



**Opinion of the CEIPI
on the European Commission’s copyright reform proposal, with a
focus on the introduction
of neighbouring rights for press publishers in EU law**

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The Centre for International Intellectual Property Studies (CEIPI) is an institute devoted to education and research in intellectual property and is a constituent part of the University of Strasbourg. CEIPI analyses and comments the main developments in the area of intellectual property at national, European and international levels. From this perspective, the European Commission’s Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market of 14 September 2016—and more generally any step towards copyright reform in the European Union—is of particular interest to CEIPI, which hereby intends to react on the proposal to introduce in EU copyright law neighbouring rights for press publishers for the digital uses of their publications.

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Summary

Among its key features, the European Commission’s planned copyright reform proposes to introduce in EU copyright law neighbouring rights for press publishers.¹ This proposal is (i) contrary to the objective of creating a Single Digital Market, (ii) detrimental for authors’ interests, and (iii) does not solve any systemic issues of the EU copyright system for the reasons stated below.

- The Directive Proposal—and the documents accompanying it—fail to explain how an **additional layer of 28 national rights** might promote the Digital Single Market. Rather, the proposal poses further challenges related to the territoriality of rights and their fragmentation. In addition, as there is already no uniform approach to exceptions or limitations to 28 national authors’ rights, 28 additional national rights for publishers will suffer the same uncertainty, **making the Digital Single Market harder to reach**.
- Granting rights to ever more actors will reduce the economic value of each right covering essentially the same economic use. While the Impact Assessment accompanying the Directive Proposal concludes that the “introduction of a related right covering digital uses of press publications is not expected to generate higher licence fees for online service providers”, it fails to assess the impact of the Directive Proposal on authors. **As the “pie” does not get any bigger, the authors’ share will inevitably decrease**. Ultimately, this might undermine the overall functioning of the copyright system, especially because it should primarily **secure fair remunerations to creators** (rather than only compensate the investment of rightholders), while at the same time providing access to users.
- In this regard, the Impact Assessment fails to demonstrate a causal link between publishers’ revenues and investments and granting them neighbouring rights to press publications—and/or promoting mechanisms facilitating initial ownership of authors’ rights by publishers. In contrast, **recent empirical evidence** from national

¹ The scope of the proposed reform is of course much larger and includes many other important topics, such as (i) certain uses of protected content by online services, (ii) exceptions and limitations for text and data mining, (iii) teaching activities and preservation of cultural heritage, (iv) use of out-of-commerce works, (v) access to and availability of audiovisual works on video-on-demand platforms, and (v) fair remuneration in contracts of authors and performers. These other topics will be reviewed in a separate position paper. Thus, this opinion shall not evaluate the entire proposed reform but shall rather draw attention only on one of its main (negative) aspects: the introduction of neighbouring rights for publishers.

implementation of publishers' neighbouring rights **confirmed a negative impact on small publishers, while news aggregators might have a positive effect on online news sites.** This might have negative repercussions on plurality of sources, users' access to information—and therefore on democratization. Also, increasing barriers to innovation and desincentivizing new business models might be an additional effect of the reform.

- The Directive Proposal does not limit the subject matter to publications presently protected by authors' rights. It goes far beyond, **restricting**, for example, **uses of works in the public domain.** Lifting materials out of the public domain has unwanted consequences, impinging greatly on freedom of expression and democratization, while favouring centralization of information.
- Any economic input into the value chain of creative activities does not merit the grant of a property right. Also, a grant of a neighbouring right to one economic actor cannot be a reason for granting such right to another one. Moreover, the Directive Proposal does not follow any meaningful logic of investment reward, since **it proposes to grant rights to any publication, even those that do not involve any substantive investment.** For example, publication of any trivial information on a “news website” will be sufficient for the grant of neighbouring rights;
- Finally, in any event, if this proposal is ever going to be approved, the scope of protection—extending also to non-commercial uses—and the term of protection are overbroad.

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1. Introduction

On 14 September 2016, the European Commission published a Proposal for a Directive on copyright in the Digital Single Market,² which, *inter alia*, foresees the introduction of neighbouring rights for press publishers for digital uses of their publication.³ In addition, the proposal provides that, upon transfer or licence of authors' rights, publishers are entitled to claim a share of the revenue stream stemming from compensated exceptions or limitations.⁴ The publication of the Directive Proposal follows a public consultation on the role of publishers in the copyright value chain launched by the Commission on 23 March 2016.⁵ This Consultation aimed in particular at gathering views on the impact of neighbouring rights for publishers on the publishing sector, citizens and creative industries.

