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Position on the Commission's Consultation
on the role of publishers in the copyright value chain

Brussels, 15 June 2016

Background

The Commission has announced the objective of achieving a well-functioning market place for copyright, which implies, in particular, "*the possibility for right holders to license and be paid for the use of their content, including content distributed online*"[1] and wants to gather views as to whether publishers of newspapers, magazines, books and scientific journals are facing problems in the digital environment as a result of the current copyright legal framework with regard notably to their ability to license and be paid for online uses of their content.

Conclusions

There is a lack of evidence as to the very existence of a copyright problem to be solved either for the press or other publishing sectors. Past experiments in Germany and Spain in the context of news snippets show that granting an ancillary right is not a solution. Financial stress in the publishing sectors, if any, is attributable to reasons other than a copyright law problem. Granting an ancillary right for publishers would have a number of negative effects on the publishers themselves, but also importantly on other key stakeholders whose interests have to be fairly balanced, such as consumers and digital businesses, and will hamper innovation, research and education.

Moreover, there is no legal gap that prevents publishers "*to license and be paid of the use of their content, including content distributed online*". They typically enjoy on an exclusive basis all exploitation rights on the works they publish, may even be considered authors (original rightholders) by virtue of national laws, and their investment in terms of human, technical and financial resources may be already protected under the databases sui generis right. If the bone of contention is about making them eligible for copyright levies distribution, this goal may be achieved without granting any ancillary rights but by requiring publishers that such funding is reinvested in (publishing) activities that somehow may be deemed to benefit authors, similarly as collecting societies allegedly do with the funding that they retain for culture promotion activities.

And importantly, even if the Commission may wish to set a new ancillary right in favor of publishers, we believe that there are a number of legal barriers preventing that, including international legal obligations assumed by the EU and member states in the field of copyright and the constitutional rules of the UE, in particular rules dealing with free circulation of goods (art 34 and 36 TFEU) and the Charter of Fundamental Rights of the EU. In a nutshell, changing copyright rules EU-wide by introducing a novel ancillary right in favor of newspapers, magazines, scientific journals and/or books will be not only a bad idea from a policy perspective but is barred from a legal perspective.

Recommendation

No ancillary rights to be granted either to newspapers, magazines, scientific journals or books or publishers at EU or national level.

1 "Communication Towards a modern, more European copyright framework" of 9 December 2015.

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What is the issue?

The Commission does not provide explanations on what the justification for any such neighboring right for publishers is and what the content and duration of such right would be. However, it is public knowledge that part of the legacy newspaper publishing industry and collective rights management societies representing publishers in general are asking for legislative action which could lead to additional remuneration basis, on the one hand to mitigate the financial difficulties that newspapers are suffering - allegedly - because of digital platforms and, on the other hand, to override the decision of the Court of Justice of the European Union of 12 November 2015 in the *Reprobel* case (and the following decision of the German Federal Supreme Court of 21 April 2016 in the *Vogel vs. VG Wort* case) confirming that publishers are not right-holders and cannot get a share of the fair compensation provided to authors by means of copyright levies or other schemes of fair compensation.

Whilst the consultation is not clear on what exactly the neighboring right would be, in light of the consultation, existing EU law, online snippets-related laws adopted in Germany and Spain, existing practice of sharing copyright levies income between publishers and authors in Germany, Belgium and other Member States, and the demands of some news and general publishers associations, we are looking at the impact of any of the following scenarios that may be specifically under Commission's consideration:

1) A full neighboring right on any original publications made available online or distributed in a tangible form, including specifically newspapers, academic/scientific journals and books, similar to neighboring rights that are available to broadcasters and producers of phonogram and audiovisual works;

2) A full neighboring right but limited to online news snippets, as is demanded by news publishers; and/or

3) A partial neighboring right for general publishers to get a share of the reprography or private copying levies provided to right-holders under national laws passing on the respective exceptions of the Copyright Directive 2001/29/EC;

A full neighboring right would:

- Include the range of exclusive rights (reproduction, public communication and distribution), so that:
    - It covers, in whole or in part, "linking": this is what the news publishers who are asking for a news right want. For example, the European Newspaper Publishers' Association (ENPA) argues that "*a neighbouring right could be considered as a solution for publishers when third parties generate revenue and web traffic based on the unauthorised use of publishers' press content*"[2]; moreover, the European Publishers Council argues that *Svensson*, an CJEU ruling stating that linking does not require copyright permission, should be "clarified": "*The EPC calls for legal clarification as to why the provision of hyperlinks should be compliant with license terms of websites (or other platforms) to which they link. It must be clear at law that rights owners may by their licence terms define, or limit access to and use of the content made available on an "open website"*"[3]

2 See "Copyright in the EU Digital Single Market – 10 Recommendations of the Newspaper" (May 2015) here.

3 See here; here also pointing to links to illegal content and deep-framing as requiring legislative intervention.

- It covers digital and physical reproductions (Article 2 Directive 2001/29): i.e. from a print copy to an e-book, and digital transmissions (making available, Article 3(2) Directive 2001/29: i.e. distribution on Amazon, Kobo, etc.) or any other distribution on the internet.

- Last between 50 to 70 years, as is the case for existing neighboring rights.

- Involve collecting societies for its management: in Germany, collective rights management is not mandatory for the existing new right, but in practice a collecting society has been entrusted by some publishers with the task of enforcing those new rights; in Spain, collective rights management is mandatory (the right gives rise to a "compensation claim") and CEDRO has been appointed for such management.

- Either:

  i. Covers (all) "literary" works, i.e. all creations that are in written form, including those published on the Internet or off-line in tangible form. In such regard, the Commission's Consultation mentions book publishers, science publishers and news publishers as separate categories; however, we believe that is highly unlikely that a law could be devised to protect only works considered either as "news" or "science publications" or "books" – it may be unworkable to draw distinctions according to subjective, value based categories; or

  ii. Covers only short extracts of text ("snippets") made available online, as is the case in Germany and Spain[4] ; i.e. use of short extracts of in news aggregators, newsfeeds, apps and/or social networks like Twitter or Facebook.

Analysis resulting from the assessment of those scenarios may be extrapolated to other scenarios[5] that may arguably result from granting neighboring rights to publishers.

Lack of a copyright problem to solve

We are not aware of any convincing statement of what problem the creation of these new rights would solve. Further, we are not aware of any indication that there is indeed a problem to solve.

While the transition to digital business models may be challenging for many areas, it also comes with opportunities. Between 2003 and 2013, digital accounted for a €34 billion revenue increase for the EU's creative sector, off-setting a 14 billion decrease in non-digital revenue over the same period.[6]

4 For a description see here document "Understanding Ancillary Copyright in the Global Intellectual Property Environment" by CCIA.

5 For example, may a neighboring right in favor of news publishers be translated into a right of remuneration not only in front of online news aggregators, but also in front of news TV channels and radio stations that rip and read the headlines of newspapers as part of their broadcasting activities? See proposition by Mr. Chris Beall at the conference "*Copyright, related rights and the news in the EU: Assessing potential new laws*": https://youtu.be/enE0Y46SqWg?t=2385

6 Strategy&Co, 'The digital future of creative Europe: The impact of digitization and the Internet on the creative industries in Europe' (2015) http://www.strategyand.pwc.com/global/home/what-we-think/reports-white-papers/article-display/the-digital-future-creative-europe

Further, the role of legislators cannot be to legislate the continuation of old business models – such as selling newspapers. Those best placed to successfully see though the transition to digital are journalists, newspaper publishers, innovators and technology companies working together.

