



Position Statement of the Max Planck Institute for Innovation and Competition

on the

“Public consultation on the role of publishers in the copyright value chain”

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- (1) The Max Planck Institute for Innovation and Competition is a research institute within the Max Planck Society that since its founding 50 years ago has been committed to the analysis and development of intellectual property and competition law on the basis of established scientific principles. The Max Planck Institute undertakes research on fundamental questions of law in these areas. Through its wide range of contributions to research, it has initiated and provided guidance for important legislative processes at the national, European and international level. The Institute regularly advises governmental bodies and other organisations. It takes an international approach and places emphasis on the comparative analysis of law as well as economic and technological aspects of legal development.
- (2) The Institute hereby provides its comments on the Commission’s Public Consultation on the role of publishers in the copyright value chain. It has taken a stance on this Consultation because of the significant and delicate relationship of the issue to the potential impact that a legislative change might have on the functioning of the Digital Single Market and the circulation of knowledge. The Max Planck Institute recognises the importance of the interplay among all stakeholders providing information and the vital role that a free and independent flow of information plays in democratic societies.
- (3) The Institute appreciates the openness of the European Commission to fully understand the possible needs and effects of a new legal instrument that is broadly defined by the Commission as a neighbouring right. However, on a preliminary level the Institute notes that the Commission has requested assessments of the consultation on a neighbouring right in favour of publishers without outlining its features and the objectives to be achieved. If the premises are not clearly established, the outcome of the Consultation on the expected impact of such measures can be only partial. Nevertheless the Consultation does not rule out assessments of principle formulated within the

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context that will be mentioned below. If the problem that the Commission intends to resolve is the publishers' ability to be paid for the use of their content, it is important to ask whether the change to the law on copyright and in particular the introduction of a related right in favour of publishers is a sound solution or merely responds to a "sense of justice".

I. Context

- (4) The Public Consultation in question has come about in a particular technological, economic and political context in which some publishers call for the recognition of a right that is connected to copyright. They demand to be acknowledged as right holders by operation of law, claiming that this is a tool for tackling the alleged non-functioning market place and the loss of revenue that they suffer particularly in the digital market due to business models adopted by service providers such as content aggregators. In particular, it is argued that new ways of consuming content on many digital platforms facilitate free riding. It is alleged that especially in the digital world the online publishing sector runs the risk of being taken over by third parties (e.g. content aggregators) that would profit from using content in a variety of ways, preventing publishers from receiving a market compensation for their productive activities.
- (5) It is important to note that there is no unanimity among publishers on the negative impact caused by aggregation services *et similia*. On the contrary, some of them point out the positive effects of aggregators' practices. Economic reports (e.g. *Coalición Prointernet – AFI ("Economic argument on the amendment of the Intellectual Property Law (IPL) with regard to aggregation of information"*, July 2014 - available at https://issuu.com/coalicionprointernet/docs/20140703_economic_analysis_ip_l_afi) show evidence of "the multiplier effect of advanced aggregation services" (increasing visits to media websites) as well as the "learning effect" (increasing direct visits to smaller and local media).
- (6) The position of publishers who claim a neighbouring right has also been exacerbated by the *Reprobel* case: C-572/13, *Hewlett-Packard Belgium SPRL/13 v Reprobel SCRL, Epson Europe BV intervening*. 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 required a preliminary ruling concerning the interpretation of Article 5(2) (a) and (b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. One of the issues raised before the CJEU was the allocation of the right to fair remuneration. The response of the Court largely acknowledges the "author principle". In particular, according to the CJEU, publishers are not among the reproduction right holders listed in Article 2 of the InfoSoc

Directive. Therefore they are not subject to any harm for the purposes of the exceptions regulated by Article 5 (2) (a) and (b). As such they cannot likely be beneficiaries of any fair compensation. More precisely, the Court held that Article 5 (2) (a) and (b) preclude national legislation from allocate a part of the “fair compensation” (i.e. levies plus volume-based copying fees) 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. How the CJEU principle will be accepted by the Member States is not yet known. However, excessive importance should not be given to this debate in the online context, since the *Reprobel* case primarily regards reprography.