So far, the EU *acquis* for publishers' neighbouring rights only concerns particular cases when no parallel authors' rights exist. For example, Article 4 of the Term Directive provides for economic rights for the publication of previously unpublished works once the work has fallen in the public domain.⁶ Again, Article 5 of the same Directive sets up a framework for the optional grant to publishers of neighbouring rights for critical and scientific publications.⁷

However, Member States have been free to create publishers' neighbouring rights in their national law. For instance, British and Spanish laws granted rights to publishers by virtue of their typographical arrangements of publications.⁸ In recent years, as it was acknowledged by

² See European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, 2016/0280 (Text with EEA relevance).

³ See Article 11 (1) of the directive proposal: "Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications".

⁴ See Article 12: " Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right."

⁵ See European Commission, Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', the announcement of the consultation is available at: <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>.

⁶ For national examples of the implementation of this provision, see Article 16 of the Copyright and Related Rights Regulations 1996 of the UK, Article 71 of the German Law on Authors' and Neighbouring Rights, Article 76b of the Austrian Law on Authors' and Neighbouring Rights, Article 85^{ter} of the Italian Law on Authors' and Neighbouring rights and Article 99¹ of the Polish Law on Authors and Neighbouring Rights.

⁷ For implementation, see Article 70 of the German Law on Authors' and Neighbouring Rights (for scientific editions), Article 85^{quater} of the Italian Law on Authors' and Neighbouring Rights and Article 99² of the Polish Law on Authors and Neighbouring Rights (for critical and scientific editions).

⁸ See Articles 8 and 9(2)(d) of the Copyright, Designs and Patents Act 1988 (CDPA) of the UK and Article 129(2) of the Spanish Law on Intellectual Property. See also European Commission, Commission Staff Working

the Impact Assessment,⁹ a limited number of Member States created new press publishers' rights for some online uses of fragments of publications. In 2013, Germany amended its Law on Authors' and Neighbouring Rights by introducing a section that provides exclusive neighbouring rights to press publishers. This right covers the making available for commercial purpose of any publications and their fragments¹⁰, with the consequence that only individual words or the smallest text excerpts do not fall within its scope. In 2014, Spain added a new provision to its Intellectual Property Law (Article 32(2)), introducing a remunerated exception or limitation for press publishers.¹¹ It effectively provides press publishers—or authors, if there are no publishers—with a right to remuneration for making available online non-significant fragments of their publications.¹²

Meanwhile, conflicts between press publishers and online service providers—such as online news aggregators and search engines—emerged also in Belgium, France and Italy, although they did not result into the adoption of new legislation. In 2012, an agreement was reached between Google, the Francophone Belgian press publishers and a Belgian collective management organisation representing journalists' authorship rights (SAJ). Apparently, Google paid a compensation between 2 and 3 percent of the press publishers' turnover (around 5 million euros).¹³ Journalists received some remuneration through SAJ. In France, after high-level political pressure,¹⁴ Google signed an agreement with the association of news press publishers (AIPG) in 2013. The agreement created a 60 million euros fund—*Fonds Google–AIPG pour l'innovation numérique de la presse*—financed by Google, which provided French publishers with grants for partial funding for innovative development

Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 3/3, Annex 13B, pp. 189-192.

⁹ See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, pp. 159, 160 and 167.

¹⁰ See Articles 87f-87h of the German Law on Authors' and Neighbouring Rights.

¹¹ While this remunerated exception or limitation is not a neighbouring right *per se*, we consider that this provision is relevant for the present discussion in light of the context and purpose of its adoption.

¹² The compliance of this "exception or limitation" with the EU law is being questioned. See Rodrigo Becovitz Rodríguez-Cano (2015), 'Tasa google o canon AEDE: una reforma desacertada', *Revista Doctrinal Aranzadi Civil-Mercantil*, Vol. 11, pp. 53-94; Sebastián López Maza (2015), 'El límite sobre agregadores y buscadores', in Rodrigo Becovitz Rodríguez-Cano (ed.), *Las reformas de la Ley de Propiedad Intelectual*, Valencia, Spain: Tirant lo Blanch, pp. 94-95; and Raquel Xalabarder (2014), *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, IN3 Working Paper Series, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596.