Online, news publishers actually benefit from traffic driven by online services (social networks, news aggregators, instant messaging, email etc). According to one estimate, the total value of web traffic to news publishers in four markets (France, Germany, Spain and the UK) amounted to €746 million in 2014.[7] News publishers are also free to decide whether all or part of their publications are indexed in news aggregators, behind a paywall, included in an App, etc.

Online, news publishers also get traffic from a wide variety of sources – direct access but also news aggregators and search engines, social media, email, etc. These provide multiple and multiple « pathways » to news.

Starting point for news – Europe, per cent of online news consumers						
Country	Direct to news brand	Search and news aggregators	Social Media	Email	Mobile notifications and alerts	Other aggregator sites, newsreaders, apps
United Kingdom	52%	32%	28%	10%	10%	4%
Germany	26%	45%	20%	15%	9%	5%
Ireland	44%	46%	36%	9%	9%	7%
France	27%	40%	21%	21%	14%	6%
Spain	36%	54%	35%	14%	8%	11%
Italy	20%	66%	33%	17%	7%	6%
Denmark	54%	29%	38%	24%	9%	9%
Finland	63%	26%	28%	9%	7%	12%

Source: Reuters Institute Digital News Report 2015, p76.

Financial stress for some – not all – press products is not specifically attributable to news aggregators. In fact, the European press industry has seen declining revenues in Europe for most of the post-war period (factors include the migration of classified advertising to classified ads platforms, competition from television news). Moreover, such stress is not attributable to news aggregators either for online advertising, but consequence of circumstances such as change on users behavior that prefer to read online, the economics of online advertising inasmuch as income for an online ad posted in an online newspaper is much lower than same ad posted in printed newspaper or the fact that newspapers have to compete with other sources of information (blogs, …).

The news sector is subject to different economic dynamics than book publishing in general, because the role that advertising plays in their funding model. Each sector should be subject to their own economic assessment. And book publishing is also different than academia / science publishing, which is also subject to other dynamics (authors not compensated, high concentration in academic / science publishing sector, etc.) [8].

7 Deloitte: "The impact of web traffic on revenues of traditional newspaper publishers. A study for France, Germany, Spain and the UK" (2016). http://www2.deloitte.com/uk/en/pages/technology-media-and-telecommunications/articles/the-impact-of-web-traffic-on-revenues.html

8 For an overview of concentration levels and economic dynamics in the academic / science sector, see "*The Oligopoly of Academic Publishers in the Digital Era*" by Larivière, Haustein and Mongeon (2015) http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0127502#pone.0127502.ref048

If we look at book publishing in general, it is also clear that the sector is doing well. On the supply side, the number of books published in Europe grew by close to 80% between 1995 and 2008[9]. Between 2009 and 2013, the active catalogues of book titles more than doubled, according to the Federation of European Publishers.

The most current statistics made available by the FEP show the following data. Whilst FEP statistics do not indicate the split between physical and digital books in the EU, FEP reports that "*in 2013 and 2014 the market slowed down again, with the most notable trends being the continuous growth of the e-book market (now around 5% of the total*)."

European Book Publishing Statistics 2014

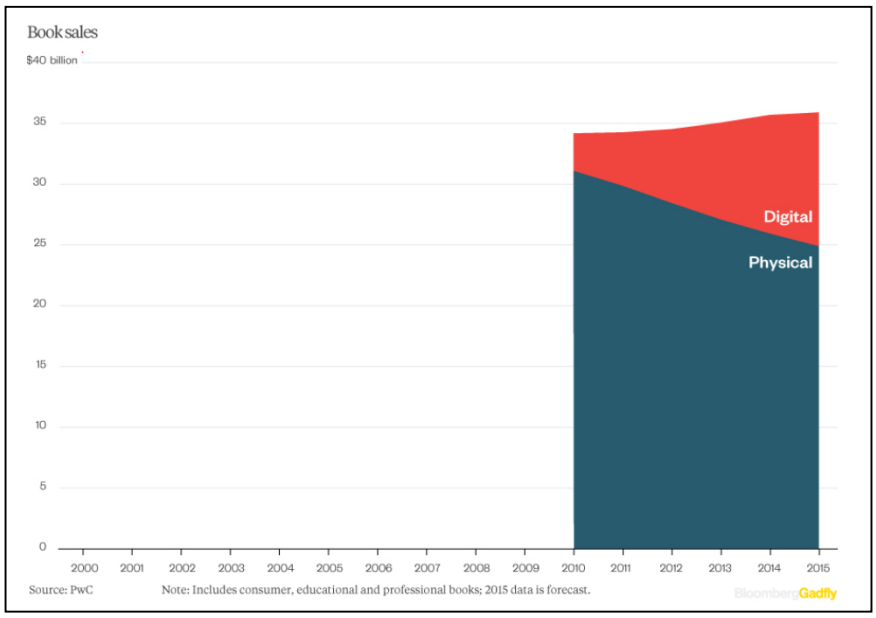
	2014	2013	2012	2011	2010
Publishers' revenue from sales of books (bln)	22	22.3	22.5	22.8	23.5
Educational (school) books	19.2%	18.8%	19.8%	18.7%	17.9%
Academic/Professional books	19.5%	19.5%	19.7%	19.5%	20.5%
Consumer (trade) books	49.2%	49.5%	48.7%	49.8%	49.6%
Children's books	12.2%	12.3%	11.8%	12.1%	12%
Sales by area					
Sales in the domestic market	80%	81%	79.6%	80.5%	81.5%
Exports	20%	19%	20.4%	19.5%	18.5%
Sales by distribution channels					
Trade (retail and wholesale)	79.5%	79.3%	80.2%	80.9%	78%
Book Clubs	3.3%	3.5%	4.7%	6%	5.7%
Direct	17.2%	17.2%	15.1%	13.1%	16.3%
Number of titles published in period					
New titles	545,000	560,000	535,000	530,000	525,000
Number of titles in print (active catalogue)	16,900,000	14,500,000	9,000,000	8,500,000	7,400,000
Number of persons in full-time employment in book publishing	125,000	130,000	130,000	135,000	135,000

** Estimates, all figures rounded*

Source: Federation of European Publishers - European Book Publishing Statistics 2014, EU+EEA market
http://fep-fee.eu/European-Book-Publishing-741

A better transition to the digital business is happening in the US, where no ancillary rights exist in favor of publishers.