II. General Requirements and the Necessity of Differentiation

- (7) The introduction of a new neighbouring right requires the existence of a market failure. It is a general rule that whenever there is no market failure, there is no need for legal intervention. Consequently, as a first step, one needs to analyse in detail, whether and under which conditions a lack of a neighbouring right will lead to a market failure. Such analysis can only be applied seriously by collecting sufficient empirical data on the present situation of publishers as well as on the expected impact of any new neighbouring right in whatever form.
- (8) An appropriate evaluation of the market situation and of the involved interests, however, requires a clear differentiation between the digital and the analogue environment. Indeed one should be very cautious in deciding whether a new legal instrument is needed in the field of copyright law especially in cases of digital business models for which publishers to a large degree are able to take technical measures to protect their economic interests. Beyond that, specific works and types of publishing within different markets need to be observed. In the following, this necessity of this distinction will be discussed from both perspectives. As to the specific markets press publishing, educational and scientific publishing and traditional novel publishing will be considered.

III. Digital vs. Analogue World

- (9) As a general observation, it is most likely that there is no market failure in the digital world that would justify the introduction of a neighbouring right for publishers in whatever form. Digital publishers (like any other digital content provider) are sufficiently in the position of protecting their contents against unwanted use activities by applicable technological protection measures. By the applicability of technological protection measures, publishers are generally in the position to prevent undesired reproductions, including private copying. This assessment particularly applies for e-books, e-journals and other digital content, irrespective of the category of works.

Consequently, there is apparently no general need to ensure any sort of external compensation mechanism (like collective rights management) for reproductions of digital works to publishers.

- (10) This assessment, however, might be different in relation to publishing in the analogue world. Depending on the individual field of publishing, it might well be that reproductions by copying still occur on a considerable scale. Consequently, a publishers' share of collected revenues may remain justified. However, the effects of the *Reprobel* decision might lead to a significant loss of profits for certain publishers.
- (11) Although it is doubtful whether a loss of profit as such is already sufficient to prove a market failure, it might at least indicate that certain types of analogue publishing might seriously suffer without the introduction of a neighbouring right ensuring them a fair remuneration for private copying and other types of reproductions within the scope of relevant limitations and exceptions to copyright.

IV. Specific Fields of Publishing

- (12) As already indicated above, the assessment of whether there is a market failure is not only related to the question of whether the publication at issue is digital or physical. It is also closely linked to the individual field of publishing.

The necessity of introducing a neighbouring right will be discussed in relation to three exemplary fields of publishing, namely: (i) press publishing, (ii) educational and scientific publishing and (iii) traditional novel publishing.

1. Press Publishing

- (13) Press publishing still occurs in both digital and print format. The answer to the question of whether a neighbouring right needs to be introduced in favour of press publishers requires a differentiation between digital and print publishing.
- (14) Concerning digital press publishing, press publishers frequently argue that they are a victim of third parties using content in a variety of ways without paying any remuneration to them. Especially press publishers claim that content aggregators cause them economic damages.

The existence of direct competition in the market between the original sites and the aggregators, however, has not been proven. In fact, some protocols already provide control to publishers who prefer that their content not be indexed or introduced to social media: if publishers wished, standard robots.txt exclusion protocols could easily be used by copyright owners to avoid aggregation. Also, on this basis there is the option of contractual agreements including remuneration on a voluntary basis. Furthermore, as mentioned

above as context, aggregation of content has positive effects in terms of visibility of publishers. Online services drive considerable traffic to the websites of news publishers, who then gain economic advantages by selling advertisements and subscriptions (See R. Xalabarder, *The Remunerated Statutory limitation for News Aggregation and Search engines Proposed by the Spanish Government; Its Compliance with International and EU Law*, Universitat Oberta de Catalunya, 2014, available at <http://journals.uoc.edu/index.php/in3-working-paper-series/article/view/2379>).

- (15) Not surprisingly, the German and Spanish approaches to answer their claims through legislative instruments have failed. The first publishers' neighbouring right (*Leistungsschutzrecht für Presseverleger*) statute in Europe was enacted in Germany in August 2013: Section 87f-g Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Section 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714). The law, specifically aimed at granting revenues to publishers for news aggregation, attributes an exclusive right to press publishers. According to Section 87f “[t]he producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts [...]”. Providing access to press publications remains permissible, as long as the access provider is not a commercial search service or similar entity.
- (16) The Institute does not here enter into the detailed shortcomings of this law (nor comment on its inconsistency with European and international law. See the Max Planck Institute for Innovation and Competition position statement “*Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger*”, available at www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht_fuer_verleger_01.pdf). Instead, it points out the effects that this law has had on the market without reaching the expected results. As a matter of fact, the enactment of the Act divided the German news publishing industry. While several major news outlets publicly refrained from exercising their right and explicitly allowed online aggregators to index their content, a second group of publishers represented by VG Media is trying to enforce the right for its members. When Google announced its intention to de-index snippets from certain German publishers – justifying this by claiming that otherwise it ran the risk of being sued for breaching the ancillary copyright – VG Media complained to the German Federal Competition Authority (*Bundeskartellamt*). Recently the *Bundeskartellamt* has rejected the VG Media claims, arguing as following: “if an online service does not want to acquire a license for the display of snippets and hence only displays search results in a more limited, shorter version, it can do so. There is nothing in antitrust law that would prevent companies from doing so, even if they are found to