¹³ See Xavier Ternisien (2012), 'Google indemnise la presse belge pour violation du droit d'auteur', *Le Monde*, 14 December 2012, p. 14.

¹⁴ For a brief account of the political mediation process, see a joint declaration made 1 February 2013 by the President of France, the CEO of Google and the President of AIPG, available at: <http://www.elysee.fr/chronologie/#e2517.2013-02-01,accord-avec-google-2>. See also Michel Vivant and Jean-Michel Bruguière (2016), *Droit d'auteur et droits voisins*, 3rd edition, Paris, France: Dalloz, pp. 1036-1037.

projects in news publishing from 2013 to 2015.¹⁵ A similar agreement was reached in the mid-2016 between Google and the Italian federation of newspaper publishers (FIEG). It established, *inter alia*, investment of 12 million euros in the publishing sector over the period of three years.¹⁶ An EU-wide fund of 150 million euros—under the name of Digital News Initiative (DNI)—was launched by Google in 2016 for a three-year period to support projects in the news sector.¹⁷ Other EU online service providers have reached agreements and/or are presently working on new arrangements with publishers.¹⁸

Against this background, this CEIPI opinion intends to comment on the introduction of neighbouring rights for press publishers in the EU. This position paper would like to highlight some important issues overlooked by the Directive Proposal and the Impact Assessment leading to legislative initiative.¹⁹ In our view—although some press publishers may benefit from neighbouring rights—negative externalities for the functioning of the Digital Single Market and other relevant policy areas weight against this legislative initiative.

¹⁵ For more information about the fund and financed projects, see <http://www.finp.fr>. See also ‘En France, le front des « anti-Google » se fissure peu à peu. A la surprise générale, Lagardère Active, fréquent détracteur du géant américain, a signé un partenariat stratégique avec lui’, *Le Monde*, 9 October 2015, p. 7 and ‘Google veut s’attaquer au défi de la vieillesse et à la maladie...’, *Le Monde*, 20 September 2013, p. 6.

¹⁶ See FIEG and Google press release, 7 June 2016, available at: <http://www.fieg.it/upload/salastampa/COMUNICATO%20STAMPA%20FIEG%20-%20GOOGLE%2007%2006%202016.pdf>

¹⁷ For more information about the fund, see its website: <https://www.digitalnewsinitiative.com> (the DNI website contains a non-exhaustive list of over 150 organisations in the news sector of the EU member states participating in the initiative). See also Alexandre Piquard (2015), ‘Google élargit son fonds d’aide à la presse. La structure sera dotée de 150 millions d’euros à destination des éditeurs européens’, *Le Monde*, 29 April 2015, p. 7.

¹⁸ For other examples of agreements between publishers and online service providers—such as Apple’s News and Facebook’s Instant Articles, and others—see European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 3/3, Annex 13C, pp. 193-197.

¹⁹ In advance of the Directive Proposal, several leading scholars already advised against the introduction of neighbouring rights for publishers. See Martin Kretschmer, Séverine Dusollier, Christophe Geiger, and P. Bernt Hugenholtz (2016), *The European Commission’s Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society*, EIPR, Vol. 38, No. 10, pp. 591-595, available at: <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions> and Reto M. Hilty, Kaya Köklü, and Valentina Moscon (2016), *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”*, 15 June 2016, available at: http://www.ip.mpg.de/fileadmin/ipmpg/content/aktuelles/MPI_Position_statement_15_6_2016_def.pdf. On the lack of EU’s competence in the area, see Ana Ramalho (2016), *EU competence to create a neighbouring right for publishers? The small pieces make up the big picture*, 5 September 2016, available at: <http://kluwercopyrightblog.com/2016/09/05/eu-competence-create-neighbouring-right-publishers-small-pieces-make-big-picture/>. On the impact of the proposed legislative measure on the sustainability and innovation of the European publishing industry, see Martin Senftleben (2016), ‘Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?’, *Tijdschrift voor Auteurs-, Media- en Informatierecht*, Vol. 5, pp. 130-133.