9 UNESCO, Mike Masnick, 'The Sky is Rising 2' (2013), https://www.techdirt.com/skyisrising2



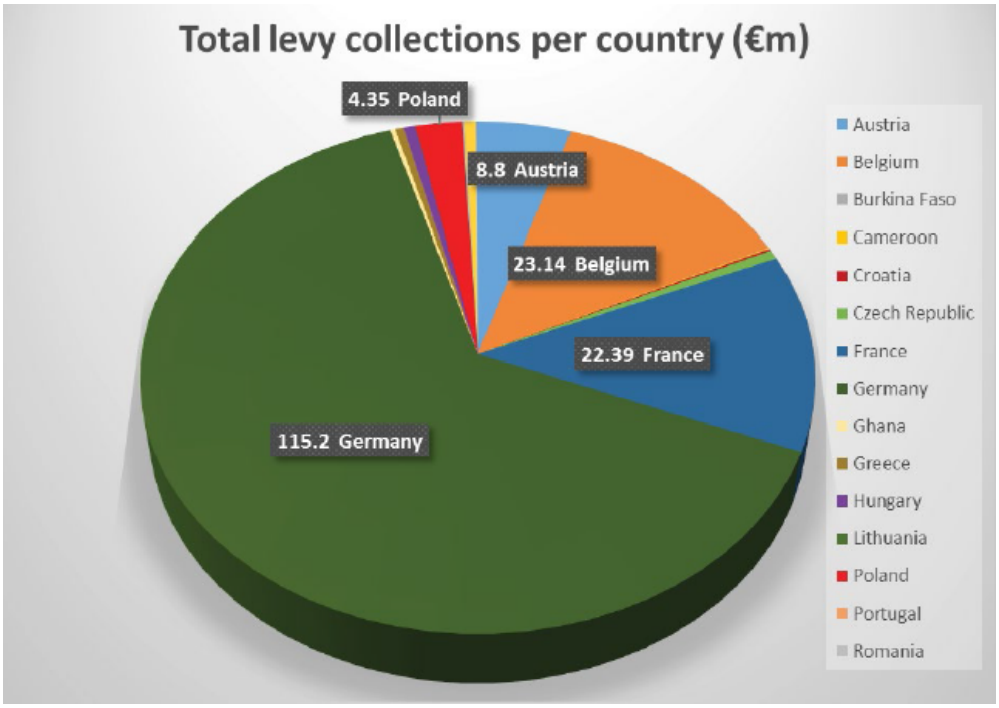
Source: Bloomberg Gadfly, US market
http://www.bloomberg.com/gadfly/articles/2016-04-01/6-charts-help-explain-the-digital-upheaval-in-media

And then, if you look to academic journals, who have been even referred as "*the most profitable obsolete industry in the marked*"10, their extraordinary financial health seems to suggest that a new right is not needed.

Finally, if one looks at "fair compensation claims" (reprography, private copying, etc.) flowing through collecting societies to publishers, there is little evidence that they are set to suffer any losses of significance as a result of the recent judicial decisions that are critical for the well-functioning of the publishing business in general and the news sector in particular. With the most competitive publishing and press sectors in Europe, the UK has no levies at all. In Germany, the news publisher share of the income is allocated to training journalists (and will now go directly to journalists instead). In Spain, news publishers had not benefited from fair compensation at all in last 25 years, but only book publishers (eventually in the detriment of authors) benefited from levies. In fact, revenue for fair compensations concerning text and images is limited to a few EU countries (Germany, Belgium, France and Austria) and is not widely-spread all over Europe. Granting an ancillary rights for publishers to make them eligible to get a share of copyright levies collected in those few countries11 would have the perverse effect of unfairly aiding publishers in those countries in prejudice of publishers based in other EU countries.

10 See "*Academic journals: the most profitable obsolete industry in the marked*" by Jason Schmitt, HuffPost Education Blog (2015): http://www.huffingtonpost.com/jason-schmitt/academic-journals-the-mos_1_b_6368204.html

11 For details on the size and form of determination of the split of compensation between authors and publishers at a country level, check Table 13 (p 37) of the "International Survey on Text and Image Copyright Levies - 2015 Edition" by WIPO/IFRRO http://ifrro.org/sites/default/files/levies_2015_online.pdf



Source: "International Survey on Text and Image Copyright Levies - 2015 Edition" by WIPO/IFRRO, p25
http://ifrro.org/sites/default/files/levies_2015_online.pdf

About the economic implications

The lack of any positives

A proposal should balance expected benefits from a new proposal, against its costs, and assess whether it is an economically, socially and politically desirable outcome. At the outset, we note that we are unaware of any positive impacts that the creation of a new neighboring right may have – perhaps with the sole exception of a positive impact for collecting societies who will manage more rights and retain related collection and administration fees. In Spain or Germany, legislative experiments in "text snippets" have had no demonstrable positive impact including for the purported beneficiaries, news publishers. In the EU or elsewhere, the creation of new rights also has no demonstrable value and will not encourage the creation of new, more or better works. For a start, publishers already own all exploitation rights resulting from copyright via contract with authors. Research also shows the strengthening of copyright does not increase the production of creative works.12 And the Commission itself noted in relation to the neighboring right for EU databases that *"the economic impact of the 'sui generis' right is unproven"* according to the Commission's evaluation report of the Database of Directive. And the European Parliament's Digital Single Market Report called for the abolition of the databases 'sui generis' right (para. 108).

12 Png, Wang, Copyright law and the supply of creative work: Evidence from the movies (2009)

Impact on consumers

- **Limited and costly access to information:** News aggregators have created a new market that contributes to consumer welfare. Ancillary rights on news snippets and/or other materials published online will increase search costs for consumers, as it makes harder for them to access news from aggregators, apps, blogging services, social networks etc. In Germany, 57% of the consumers find text "snippets" helpful (Bitkom, 2015). The loss of snippets increases the difficulty of accessing information. In Spain alone, this means a loss of EUR 1.85 billion a year for consumers in "consumer surplus" (NERA, 2015, study for Spanish publishers association AEEPP).

- **Increased levy payments resulting in increased price for devices**: Given the way private copying and reprography levies are set, with no real methodology to make compensation commensurate to harm resulting from the concerned exception, it is likely that the creation of new rights for publishers will be relied upon by collecting societies to increase the levies charged on various devices and equipment. While this is unlikely to be significant for press publishers (who currently receive no income from levies, e.g. in Spain, a very little share in France), book and scientific publishing involves more significant amounts of levies. In a nutshell, a new right for publishers to get a share of the reprography or private copying levies provided to right-holders may result in an increase of copyright levies to be paid and an increase on prices[13] to be paid by final users to have access to devices that are core for the development of the information society.

- **Fewer, more fragmented online services:** The increased costs (of using snippets in the German or Spanish example; transaction and licensing costs for other new digital rights) will invariably impact the availability of online services in the EU. Larger online services may well have the resources to handle the additional complexity – but would nevertheless take longer to roll out across the EU, be more fragmented across borders (new rights would be territorial). Smaller services may simply have to shut down or give up providing a free service.

- **Reduced availability of content:** Works in copyright are less widely available than out of copyright works. For books, Paul Heald shows (How Copyright Keeps Works Disappeared, 2013)[14] how books reappear in increased numbers once they are no longer copyright protected. For example, more than twice as many new books originally published in the 1890's (and thus in the public domain) are for sale by Amazon than books from the 1950's, despite the fact that significantly fewer books were published in the 1890's. Similar effects have been found for musical compositions (Paul Heald, 2008, here) sound recordings (Tim Brooks, Survey of Reissues of U.S. Recordings (2005), images (Create, Copyright and the Value of the Public Domain, 2015). And authors may be prevented from making their works available for free in case there is an additional overlapping right for publishers that prevents them to freely dispose of their creations.