be dominant on a given market". The *Bundeskartellamt* considers this to be an objective justification for Google's conduct as a news aggregator. Even a dominant company cannot be compelled under competition law to take on a considerable risk of damages where the legal situation is unclear. It is interesting to note that one of the biggest publishers and the most vocal supporter of the ancillary right ultimately granted a gratis license to Google only.

Some conclusions can be drawn:

- The exclusive right promised much more than it could ever deliver.
 - *De facto*, the provision recreated, regarding Google, the situation that existed before its enactment.
 - Transaction costs are raised.
 - The ancillary right is responsible for a possible competitive disadvantage of other search engines, producing the result of punishing smaller services.
- (17) Although it was not possible to find any evidence for a market failure that would justify the introduction of a remuneration right for press publishers (*cf.* Spanish Competition Authority, *Comisión Nacional de los Mercados y de la Competencia* – CNMC) -, IPN 102/13, 4 Sept. 2013) the Spanish legislature introduced into the Spanish Copyright Act a remuneration right in favour of press publishers for the aggregation of news and other copyrighted content available online by means of a statutory limitation that authorises the aggregation of online contents. The "snippet levy provision" was enacted late in 2014 and went into effect on 1 January 2015. Section 32.2 provides that "[t]he making available to the public by providers of digital services of contents aggregation of non-significant fragments of contents, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment, will not require any authorization, without prejudice of the right of the publisher or, as applicable, of other rights owners to receive an equitable compensation. This right will be unwaivable and will be effective through the collective management organizations of intellectual property rights. In any case, the making available to the public of photographic works or ordinary photographs on periodical publications or on periodically updated websites will be subject to authorization".
- (18) According to this provision, depending upon whether quoted fragments are "significant" or "non-significant", regulated service providers appear to be obligated to obtain the publisher's permission to reproduce content and provide "equitable compensation". If quoted fragments are "non-significant", regulated service providers need not obtain authorisation to quote, but apparently they must still provide "equitable compensation". Unlike its German counterpart, the right is indispensable and has to be managed by the corresponding collective management organisation. Therefore, news publishers cannot negotiate over the right to be remunerated. This appears to in-

clude even cases where the author wants the content to be available on a more permissible basis, such as a Creative Commons licence or open publishing. Unlike the German law, the Spanish remuneration right could be interpreted to cover any content online (apart from photographs), not only that of press publishers.

- (19) As mentioned before, the Spanish provision went into effect only recently, but as of the time of submitting this statement some results have been reached. They go in the opposite direction of what the law was expected to achieve: Google, as probably the most relevant news aggregator, exited the market for Spanish news aggregation, closing down its news.google.es website in December 2014, and de-listing links to Spanish news publications in Google search results. Also, domestic online service providers have closed down their operations (e.g. Planeta Ludico, NiagaRank, InfoAliment, and Multifriki). Recently the Spanish Association of Publishers of Periodical Publications has commissioned NERA Economic Consulting to assess the impact of introducing new Section 32.2 into the Spanish Copyright Act. NERA's analysis focuses on the new law's effect on competition, primarily for the news aggregator and publication areas, as well as for consumers and advertisers. The study has found that the law has done substantial damage to the Spanish news industry. According to this inquiry, *“on the more distant horizon, the negative impact will be more significant, discouraging the development of innovative content and platforms in the ecosystem of online news consumption in Spain”*.
- (20) As indicated above, the situation might have to be assessed differently as far as press publishing in print format is concerned. Print production of newspapers has not been replaced by digital newspapers. On the contrary, a large number of printed newspapers are still being produced, and photocopying them is not an uncommon practice, for instance in the educational field, including language learning and primary and secondary schools. As traditional photocopying of printed press articles might still occur on a significant scale, it might well justify considering the economic interests of these press publishers, especially after the decision in the *Reprobel* case as far as it deprives them of the fair compensation they are due under Article 2(a) and (b) of Directive 2001/29.