2. A Challenge for the Digital Single Market: Coexistence of EU Rights, National Rights, and Unharmonised Exceptions

The principle of territoriality governs all existing authors' and neighbouring rights in a Member State. They are granted by national law, thus they are national rights. The Impact Assessment acknowledges this challenge for the Digital Single Market:

Copyright is territorial (referring to national territories) in the sense that the rights granted under copyright are provided for in national law, and not in the form of unitary rights at EU level. For example, the author of a book has not a single EU-wide right of reproduction but 28 different national rights of reproduction. The geographical scope of these 28 rights is limited to the territory of the MS [member state] that grants the right in question.²⁰

However, *the Impact Assessment fails to explain how an additional layer of 28 national rights might promote the Digital Single Market. Rather the proposal poses further challenges related to the territoriality of rights and their fragmentation.* Apparently, this legislative measure stands in sharp contradiction with the declared objectives of the copyright reform. Supposedly, the reform would like to foster the creation of the Digital Single Market by actually overcoming—rather than creating—issues related to the territoriality of rights.²¹

In addition—although inherent to the principle of territoriality—a second concern is worth briefly raising. While the *Directive Proposal* harmonises the approach to neighbouring rights across the EU—and thus promotes the coexistence of miscellaneous national approaches—it *does not pre-empt the re-emergence of new national legislation extending rights of press publishers. Member States remain still free to create other neighbouring rights in their national law.*²² Some scholars have questioned the lawfulness under EU norms of creating

²⁰ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, p. 7.

²¹ See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a modern, more European copyright framework, 9 December 2015, COM(2015) 626 final, p 3. (“[To] inject more single market and, where warranted, a higher level of harmonisation into the current EU copyright rules, particularly by addressing aspects related to the territoriality of copyright”).

²² See Article 11(1) of the Term Directive. See also Michel M. Walter (2013), ‘Term Directive’ and Silke von Lewinski and Michel M. Walter (2013), ‘Status of Harmonization and Outlook’ in Michel M. Walter and Silke von Lewinski (eds.), *European Copyright Law: A Commentary*, New York, USA: Oxford University Press, pp. 579-581, 628 and 1487.

neighbouring rights by national legislation.²³ As the Commission itself noted, “different approaches to the protection of publishers at national level result in fragmentation in the single market”.²⁴ In this sense, this reform is a bad trade-off. It introduces 28 brand new EU mandated national rights, which will hurt the Digital Single Market. At the same time, it maintains in place a diversity of national approaches, since Member States can further expand publishers’ neighbouring rights—which in turn will also disrupt the functioning of the Digital Single Market. If the Digital Single Market stands as the final goal of the reform process—and this proposal should ever be enacted—only a unitary right could achieve this goal. In contrast, miscellaneous EU harmonised national rights would actually take further away from it.

Finally, the proposed reform might also trample on users’ enjoyment of privileged uses and cause further harmonisation hurdles. First, publishers might be able to “block” uses of press publications authorised under the exceptions and limitations to authors’ rights. This would easily happen in a scenario in which exceptions and limitations—as currently applicable to authors’ rights in the Member States—are not equally applied to the proposed neighbouring rights. In addition, even if Member States implement the same exceptions or limitations for both authors’ and neighbouring rights, there might be inconsistencies regarding the impact of contractual law and technological protection measures on them. National legislations might regulate differently whether and/or which exceptions can be “overridden” by contracts and/or technical protection measures.²⁵ As there are already inconsistent national approaches to privileged uses to authors’ rights²⁶, ***an additional layer of 28 national rights—for which each member state may choose different exceptions and limitations to be applied—will undoubtedly make the Digital Single Market and the cross-border access to cultural content harder to reach.*** Unfortunately, the Impact Assessment silently overlooked this issue.

²³ See Eleonora Rosati (2016), ‘Neighbouring rights for publishers: are national and (possible) EU initiatives lawful?’, *IIC*, Vol. 47(5), pp. 571 and 585.

²⁴ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, p. 160.

²⁵ For example, under the French law only some of the uses permitted under exceptions and limitations are protected against application of technological protection measures preventing users from taking advantage of them. See Article L331-31 of the CPI.

²⁶ See on this issue Christophe Geiger (2004), *Droit d’auteur et droit du public à l’information, Approche de droit comparé*, Paris, France: Litec, at p. 376, and from the same author i.a.: (2008) ‘The Answer to the Machine should not be the Machine, Safeguarding the Private Copy Exception in the Digital Environment’, *EIPR*, Vol. 4, pp. 121-129; Christophe Geiger and Franciska Schönherr (2014), ‘Limitations to Copyright in the Digital Age’, in: Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law*, Cheltenham, UK: Edward Elgar, pp. 110-142.