- **More expensive access to content:** New rights or expanded rights are also known to increase the cost of cultural goods: for books, for example, copyright protection increases the costs for consumers of purchasing a work. See the UK Gower's review of intellectual property (2006)[15]

13 See report "*Analysis of prices after the elimination of copyright levies in Spain and Finland*" (December 2015) produced by KPMG for Digital Europe.

14 See a summary in page 55 of the UK Gower's review of intellectual property (2006).
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf

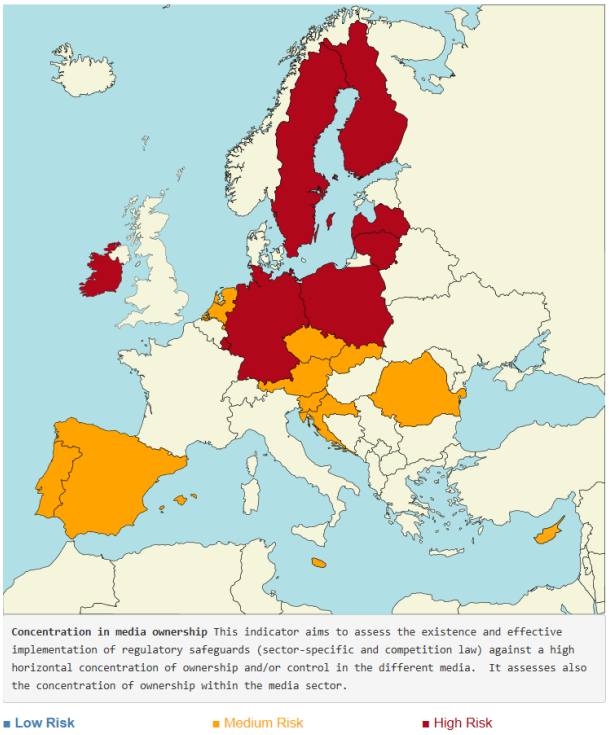
15 See page 55: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf

Impact on news publishers

- **Less traffic and advertising revenue**: Ancillary rights in favor of news publishers in Spain resulted in publishers losing traffic. This was more than 6% on average; 14% for smaller publishers.[16] The loss for the news publishing industry, suffered predominantly by smaller, free or online publishers, is estimated to reach €10 million a year.

- **Increased barriers to entry, reduced media pluralism:** The creation of ancillary rights in Member States also had the negative effect of creating barriers to the entry on the media market, as the Spanish Competition Authority found.[17]

  Those increased barriers to entry and expansion also impact negatively media pluralism, a critical issue given that none of the EU countries recently examined are free of risk and that the situation is specially worrying in the area of 'Market Plurality' (media ownership), an essential element in the assessment of a level of media pluralism in any given context.[18]



Source: Media Pluralism Monitor 2015

16 See AEEPP/NERA (July 2015) - http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20%28VERSION%20FINAL%29.pdf

17 CNMC: PRO/CNMC/0002/14, Study on proposed article 32.2 to Intellectual Property Act (May 2014) https://www.cnmc.es/Portals/0/Ficheros/Promocion/Informes_sobre_normativa/2014/140516_PRO_CNMC_0002_14_tasa_google-EN.pdf

18 See the Media Pluralism Monitor 2015 Report prepared by the European University Institute's Centre for Media Pluralism and Media Freedom (CPMF) and published on March 2106: https://ec.europa.eu/digital-single-market/en/news/media-pluralism-member-states-eu-funded-project-presents-new-results.

Impact on digital businesses

- **Online services:** Services that licence books, news, etc. such as Kobo, Amazon, Apple, Google etc. will face a new layer of licensing obligations. They would need to license materials not just from authors/owners, but also license those same materials again from publishers. There will invariably be situations where the rights of the authors are not with the publisher - or no longer with the publisher. When a publishing contract is limited in time and the author gets another publisher for example, or self publishes: both publisher and author will have to be identified separately, to conclude separate agreements, although this is for one single work. All this would increase transaction costs, the fragmentation of online offerings and slow the roll-out of online services across the EU, and may also increase territorial fragmentation.

- **Online services that rely on short extracts of text ("snippets")** including for the provision of links will be negatively affected - from news aggregators to social networks. As they face unclear restrictions - or in some cases plain requests to pay despite the consent of publishers - they may have to change their services in Europe; close them; deal mainly with non-European content; face litigation; etc. Having now licensed both the author's rights and the new ancillary or neighboring rights, these online services may also have to conclude a third arrangement specific to "snippets". This would be a consequence of following e.g. the Spanish model or indeed the case where the "snippet rights" are entrusted to a collecting society, which acts as a separate licensor. Consider a service like Blendle, or apps offering access to paid content, but which all "index" the news articles they have licensed.

- **Device and equipment providers:** Given the way private copying and reprography levies are set, it is likely that the creation of new rights will be relied upon by collecting societies to increase the levies charged on various devices and equipment, increasing the complexity of what can be deemed to be «fair compensation», the reporting and payment obligations by manufacturers and importers, and the handling of « ex ante » exemptions and « ex post » reimbursement schemes for B2B transactions, or for cross-border sales.

- **Text-and-data mining reliant industries:** Large and small business that operate computer-based mining of text and data, including data available on the Internet, will face new legal uncertainty in the face of these new rights in all published literary works. In particular, the precise scope of those news rights is not known. If a right also extends to « text snippets », it is further likely to directly oppose the possibility of mining content. It will encourage companies that can to undertake these activities in other markets which are more open.

- **Internet Service Providers:** The creation of billions of new rights and right owners in all written content on the Internet will cause great confusion and legal uncertainty - including for intermediaries that process large volumes of requests to remove content that is alleged to infringe copyright.

  This comes very close to making links to allegedly infringing content illegal per se - and would trigger droves of new copyright claims to take down or otherwise remove content online for intermediaries. The news publishers who argue for this new right state that "*copyright law should thus be amended to treat as infringements only those acts of making available hyperlinks to copies which are clearly and obviously unlawfully-produced*" (see European Publishers Council, page 27); this objective is also pursued by publishers before the courts (*GS Media v Sanoma*).

Impact on innovation

- The Commission has shown commitment to promoting innovation in Europe (see for instance the recently released communication "Digitising European Industry- Reaping the full benefits of a Digital Single Market"). Restricting European innovators' access to information by extending copyright could jeopardize innovation. At the end of the day, new ideas come from existing ideas. Hampering access to such existing ideas does not look like the best way to promote innovation. Important to note in this respect that innovation cannot be restricted to academia.

- The new rights will create new barriers to entry, hindering competition and innovation - as noted already by the Spanish competition authority (PRO/CNMC/0002/14, Study on article 32.2, May 2014).

- New legal uncertainties act as a strong deterrent to innovation and investment. Who is a publisher who receives the new neighboring right? What happens to the one billion websites, and billion more web-pages, where new works are published every day - who owns those rights?

