainment A/S* [1998] ECR I-5171, para. 13.

34 See by analogy Case 302/86 *Commission v. Denmark* [1988] ECR 3607.

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3. Charter of Fundamental Rights of the European Union

The granting of any neighboring rights in favor of publishers must be also assessed under the Charter of Fundamental Rights of the EU (2000/C 364/01) which has the same legal value as the European Union treaties since its entry into force of the Lisbon Treaty in 2009.

It is settled case law that a fair balance must exist between the protection of intellectual property (as protected under Article 17.2 of the Charter) and the protection of the fundamental rights and freedoms of other stakeholders.³⁷

In particular it should be assessed whether such granting may suppose a limitation – as we believe is the case – of any rights protected under the Charter. Indeed, we believe that is the case in connection with:

- a) The freedom of expression and information, including the right to access to information, protected under Article 11 of the Charter.

35 Case C-388/95 *Kingdom of Belgium v. Kingdom of Spain* [2000] ECR I-3123, para. 77.

Case 4/75 REWE Zentralfinanz [1975] ECR 843.

37 See judgments of the Court of 29 January 2008, *Promusicae* (C-275/06) 16 February 2012, *Sabam* (C-360/10) and 24 November 2011, *Scarlet Extended* (C-70/10)].

Our Position on the Commission's Consultation, to which this Annex is attached, provides a number of practical examples about the implications of any such ancillary right in favor of publishers, which undermines the right to access to information, including limited and more costly access to information, increased levy payments resulting in increased price for devices, fewer and more fragmented online services, reduced availability of content, more expensive access to content, reduced media pluralism, restriction on text-and-data-mining activities, restrictions on open publishing, etc.³⁸

b) The freedom to conduct a business, protected under Article 16 of the Charter.

Similarly, our Position on the Commission's Consultation provides a number of examples about how an ancillary right in favor of publishers will limit freedom of other companies to conduct their business, including the impact on providers of reproduction devices that may be subject to levies in favor of publishers, the reduction in the availability of online services, limitations in traffic and advertising revenue, increased barriers to entry, new layers of licensing obligations by online services, impact on text-and-data mining industries and Internet Service Providers, impact on industries growing their business based on innovation, etc.

In conformity with Article 52.1 of the Charter:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

The limitation of rights and freedoms of such a large number of stakeholders (consumers, businesses, other publishers, ...) in the sake of publishers of online news, academic journals and/or books lacks justification and does not conform to the stricter requirements of proportionality imposed by the Charter itself in its Article 52(1). As described by Advocate General Cruz Villalón in his Opinion delivered on 12 December 2013 (joined cases C-293/12 and C-594/14, paragraph 133):

"Article 52(1) of the Charter requires not only that any limitation on the exercise of fundamental rights be 'provided for by law', but also that it be strictly subject to the principle of proportionality. That requirement of proportionality, as already pointed out, acquires, in the context of the Charter, a particular force, which it does not have under Article 5(4) TEU. Indeed, what is postulated here is not proportionality as a general principle of action by the European Union but, much more specifically, proportionality as a condition for any limitation on fundamental rights."

The proportionality requirement and the criterion of necessity were assessed in Section 2.2.2 above in the context of the (non)applicability of Article 36 TFEU. Same findings – not meeting either the proportionality requirement or the criterion of necessity – can be drawn in the context of Article 52.1 of the Charter.

The application of the Charter is unquestionable in case the European Commission intends to recognize any such ancillary right for publisher by amending the Copyright Directive in order to recognize publishers as an additional ancillary right-holder or by other EU law means.

38 See pages 9-14 of our Position on the Commission's Consultation.

However, some publisher representatives question whether the Charter applies in case such recognition is provided at national level only by individual Member States, given that in conformity with Article 51(1) of the Charter *“the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.”*

In *Alemo-Herron and Others* case (C-426/11)³⁹, the CJEU stated that Directives, even when they do not affect the right of Member States to introduce more protective provisions, must be interpreted in light of the Charter and Member States must comply with the rights therein. Consequently, if a Member State introduces measures that increase the protection of minimum-harmonization Directives (*vis-à-vis*, for example, workers, the environment, consumers or intellectual property right holders), those measures, inasmuch they might jeopardize the overall objectives of the Directive, are to be considered an *“implementation of EU Law”* pursuant to article 51.1 of the Charter.

