Position Statement of the

Max Planck Institute for Innovation and Competition

on the Proposed Modernisation of European Copyright Rules

PART F

Claims to Fair Compensation

(Article 12 COM(2016) 593)

[Version 1.1]

I. Introduction

1. The Commission's intention behind the proposed Article 12 – although not explicitly mentioned in Recital 36 – seems to be a "correction" of potential effects of the CJEU decision in the *Reprobel* ruling (C-572/13, *Hewlett-Packard Belgium SPRL/13 v Reprobel SCRL, Epson Europe BV intervening*).

2. The case arose in Belgium when the collective rights management organisation *Reprobel* requested that Hewlett-Packard pay a €49.20 levy for every "multifunction printer" it sold. The Belgian Court requested a preliminary ruling concerning the interpretation of Article 5(2)(a) and (b) of the InfoSoc Directive. One of the issues raised before the CJEU was the allocation of the right to fair compensation. The Court held that Article 5(2)(a) and (b) precluded national legislation from allocating a part of the "fair compensation" to the publishers of works created by authors, unless those publishers are under obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.

3. The Commission's goal may be worthy of discussion, but the proposed Article 12 is a more than doubtful approach. Most importantly, it impacts the *acquis* without effectively clarifying the CJEU's interpretation. Also, it fails to

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acknowledge major problems concerning not only publishers but more generally the relationship between authors and derivative rightholders.

II. The Commission's proposal: Concerns

1. Need for clear and coherent concepts

a) Fair compensation vs. equitable remuneration

4. Firstly, the EU *acquis* presumes a distinction between the notions of fair compensation and equitable remuneration (see Part A). While equitable remuneration should be determined based on the value of use of a work in financial transactions (see cases C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*; C-271/10, *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat*), **fair compensation is associated with the "harm" suffered by rightholders** (C-467/08, *Padawan SL v SGAE*).

5. This distinction is neither addressed nor clarified in the proposed Article 12. The (re-)establishment of the possibility of Member States to stipulate the sharing of fair compensation amongst authors and derivative rightholders, including publishers, under certain conditions is related to the **notion of fair compensation** quantified on the basis of the harm suffered by rightholders as explicitly stated in Article 4(4), but also in Recitals 13 and 36 of the proposed Directive.

b) Rightholder

6. Secondly, the proposal does not touch upon the CJEU's understanding of the notions of the author and the rightholder in the *Reprobel* decision. This becomes relevant with respect to Article 5(2)(a) and (b) of the InfoSoc Directive allowing certain reproductions of a work provided that rightholders receive fair compensation. According to the CJEU the term "rightholder" is equivalent to the term "author" as the party which, pursuant to Article 2,

disposes of the exclusive right to authorise or prohibit reproductions. Consequently, only the authors who have created the work are entitled to receive fair compensation. Third parties (such as publishers) that contractually acquire copyrights are not deemed to be rightholders in terms of Article 5.

7. At the same time the CJEU seems to aim at balancing publishers' and authors' interests: Article 5(2)(a) and (b) of the InfoSoc Directive do not preclude national legislation from allocating a part of the fair compensation (i.e. levies plus volume-based copying fees) to the publishers provided that "those publishers are under obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived".

2. Legal foundation to claims to fair compensation

8. The CJEU's *Reprobel* decision is arguable for a number of reasons.

9. **First**, it ignores the **use of the term "author"** in international copyright law. The Berne Convention in Article 9 also provides an exclusive right to "authors" to allow or prohibit reproductions, but no provision prevents Member States from attributing this right to a derivative rightholder. Also, Article 2 of the InfoSoc Directive cannot be read in the sense that only original rightholders could prohibit reproductions. If the copyright is assigned to a publisher, for instance, it is doubtlessly this **derivative rightholder** who has the right to prohibit third parties from reproducing the work.

10. **Second**, it is undisputed that the derivative rightholder is the one who invests in the "production" and "commercialisation" of the work. Thus the **derivative rightholder** may obviously **suffer a direct (economic) harm** from statutory permissions to use a work, in particular uses according to Article 5(2)(a) and (b) of the InfoSoc Directive. The author, in contrast, may – but does not necessarily – suffer indirect economic harm due to losses incurred by the derivative rightholder, e.g. if the publisher compensates the authors based on its own revenues. This leads to the conclusion that the precondition of harm (as

required by the CJEU in certain cases) first and foremost makes sense for the derivative rightholder.