- Businesses that analyse data on the web, rely on UGC (User-General Content), for example, would all face new risks in the face of a new neighboring right for publishers on works available online - in addition to higher barriers to entry which only large, established digital players can afford to overcome. There is a wealth of opinions supporting this view, from the Max Plank Institute to a report from the Spanish Competition authority. (EDiMA, 2016)

- For smaller European companies ancillary right provisions represent a strong deterrent because of the legal uncertainty and the enforcement through collecting societies. In Spain, Planeta Ludico, NiagaRank, InfoAliment and Multifriki were already affected (AEEPP/NERA, 2015).

- Services and publications that rely on disseminating content under creative commonstype licenses cannot escape the law. Similarly, scientific publications that rely on open access, e.g. Public Library of Science, would see a fee collected for the circulation of their information (Xalabader, 2014).

Impact on research and education

- **Increased licensing obligations and costs:** Additional rights for publishers will become another layer of rights to the stack of rights that would make more difficult for authors to license their works. This goes specifically against the goal set by the Commission of achieving a well-functioning market place for copyright, which implies, in particular, "*the possibility for right holders to license and be paid for the use of their content, including content distributed online*".

  In some countries, researchers and educational or research institutions rely on licensing arrangements for certain activities including reprographic copying and/or scanning of articles. They also rely on paid-for licences to access online journals and academic data-bases, etc. Transactions costs will increase as well as, potentially, the cost of licences. In those countries where educational establishments rely on (compensated) exceptions for reproducing and circulating materials for research and education purposes, payments in the form of copyright levies or other compensation schemes (e.g. operator fees, such as in Belgium and Germany) are also likely to increase.

- **Open access, access to information:** The "snippets right" created in Spain is particularly detrimental to open access, as it imposes a payment for use of "text snippets" irrespective of whether the owner of the copyright in the underlying work so wishes[19]. So if you index open science publications, you still have to pay. Whether in Spain or Germany, both set of rights target "*text snippets*" and their use online. These are typically important tool for research. Researchers share information online, create indexes for science repositories, use specialised aggregators (Divulgame, Barrapunto, Links.Historische etc).

  Further, all the information that researcher uses will eventually get this new neighbouring right. Considering scientific publications alone, one estimate is that there 1.5 million new academic articles created a year (back in 2010, see here); another is that there in the region of 160 million (based on estimates of the size of Google Scholar, see here).

  Moreover, the ability for research to use "open publishing" (a priority of Horizon 2020) will be reduced. Anytime a researcher publishes in a journal first, then that journal owns a new right in the work – in parallel to the author's right. Any concurrent of subsequent publication in an open repository can be blocked by the publisher who owns the neighbouring right.

- **Text and data-mining (TDM) based research:** Text and data mining is critical for the development of European research and innovation, and the competitiveness of European research centres on the global stage. Increasingly, academic literature points to the way copyright (in works and databases) and contracts are used to limit the possibility for European researchers to engage fully in TDM.[20] The Ann Frank diaries provide a recent illustration - combining lack of clarity as to copyright status with attempts to restrict research activities on the basis of copyright claims, see here. A new right for STM publishers seems to go in the opposite direction as recent calls to allow TDM (e.g. the Hague Declaration[21], which aims to foster agreement about how to best enable access to facts, data and ideas for knowledge discovery in the Digital Age). Whatever its shape or form, it will at the minimum give publishers more power to impose licensing conditions to TDM (including restriction on number of works, number of words, mining of images, use of the outcomes of the TDM based research). If the new right includes a "snippet" element, it effectively makes TDM activities unlawful.

All these effects seem to restrict access to academic and non-academic knowledge and go against the « Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities ».[22]

19 See Paul Keller, Did Spain just declare war on the Commons?

20 Christian Handke, Lucie Guibault and Joan-Josep Vallbe, "Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research," Social SSRN, 20 May 2015.

21 http://thehaguedeclaration.com/

22 https://en.wikipedia.org/wiki/Berlin_Declaration_on_Open_Access_to_Knowledge_in_the_Sciences_and_Humanities

About the legal implications

A gap to resolve by copyright law?

From a legal perspective, it is first necessary to consider whether there is a legal gap that prevents publishers from "*[licensing] and [being] paid for the use of their content, including content distributed online*".

In such regard, it must be highlighted that publishers are not unprotected under copyright law. There seems to be no reason that justifies introducing a new ancillary right additional to the legal remedies that they already enjoy under copyright law:

- **Exclusive rights:** First, 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*[23] in front of the 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).

  In the context of remuneration rights, those existing for example under the reprography exception contemplated under Article 5.2(a) of the Copyright Directive, a better solution to secure a share for publishers would be to enable them to exercise those assigned exclusive rights, inasmuch as publishers (and authors) can easily provide licenses (either under the form of collective licensing schemes administered by collecting societies or otherwise) and secure a remuneration for reproduction of their published works. In fact, this approach is the predominant situation in most Member States, which have opted in their majority to facilitate enforcement of exclusive rights in the field of reprography, phasing out the archaic reprography exception, so that a broad reprography exception is now a relic of the past that is present only in very few Member States (e.g. Belgium). Thus, we do not find any justification to keep a general reprography exception subject to compensation, when remuneration for those reproductions (e.g. those made by companies or repro centers) may be easily administered by mean of licenses, enabling publishers to also get a fair share of those remunerations.

- **Authorship:** Second, publishers may be acknowledged under national legislations as having the condition of author. In such regard, the Berne Convention largely leaves the issue to its determination to the Union States[24]. Thus, under national laws, publishers are designated in several instances, when its contribution so deserves, as authors of the work, as it is the case with collective works created under the initiative and coordination of the publisher[25]. Thus, EU member states have the option of looking into whether there are

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

24 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."*

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

merits to protect further to publishers in certain circumstances as authors, because its contribution so deserves, and act accordingly.

- **Databases sui generis right:** Finally, publishers may be protected under the sui generis right provided under the Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases, which may play an important role in particular in the context of online news publishers. In such regard, as referred by the Commission[26] 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.*"

Therefore, no legal gap seems to exist in our view that would justify to provide online news publishers in particular or publishers in general with a neighboring right either in the form of exclusive rights or rights of remuneration.

Does Reprobel case represent such legal gap?

A political wish to override the decision of the Court of Justice of the European Union of 12 November 2015 in the Reprobel case (C-572/13), in order to enable publishers to enjoy a share of the income from reprographic and private copying levies, does not require that a new ancillary right is granted to publishers.

If one reads with attention such judgment, the CJEU specifically provided that "*Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.*"

The underlined passage above has to be put in connection with prior judgment of the CJEU in Amazon case (C-521/11), which authorizes that collecting societies may receive half of the fair compensation for private copying, provided that they dedicate that funding to culture promotion and social activities that benefit indirectly to authors. The same rule may be extrapolated to publishers, in case their activities resulting from using this funding would benefit indirectly to authors.

And precisely, if the alleged justification to provide a new neighbouring right to publishers is their contribution for the maintenance and development of creativity, in the interests of authors in particular, and more broadly in the interest of consumers, culture, industry and the public at large, then EU Member States do not need to create a new ancillary right but may provide in their legislation that publishers may receive part of fair compensation provided that such income is dedicated to certain types of activities that may benefit directly or indirectly to authors (e.g. publication of novel authors, etc.).