2. Educational and scientific publishing

- (21) Major commercial scientific e-journal and e-book publishers maintain control over content, benefiting from contractual agreements and technology. Publishers can grant users access to and use of scientific content under specific conditions protected by technological protection measures and digital rights management systems. In this industry the most common contract format is the end-user license agreement (EULA), which allows control over information and prohibits any form of digital reproduction and redistribution

of content. It is important to note, moreover, that the particular nature of content commercialised by scientific publishers imposes on users the accessibility of all content, since access to only some parts, or the abstract of a work, as might be made available by content aggregators, is not enough. In this sense the work of aggregators is essential for the visibility of content made available by these publishers. Thus while in the digital world there is no evidence of a possible market failure threatening scientific publishers' business, a new neighbouring right for them could eventually lead to a failure of the market to the detriment of the human rights to access and use knowledge. Such rights are indeed embodied in the European strategy for access to scientific content.

- (22) One should consider that granting a neighbouring right particularly to scientific publishers will likely contradict the European open access policies as well as the European intention to ensure free text and data mining of research outputs. In its research strategy and regulatory framework, the European Union requires publication in open access of all published research outcomes that result from EU funding. This appears in several strategy documents of the European Commission and the Council of the European Union (most recently, see the Communication on “The transition towards an Open Science system” – Council conclusions adopted on 27/05/2016) and in all funding schemes related to Horizon 2020 (see, Regulation of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in “Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020)”, and Article 29.2 of the Model Grant Agreement, available at http://ec.europa.eu/research/participants/data/ref/h2020/mga/gga/h2020-mga-gga-multi_en.pdf). Open access means accessibility and usability of digital content. Accordingly, to make open access effective the European Commission has committed itself to taking action allowing text and data mining of scientific research content (as stated in the Communication “Towards a modern, more European copyright framework” Com(2015) 626 EC, 9 December 2015). Therefore, introducing a new layer of rights would likely be inconsistent with its own goals.
- (23) The situation might, however, need to be assessed differently with regard to print publications dedicated to educational and research purposes. Publishers in this field are normally exposed to the risk of loss of revenue due to the common practice among students and researchers of making reprographic copies of relevant publications. If – according to the *Reprobel* decision – the publishers will no longer be entitled to claim a certain share of collected fair compensation for this kind of copying, this will quite likely lead to a significant loss of income for educational and scientific publishers. Whether this loss of income will lead to a market failure is yet not clear, but it may indicate at least the need for a remuneration right limited to this specific field of print publishing. Such remuneration right does not necessarily need to be

designed as an exclusive right (property rule). Applying the liability rule will in most cases likely be a more appropriate path to follow.

Providing a serious assessment in this regard will in any case require further empirical data in this field of publishing.

3. Traditional novel publishing

- (24) Traditional novel publishers are most likely not affected by the *Reprobel* decision. For digital publishing of novels (e.g. in the form of e-books), the findings regarding the other fields of publishing are also valid. By the applicability of technological protection measures, traditional novel publishers are most often sufficiently protected and able to prevent any undesired copying of the publications. Besides, content commercialised by novel publishers needs to be accessed in its entirety, since access to only part of a novel, as content aggregators might provide, is not enough to enjoy the novel. Such partial access to a novel will likely never substitute access to the entire story. Therefore the work of aggregators may even be important for traditional novel publishers in terms of visibility of content made available by these publishers.

Concerning print publishing of novels, it is likely that the relevant publishers will no longer receive a share of the collected remuneration for reprography after the *Reprobel* decision. But the impact on the market may be very limited, as it is likely unusual to copy printed novels and comparable literature by way of reprography. Consequently, these publishers probably will not face a relevant loss of income that would need to be compensated by way of a neighbouring right. Hence, it is likely that there is no necessity of a neighbouring right for traditional novel publishers.

V. Key messages

- It is appropriate to take recourse to legal intervention only in the event of a market failure.
- Empirical data are needed to prove a market failure and its causes, as well as the impact on the market of the regulations that are envisaged.
- If there is a failure in the publishing market and the need arises to take legal action, the best solution is not necessarily an exclusive right connected to copyright.

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