Consequently, the introduction by a Member State of an autonomous additional intellectual property right in favour of publishers, beyond the harmonization enshrined in the Copyright Directive 2001/29, is also considered to be an *“implementation of EU Law”*, thus allowing the review of the said national rule in light of the Charter, given that the *“actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.”*⁴⁰

As a conclusion, the granting of an ancillary right to publishers will result in an unauthorized limitation on the exercise of rights and freedoms recognized by the Charter in favour of other stakeholders and be prohibited under Article 52.1 of the Charter.

4. Is there a legal gap in the protection of publishers by copyright law that requires providing them with an ancillary right?

Publishers are not unprotected under copyright law. As substantiated in the following lines, no legal gap exists that makes necessary to grant an additional ancillary right in favor of publishers as sufficient legal protection is available for publishers under current copyright legal framework.

4.1. Publishers as derivative or original right-holders

a) Derivative right-holders, as licensees

Firstly, as anyone that is active in the publishing industry knows that under the publishing agreement, publishers are typically assigned on an exclusive basis all the exploitation rights that correspond to authors (reproduction, public communication, distribution, ...) on that publication, and there is nothing that legally prevents them from granting sublicenses – as they do - of those rights to third parties and/or defend their rights in front of infringers (for example, seminal *Infopaq case*⁴¹ in front of the

³⁹ In *Alemo-Herron and Others* case (C-426/11), the Court came to the conclusion that a national provision that protected workers in more protective terms than those enshrined in the Directive, was in breach of the right to conduct a business as laid down in Article 16 of the Charter. In particular, the Court provided that “fundamental right covers, inter alia, freedom of contract, as is apparent from the explanations provided as guidance to the interpretation of the Charter (OJ 2007 C 303, p. 17) and which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into account for the interpretation of the Charter (Case C-283/11 Sky Österreich [2013] ECR, paragraph 42)” and that “Article 3 of Directive 2001/23, read in conjunction with Article 8 of that directive, cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business (see, by analogy, Case C-544/10 Deutsches Weintor [2012] ECR, paragraphs 54 and 58).” (see paragraphs 23-25 and 31-36)

⁴⁰ See Fransson case (C-617/10), paragraphs 17-21.

⁴¹ Case C-5/08, CJEU judgment of 16 July 2009.

CJEU was a litigation filed by DDF, a professional association of Danish daily newspapers, which function is inter alia to assist their members with copyright issues). Repobel Case (copyright exceptions) - Out of scope

b) Original right-holders, as authors

Secondly, publishers may be acknowledged under national legislations as having the condition of author.

The Berne Convention leaves the notion of 'authorship' open to its determination to the Union States⁴². This means that there are cases where the members of the Berne Union are entitled to confer the status of 'author' to persons or entities that have acquired merits in the creation of a certain type of work, for instance collective works such as encyclopedias or anthologies (cf. 2(5) Berne Convention) or cinematographic works (cf. Article 14-bis).

Therefore, EU member states have the freedom to estimate, under certain circumstances, whether publishers can be regarded as 'authors' because of their contribution to the creation of original works. Publishers have been held to be authors of collective works created under their initiative and coordination.⁴³ In such situations, the legal protection of publishers results from their own status as authors and not their status as publishers.

Therefore, given that Article 2 of the Berne Convention leaves the issue of authorship determination to the Union States, EU member states have the option of looking into whether there are merits in defining publishers as authors under certain circumstances, in consideration of the specific contribution of publishers to the creation of original works. This would also render considerations and attempts to provide publishers with a neighboring right that overlaps with the exclusive rights of authors superfluous.

4.2. Protection of publishers as database makers

A "database" is broadly defined 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*" (see article 1.2 of Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal

⁴² Professor Sam Ricketson, the leading authority on the Berne Convention, acknowledges ("*The Bern Convention 1886-1986*"; Section 6.4 (1987)) that: "*This means, in turn, that there are different national interpretations as to what is required for "authorship" and as to who is an "author."* In this regard, the Berne Convention provides only limited guidance: while it lists a series of works in article 2 that each Union country is to protect, it does not ... contain any correlative definition of the term "author."