Thus, no new ancillary right would be required at EU level, but Member States may establish in their local legislation the conditions for such attribution to publishers in the – direct or indirect – benefit of authors.

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

Not legally possible to create a new ancillary right for publishers

Finally, the Commission must also consider whether it may legally take action in order to provide a neighboring right either to online news publishers only or to publishers in general by amending the Copyright Directive 2001/29 or following any other legislative path. We believe that the plain answer is no.

The legal arguments about why the Commission would be prevented from granting such neighboring rights in the form of any of the scenarios that are assessed result mainly from (1) their international legal obligations, (2) the rules provided in the TFEU about free circulation of goods and (3) the Charter of Fundamental Rights of the European Union, as described below.

A more detailed legal assessment dealing with those legal arguments is contained in Annex A attached to this position paper.

1) International legal obligations

Granting ancillary copyright to publishers that are either equivalent to those attributed to authors with regard to short extracts of newspaper articles or, more generally, literary works - including books and academic journals – or restricted to certain remuneration rights would make EU member states not to conform with international obligations set out in the Berne Convention (as revised lastly in 1971) and the WIPO Copyright Treaty (WCT, 1996), which is a 'special agreement' under Article 20 of the Berne Convention. Such initiative would also raise the direct liability of the EU under the WCT since the EU is a contracting party of the WCT. As far as the obligations of the EU under the laws of the World Trade Organization (WTO), the publisher rights at issue would also raise the issue of the conformity with Art. 9(1) of the TRIPS Agreement (1994), which requires its contracting parties to apply articles from 1 to 21 of the Berne Convention.

The enactment of a new set of exclusive rights to the benefit of publishers in all types of the literary works they publish (or in short extracts from newspaper articles or press products) or a narrower exclusive right (or a compensation right for private or reprographic reproduction) make the EU 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, 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.[27]

2) Rules on free movement of goods and services

Article 34 TFEU[28] prohibits all measures having an equivalent effect resulting in quantitative restrictions on imports. Such prohibition would be contravened if the granting of a neighboring right to publishers results in the payment of additional copyright levies in favor of publishers upon introduction of reproduction devices into a national market.

In such regard, is well-known that 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[29], and any such payment cannot be exempted / justified under Article 36 TFEU[30]:

- Firstly, any such compensation would not be part of the "*specific-subject matter*"[31] of copyright because publishers are not rightholders under settled international copyright rules.

- Secondly, any such provision of additional compensation would not conform with the requirements of necessity and proportionality imposed by Article 36 TFEU.

- Finally, any such provision does not conform with Article 36 TFEU as the provision can be construed as "*a means of arbitrary discrimination or a disguised restriction on trade between Member States*".

A similar conclusion about infringement of rules on free circulation of services (articles 56 and ff. TFUE) may result for levies on online services.

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[27] Copyright protection does not extend to facts underlying in published news, but only to the expression of the news that is original. Berne Convention, Art. 2.8): "*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*".

See also Art. 10 bis (1): "*It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.*

[28] 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."*

[29] Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

[30] 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*."

[31] See judgments of the CJEU in *Deutsche Grammophon* (case C-78/70, 1971) and *Phil Collins* (joined cases C-92/92 and C-326/92, 1993).

3) Charter of Fundamental Rights of the European Union

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

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 Treaty. Indeed, we believe that's the case in connection with right protected under art. 11 (freedom of expression and information, including the right to access to information) and art. 16 (freedom to conduct a business) of the Charter.

Any such limitation must meet the requirements imposed under article 52.1 of the Charter[32], notably the principles of proportionality and necessity.

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[32] Article 52.1 of the Charter provides that "*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.*"

Annex A

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.

Moreover, it is apparent from jurisprudence of the CJEU that publishers may receive a share of the fair compensation for private or reprography reproduction provided that such share is dedicated to activities that certainly benefit directly or indirectly to authors (e.g. publication of novel authors, etc.), and is not exclusively for publishers' own benefit.

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 WCT33 and under the laws of the World Trade Organization (WTO), as the creation of ancillary rights to the benefit 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.[34]

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.

1.2. Detailed Examination

The proposed creation of an ancillary right for publishers may infringe on international legal obligations as set out below. In addition, thought has been given to where change is needed and possible lawful ways to achieve the political aim of permitting publishers to receive remuneration for private or reprographic reproduction. 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 - including compensation rights for private or reprographic reproduction – 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 (or a compensation right for private or reprographic reproduction) 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*

33 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.

34 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.

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 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 Convention[35] 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*.

35 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."*

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.

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.[36]

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.

36 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)).

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 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, irrespectively 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).37 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. 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.[38] This principle aims to make it sure that copyright protection does not extend to ideas, procedures, methods of operation or mathematical concepts as such.

37 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*."

38 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*."

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 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.[39] 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.

39 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).

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

The initiative currently under consideration to grant ancillary rights to publishers seems to have gained traction as an attempt to circumvent the judgment recently issued by the German Federal Supreme Court in Vogel's case[40], which precludes publishers from getting a share of copyright levies, and which is a further development of the decision of the Court of Justice of the European Union of 12 November 2015 in the *Reprobel* case (C-572/13).[41]

Both the European Commission's actions and the actions implemented by the EU member states in application of EU law or otherwise in order to provide any such share of fair compensation to publishers must be compatible with the Treaties.[42]

This means that levies, whether intended to be in favor of authors or publishers, must be compatible with the principles of free movement of goods of the Treaty of Functioning of the EU (TFEU), in particular be compliant with Article 34 TFEU[43], which prohibits all measures having an equivalent effect resulting in quantitative restrictions on imports, unless justified under Art. 36 TFEU.[44]

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.

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

41 See Section 4.3 of this Annex A.

42 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.

43 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."*

44 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*."

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.[45] 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.[46]

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).[47]

This view is also in line with the case law suggesting that licensing systems requiring the payment of a fee constitute a quantitative restriction.[48] The same results from recent jurisprudence of the CJEU contained in its *Football Association Premier League and Others* judgment,[49] 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.

Copyright levies typically restrict the import (or intra-community acquisition) of the devices to which they apply, as they require that the importers or the intra-Community purchasers of the levied goods declare the type of equipment when it is first put into circulation on the domestic market. This declaration then serves as the basis for the payment of the levy on a good that has been lawfully put on the market in the country of exportation. Imposing such obligations to report and to pay a domestic levy to the importer or intra-Community purchaser, even when the levy has already been paid in the country of exportation, and related complexities and uncertainties in the process, appear as restrictions to intra-Community trade. This remains the case even if there is a possibility to receive a refund of the levy paid in the country of exportation.

Significantly, to fall within Article 34, levies regimes do not need to discriminate against imported products. Thus, the Belgian Council of State was incorrect when it held that a levy on reprographic equipment did not affect trade among Member States and did not fall within the scope of Art. 28 TEC (now Article 34 TFEU) because it was applied *de iure* and *de facto* to domestic as well as to imported goods.[50] For levies to fall under the prohibition of Article 34 TFEU, it is sufficient to establish that their implementation is "*capable of hindering, directly or indirectly, actually or potentially*" the trade in the levied goods among Member States, as it is clearly the case.