11. **Third**, it may be reasonable to argue that the author (as original rightholder) obtains **"adequate remuneration"** in cases in which his work is used – irrespective of the economic circumstances of the case, and in particular of whether he has assigned the copyright to a derivative rightholder. But this has **nothing to do with a harm** – on the contrary: in particular if the author agreed on a lump-sum payment for the assignment of his rights, he will not suffer harm from use activities according to Article 5(2)(a) and (b) of the InfoSoc Directive.

12. Based on that, even though the InfoSoc Directive only uses the term "compensation", but not "remuneration", it would not be unreasonable to **divide "fair compensation"** (as defined in the InfoSoc Directive) for use of works made under an exception or limitation amongst different categories of rightholders - a **practice** that was **common** in a number of **Member States** prior to the *Reprobel* decision of the CJEU. In fact, whereas derivative rightholders should get "compensation" for harm, original rightholders may get "adequate remuneration" for the use of the works (irrespective of an actual harm or of whether they still are owners of the economic rights of the related copyright).

13. Again, one may argue whether an author should be entitled to remuneration for the use of a work for which he assigned his economic rights to a derivative rightholder. But, at the same time, one can hardly justify why the party that actually incurs harm (the derivative owner) should not be compensated – for the benefit of a party (the author) that (possibly) does not suffer direct harm. This is the issue that the proposed Article 12 could have addressed – but it entirely fails to do so. The Commission misses the opportunity to shed light on the darkness created by the CJEU in a number of cases dealing with "fair

compensation". Beyond that, it maintains the undesirable fragmentation of the Internal Market that existed prior to the *Reprobel* decision.

III. Alternative regulatory approach

14. First the EU legislature should **clarify the notion of rightholders**. As mentioned above, the CJEU's decision in the *Reprobel* case is arguable for a number of reasons. However, even though it is crystal clear that the EU legislature – not least in light of international copyright law – in the InfoSoc Directive did not refer only to authors but to rightholders including derivative owners, this should be made clear by the European legislature.

15. Second, it is suggested that both **authors** and **derivative rightholders** – including publishers – should be granted an "unwaivable" right to **equitable remuneration** and a right to **fair compensation, respectively**. In this sense, Article 5 of **Directive 2006/115** (Rental Directive) betokens a **promising approach**. It addresses authors (and performers) having transferred or assigned their rental right, ensuring that they "retain the right to obtain an equitable remuneration for the rental". This right to equitable remuneration of authors is directed against the actual – derivative – rightholder. If collective rights management is involved (see Article 5(3) of the Rental Directive) this leads to the result that the collecting society has to split the distribution between original and derivative rightholders.

16. If this approach applies accordingly to uses of works made under an exception or limitation (where such uses are conditional upon fair compensation), and if the rights in question are transferred or assigned – in whole or in part – to third party exploiters, including publishers, it seems obvious that these derivative rightholders are entitled to at least a share of the fair compensation provided for in certain paragraphs of Article 5 InfoSoc Directive. In this situation, a provision like Article 5 of Directive 2006/115 provides the justification (and a legal foundation) for the author as the original – but no longer actual –

rightholder to receive his own share of the amount that in the first instance the derivative rightholders receive as “fair compensation”.

16a. The suggested approach refers to authors in the first instance, but it should apply *mutatis mutandis* to performers. This is in line with the abovementioned Article 5 of the Rental Directive, which seeks to ensure that both authors and performers benefit from their rental right. This takes into account that both similarly suffer from a weak bargaining position in relation to exploiters. Likewise, Articles 14 to 16 of the proposed directive on copyright in the digital single market when dealing with copyright contract law considers authors and performers alike.

17. Finally, according to the abovementioned Article 5(3) of the Rental Directive, Member States are free to decide whether and to what extent to **entrust** the **administration** of this right to obtain an equitable remuneration **to collecting societies**. This principle could apply generally, just as the question from whom this remuneration may be claimed or collected may be left to the Member States.

IV. Proposal

Article 12

(1) Where the author has transferred or assigned, in whole or in part, his rights to a publisher or producer, or whoever makes the work available to the public through customary channels of commerce, that author shall retain the right to obtain an equitable remuneration for use of his work made under an exception or limitation where such use is conditional upon fair compensation.

(2) The right to obtain an equitable remuneration for use of a work under an exception or limitation cannot be waived by the author of that work.

(3) The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors.

(4) Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

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