⁴³ For instance, in virtue of judgment of the Spanish Supreme Court of 13 May 2002, the publisher of newspaper La Vanguardia was recognized as the author of its newspaper as a collective work and was granted protection against unauthorized copying of its classified ads. A similar protection has been granted to newspapers publishers against press-clipping practices under a judgment of the Spanish Supreme Court of 25 February 2014.

protection of databases). This definition may cover newspapers, academic journals and book collections, for instance.

Publishers who create databases may be protected either as authors by means of the exclusive rights when the database is subject to protection by copyright protectable, or by means of the special protection conferred by the sui-generis right specifically provided by the Directive 96/9/EC.

a) Databases protected by copyright

An ancillary copyright for publishers would be redundant and counterproductive in relation to newspapers and academic journals and other collective works such as encyclopedias and anthologies insofar as these works qualified as compilations of data and other materials that, *"by reason of the selection or arrangement of their contents"*, constitute intellectual creations and are protected as such (see art. 3.1 Directive 96/9/EC).

Publishers may be granted with the condition of authors and original right-holders of the database. Moreover, the arrangements applicable to databases created by employees are left to the discretion of the Member States; therefore nothing prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract (see art. 4.1, art. 4.2 and recital 29).

As clarified under Article 5 WCT and Article 10(2) TRIPS Agreement, the protection of the exclusive rights granted to the author of an original database does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data, items or works embodied in the compilation.

This means that, at least for works that qualify as original compilations, a set of rights for the publishers to authorize the reproduction, distribution and communication to the public of their works already exists. The crucial difference between this right and a hypothetical set of ancillary rights granted directly to publishers is that the scope of the copyright in compilations of literary works and press products is firmly limited by copyright exceptions, in particular the mandatory exception of quotation under Article 10 of the Berne Convention. Moreover, both the TRIPS Agreement and the WCT specify that any copyright subsisting in the data or works contained in a database should remain unaffected by the exclusive rights in the whole database.

b) Databases protected by "sui-generis" right

EU and national lawmakers should also consider that publishers may already benefit from the special regime of protection granted to database makers by means of the sui generis right provided under Article 7 of Directive 96/9/EC. Article 7 of such Directive protects those publishers showing that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the database contents. This special protection may play an important role, in particular, in the context of online news publishers.

The existence of the special protection under Article 7 of Directive 96/9/EC shows that, at least in the EU as a whole and in the EU member states, databases are protected not only on the grounds of the selection or arrangement of their contents – as prescribed by international copyright law conventions - but also on the grounds of mere aggregation of data, through the application of a (narrower) sui generis right.

While considering the legitimacy and desirability of ancillary rights for publishers, lawmakers should therefore bear in mind that publishers may already benefit from the 15-year exclusive right granted under Directive 96/9 to mere compilations of data such as newspapers as well as academic journals and book collections. For instance, if a newspaper publisher were regarded as a holder of a sui generis right in a database (i.e. the newspaper itself and/or the related collections), this right would be broad enough to grant the publisher the power to restrict quotations or extractions *“which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database”* (art. 8.2 Directive 96/9/EC).

Publishers’ sui-generis right on databases plays an important role in particular in the context of online news publishers. In such regard, as referred by the Commission⁴⁴ itself *“in December 2005 the European Commission published an evaluation report on database protection at EU level. The aim of the evaluation was to assess the extent to which the policy goals of Directive 96/9/EC had been achieved and, in particular, whether the creation of a special sui generis right has had adverse effects on competition. The evaluation finds that the economic impact of the sui generis right on database production is unproven. However, the European publishing industry, consulted in an online survey (August - September 2005) argued that this form of protection was crucial to the continued success of their activities.”*

Reprobel Case (copyright
exceptions) - Out of scope

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■ at http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf

As a conclusion, in case there is a political aim for securing that publishers can enjoy originally (and not derivatively, as is the case today) certain exclusive rights or, at least, a right to receive compensation for certain acts, either at a EU or member state level, there is no need to provide them with ancillary rights additional to those granted to authors, but protection of publishers may result either (1) from attributing them the condition of author of certain works, or (2) from existing legal protection of databases.

Reprobel Case (copyright
exceptions) - Out of scope