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

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

47 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).

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

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

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

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 TFEU[51].

As set out in detail below, whilst there are serious doubts as to whether levies in favor of authors can be justified under Article 36 TFEU, it is clear in our view that the proposed neighboring right for publishers requiring the payment of additional levies in favor of publishers upon introduction of reproduction devices into a national market could not be exempted under Article 36 TFEU.

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.[52]

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*"[53]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*"[54] and in the case of films "the right of a *copyright owner* and his assigns *to require fees* for any showing of a film"[55].

51 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*.

52 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.")

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

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

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

In our view, copyright levies do not fall within the definition of the "*specific subject matter*" of copyright, because they result from an (optional) statutory exception to the exclusive right[56]; thus, the right-holder's reproduction right is expressly dis-applied[57,] and the rightholder has no longer an exclusive right that can exploit and license for a fee.

Although measures that advance a copyright owner's exclusive right to exploit his work for remuneration have been held to safeguard the "specific subject-matter" of copyright, the CJEU has never held that national rules providing compensation for a *limitation* on such exclusive rights – such as the levies systems at issue here – do so.

Moreover, as it is elaborated below, even copyright levies in favour of authors are not likely to safeguard the "*specific subject-matter*" of copyright, and therefore, are not likely to fall within the exception for the protection of industrial and commercial property of Article 36 TFEU, because: (i) a system of compensation for an exception or limitation of copyright is not likely to be included within the "specific subject-matter" of copyright; and (ii) even if a system of compensation system would fall within the "specific-subject matter" of copyright, levies do not.

Finally, even if one concludes that *"specific subject matter"* includes levies granted in favour of authors, it seems unquestionable that levies in favour of publishers that are based on the creation at EU or national level of a new ancillary right in their favour are not part of the "*specific subject matter*" of copyright and are therefore outside the derogation provided by Article 36 TFEU.

i) A system of compensation for an exception or limitation of copyright does not fall within the "Specific Subject Matter" of Copyright

The CJEU has never held that a national legislation amounting to a compensation for an exception or limitation on copyright owners' exclusive rights falls within the "specific subject-matter" of copyright so as to be justified under Article 36 (ex Article 30 TEC).

While the CJEU has not yet had the occasion to address this question directly, there are persuasive grounds to believe that the Court would answer in the negative:

- First, the exceptions of Article 36 must be interpreted narrowly, as they "*constitute[s] a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly.*"[58] A broader interpretation of Article 36 TFEU to extend to levies (in particular in favour of publishers under a new "sui-generis" ancillary right) wouldn't be appropriate.

56 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").

57 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.

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

- Secondly, the CJEU is likely to take into account the fact that international copyright agreements do not recognize compensation for a limitation of copyright as an essential element of copyright.[59] In such regard, although the international framework allows for compulsory licenses and compensation schemes under strict conditions, it does not recognize them as the standard way for the deployment of copyright. For instance, the Berne Convention and the TRIPS Agreement allow for some "use limitations requiring compensation" (*e.g.*, "compulsory" or "obligatory licenses"), but only if they meet the following three conditions (the so-called "three-step-test"): (i) they are limited to "certain special cases," (ii) they do "not conflict with a normal exploitation of the work," and (iii) they do "not unreasonably prejudice the legitimate interests of the author."

- Third, the optional nature of the exceptions or limitation, and the significant divergence among Member States on whether to require compensation for reprographic and/or private copying also suggests that a compensation system linked to the reprographic or private copying exception does not fall within the "specific subject-matter" of copyright. This is particularly so where the copyright owner can feasibly exercise his exclusive rights directly -- namely, "in the form of licenses granted in return for payment of royalties."[60]

  The fact that, in the digital world, copyright owners have new and more effective means of licensing their works directly and preventing unauthorized copying means that levy regimes and similar compulsory licensing schemes are likely to become even less justifiable as part of the "specific subject-matter" of copyright.

ii) Levies for authors are (likely) not part of the "Specific Subject-Matter" of Copyright

Even if the CJEU was to hold that the "specific subject-matter" of copyright encompasses certain compensation systems linked to a copyright exception or limitation, levy regimes are not likely to fall within this broad reading of Article 36. This is due to two reasons:

- First, Article 5(2)(a) and (b) of the Copyright Directive, on which copyright levies are based, allow Member States to provide for reprographic or private copying exceptions upon condition that the right-holders receive "fair compensation." The term "fair compensation," however, is not the same as the concept of "equitable remuneration" set forth in international copyright agreements. Instead, it is a new Community concept that must be interpreted as compensating copyright holders only for the direct and actual harm incurred due to such reprographic or private copying, and not for the potential lost license income. Hence, contrary to the equitable remuneration systems included in some international agreements, the concept of "fair compensation" requires a proof of harm, and thus, in some cases, "fair compensation" can even be equal to zero; also when harm is "de minimis", as provided in Recital 35 of the Copyright Directive.

59 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 Heiztechnick v. Ideal-Standard [1994] ECR I-2789.* (for trademark). See also Opinion of Advocate General Sharpston in Case C-306/05, *SGAE v. Rafael Hotles SL* of 13 July 2006 (not yet reported).

60 Case 55/80 *Musik-Vertrieb membran GmbH et K-tel International v. GEMA* [1981] ECR 147, para. 12.

- Second, Member States are not required to include a system of levies and may, instead, introduce other forms of "fair compensation." In fact, not all Member States have a levy system in place to provide fair compensation, which can also be secured in the form of operator fees or by means of an allocation from the State public budget.

iii) Levies for publishers are (definitively) not part of the "Specific Subject-Matter" of Copyright

Firstly, as it has been elaborated in-depth in Section 1 of this Annex when dealing with the nonconformity with international legal obligation of an ancillary right for publishers, no international convention in the field of copyright provides for such ancillary right in favour of publishers. Such a concession for publishers would be a unilateral invention of the EU or some of its member states (in contravention of their international legal obligations). Therefore, it is unquestionable that an ancillary right in favour of publishers cannot be part of the "specific-subject-matter" of copyright, as recognized at an international level.

Secondly, a similar conclusion may be reached by looking at the practice of the CJEU: in its recent *Football Association Premier League and Others* judgment[61], the Grand Chamber denied the conformity with rules of free circulation of goods of the payment of a "premium" additional to the appropriate remuneration to be ensured to legitimate well-established right-holders:

> *"106 In this regard, it should be pointed out that derogations from the principle of free movement can be allowed only to the extent to which they are justified for the purpose of safeguarding the rights which constitute the specific subject-matter of the intellectual property concerned (see, to this effect, Case C-115/02 Rioglass and Transremar [2003] ECR I-12705, paragraph 23 and the case-law cited).*
>
> *107 It is clear from settled case-law that the specific subject-matter of the intellectual property is intended in particular to ensure for the right holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject-matter, by the grant of licences in return for payment of remuneration (see, to this effect, Musik-Vertrieb membran and K-tel International, paragraph 12, and Joined Cases C-92/92 and C-326/92 Phil Collins and Others [1993] ECR I-5145, paragraph 20).*
>
> *108 However, the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration. Consistently with its specific subject-matter, they are ensured – as recital 10 in the preamble to the Copyright Directive and recital 5 in the preamble to the Related Rights Directive envisage – only appropriate remuneration for each use of the protected subject-matter.*

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

(…)

115 None the less, here such a premium is paid to the right holders concerned in order to guarantee absolute territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market. In those circumstances, that premium cannot be regarded as forming part of the appropriate remuneration which the right holders concerned must be ensured.

116 Consequently, the payment of such a premium goes beyond what is necessary to ensure appropriate remuneration for those right holders."

If any such extra-compensation is denied to legitimate right-holders on the basis of the rules of free circulation of goods, EU or member states' unilateral desire to provide an extra "sui generis" compensation to the publishers, on top of the fair compensation payable to authors, cannot be exempted under Article 36 TFEU.

As a consequence, the prohibition contained in Article 34 TFEU for the share of the levies set in favour of publishers cannot be justified under Article 36 TFEU.

2.2.2 The Requirements of Necessity, Proportionality and Non-Discrimination

Even if levies would fall within the protection of industrial and commercial property of Article 36 TFEU, Member States must demonstrate that their levy systems meet each of the following three conditions to benefit from such exemption:

(i) the levies are necessary to ensure the protection of copyright,
(ii) the levies are proportionate, and
(iii) the levies or their application are not discriminatory.[62]

These three conditions must be interpreted strictly[63]. It is clear that at least the two first criteria are not met in the context of levies to compensate an ancillary right in favour of publishers.

i) The Criterion of Necessity

Copyright levies are necessary only if they are relevant and pertinent for the protection of the intellectual property of copyright holders. In assessing this standard, the CJEU will look at whether Member States can provide evidence justifying the imposition of copyright levies in order to provide fair compensation not only to authors but to publishers.

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

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

In such regard, the Court has held that a French measure seizing goods in transit was not necessary to protect an industrial design because the transit of goods through France from one Member State to another involved no use of the protected design.[64] Similarly, the Court has held that a national trade restriction on imports from another Member State cannot be justified as necessary for the protection of industrial and commercial property rights when, as a result of the legal marketing of the goods in the other Member State, these rights have been exhausted.[65]

Member States will have difficulty demonstrating that providing a levy in favour of publishers is justified to ensure their fair compensation and that no other means are available.

ii) The Proportionality Requirement

Even if copyright levies in favour of publishers were necessary, they must be proportionate to benefit from the Article 36 TFEU exception. In practice, this means that the CJEU would have to assess (i) whether the goal of compensating publishers could be ensured by means less restrictive than levies, and (ii) whether the trade restriction resulting from such levy is commensurate with such goal.[66]

Applying this proportionality test, the Court held that a Spanish measure requiring that wine carrying the *Rioja* denomination of origin be bottled in a specific region of Spain was not disproportionate only after concluding that no alternative measures would ensure the reputation of *Rioja* wines, and that the restrictions resulting from the requirements were commensurate with such goal. The Court argued that labelling requirements indicating that the wine had not been bottled in the region would not ensure the image of *Rioja* wines; and that a different bottling process outside the region without monitoring by a specific group of producers would reduce consumer confidence in the product.[67]

Copyright levies that compensate not only authors but also publishers can be viewed as disproportionate because Member States can ensure such compensation by means of less restrictive measures and their resulting restriction on trade is not commensurate to such goal.

Similarly, the obligations of self-reporting and paying a domestic levy before any refund from the levy paid in the country of exportation can be considered disproportionate as measures less restrictive of intra-Community trade do exist (such as compensation by mean of operator fees or compensation through an allocation from the State public budget).

Moreover, the sum up of a compensation in favour of publishers on top of the compensation payable in favour of authors may result in levies being so high that they *de facto* constitute a ban, which cannot be justified on grounds of ensuring the fair compensation of copyright holders.

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

65 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.

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

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

iii) Non-Discrimination

Even if the copyright levies in favour of publishers were necessary and proportionate, they would still not benefit from the exemption of Article 36 if they discriminate in law or in practice against imported equipment and such different treatment cannot be objectively justified.[68] For example, if it can be shown that levies are *de facto* enforced more stringently against imported equipment than against domestically manufactured equipment, they will be excluded from the exception of Article 36 TFEU.

As a conclusion, rules on free circulations of goods contained in Articles 34 and 36 TFUE will be infringed in case of granting an ancillary right to publishers in the form of copyright levies to be collected upon importation or intra-community acquisition of goods into a national market.

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.[69]

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.
   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.[70]

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

69 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)].

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

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.

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 Other*s case (C-426/11)71, 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."*[72]

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*[73] in front of the 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).

71 In *Alemo-Herron and Other*s 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)

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

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

In the context of remuneration rights existing under the reprography exception subsequent to Article 5.2(a) of the Copyright Directive, a better solution to secure additional income for publishers, if politically desired, would be to enable them to exercise those assigned exclusive rights, inasmuch as publishers (and authors) can easily provide licenses (either under the form of collective licensing schemes administered by collecting societies or otherwise) and secure a remuneration for reproduction of their published works. In fact, this approach is followed in most Member States. Thus, we do not find any justification to keep a general reprography exception subject to compensation (which is now only maintained in very few Member States e.g. Belgium), when remuneration for those reproductions (e.g. those made by companies or repro centers) may be easily administered by mean of licenses, enabling publishers to also get a fair share of those remunerations.

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 States[74]. 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.[75] 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.

74 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."*

75 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 got 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.

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 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 Commission[76] 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."*

4.3. Does *Reprobel* case represent the legal gap in the protection of publishers by copyright law that requires providing them with an ancillary right?

Finally, a political wish to override the decision of the Court of Justice of the European Union of 12 November 2015 in the *Reprobel* case (C-572/13) in order to enable publishers to enjoy a share of the income from reprographic and private copying levies does not require that a new ancillary right is granted to publishers.

If one reads with attention such judgment, the CJEU specifically provided that "*Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived."*

The underlined passage above has to be put in connection with the earlier judgment of the CJEU in *Amazon* case (C-521/11), which authorizes that collecting societies may receive half of the fair compensation for private copying, provided that they dedicate that funding to culture promotion and social activities that benefit indirectly to authors. The same rule may be extrapolated to publishers, in case their activities resulting from using this funding would benefit indirectly to authors.

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

If the alleged motivation and justification for the provision of a new neighboring right for publishers is to reflect their contribution for the maintenance and development of creativity, both in the interests of authors and consumers, culture, industry and the public at large, then EU Member States do not need to create a new ancillary right but may resolve in their national legislation by providing that publishers may receive part of fair compensation where such income is dedicated to certain types of activities that may benefit directly or indirectly to authors (e.g. publication of novel authors, etc.). Thus, no new ancillary right would be legally required at EU level.

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.

Moreover, it is apparent from jurisprudence of the CJEU that publishers may receive a share of the fair compensation for private or reprography reproduction provided that such share is dedicated to activities that certainly benefit directly or indirectly to authors (e.g. publication of novel authors, etc.), and not exclusively for publishers' own benefit, as it happened in the scenario assessed by the CJEU in the *Reprobel* case.

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