3. A “Slippery Slope”: Multiple Rights, Multiple Revenue Streams but One Pie

In granting neighbouring rights to a new category of economic actors, a more general and fundamental question ought to be asked: *does any economic input into the value chain of creative activities merit the grant of a property right?*

The European Commission proposes to grant neighbouring rights covering digital uses of publications as a result of requests from press publishers.²⁷ If publishers in one sector—e.g., press publishing—are given neighbouring rights, publishers in another sector might claim the same.²⁸ If press or book publishers are granted neighbouring rights, musical publishers might want to demand one as well.²⁹ Further, other economic actors might also claim neighbouring rights based on their input in the value chain of production and dissemination of cultural goods and services.³⁰ Similar arguments could be put forward endlessly. Surprisingly, the impact assessment adopts this misplaced argument—and uses it as a rationale for granting neighbouring rights to publishers in the first place:

EU copyright law recognises and incentivises the economic and creative contribution of film producers, phonogram producers and broadcasting organisations by granting them related rights. Publishers across different sectors also play an important role in assembling, editing and investing in content. However, today, *despite playing a comparable role* in terms of investments and contribution to the creative process to film and phonogram producers in their respective industries, publishers are not

²⁷ See press publishers’ responses to the Commission’s public consultation in European Commission (2016), *Synopsis report on the results of the public consultation on the role of publishers in the copyright value chain*, p. 4, available at: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=17048 (noting that “[a neighbouring] right would recognise the *added value* [publishers] provide regarding the production of press content, also in terms of *investment*”) (emphasis added)

²⁸ See European Commission’s public consultation on the role of publishers in the copyright value chain, conducted from 23 March 2016 until 15 June 2016, concerned not only press publishing but also *book/scientific publishing*.

²⁹ See responses of music publishers to the Commission’s public consultation, European Commission (2016), *Synopsis report on the results of the public consultation on the role of publishers in the copyright value chain*, p. 5.

³⁰ For example, claims to neighbouring rights for organisers of concerts and other cultural events have been made in France. See Nathalie Emmanuel (2011), *Le festival et le droit. Essai sur la nature juridique d’un nouveau bien*, doctoral thesis, Université de Grenoble, France, pp. 353-365, available at: <https://tel.archives-ouvertes.fr/tel-00595977> Other authors cited multiple arguments provided by parties involved in the debate for and against the institution of this neighbouring right. See Michel Vivant and Jean-Michel Bruguière (2016), *Droit d’auteur et droits voisins*, 3rd edition, Paris, France: Dalloz, pp. 1038-1039.

identified as rightholders under EU copyright rules”³¹ [. . .] “[Introduction in the EU law of a neighbouring right] would ensure that the creative and economic contribution of press publishers (such as newspaper and magazine publishers) is recognised and incentivised in EU law, *as it is today the case for other creative sectors* (film and phonogram producers, broadcasters).”³² (emphasis added).

On the contrary, the grant of rights to ever more actors will decrease the economic value of each right covering essentially the same economic use. According to Article 11(1) of the Directive Proposal, publishers’ neighbouring rights would encompass the right of reproduction and making available to the public for digital uses. This overlap with existing authors’ rights makes it uncertain whether additional revenues would be available since the grant of an additional layer of rights does not, by itself, increase the value of cultural goods. In this regard, the Impact Assessment comes to the following conclusion: ***“The introduction of a related right covering digital uses of press publications is not expected to generate higher licence fees for online service providers*** which already conclude licences covering specifically the use of digital news content.”³³ However, the Impact Assessment fails to explain how the introduction of a new layer of rights is going to impact the authors’ revenues.³⁴ According to the so-called ***“pie theory,”***³⁵ new royalties stemming from neighbouring rights are going to be distributed at the expense of those receiving royalties from authors’ rights today.

In this regard, a combined reading of Article 11 of the Directive Proposal—granting press publishers with neighbouring rights for digital uses—and Article 12—entitling publishers of

³¹ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, p. 159.

³² *Id.*, at p. 162.

³³ European Commission, Commission Staff Working Document, Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 302 final, p. 4. See also European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, pp. 168-169 (emphasis added).

³⁴ Such scrutiny was specifically prescribed by the third Recommendation from the Regulatory Scrutiny Board: “should clearly spell out how the separate measures are likely to change the distribution of income among the actors.” See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 2/3, Annex 1, p. 5.

³⁵ See Joseph Pomianowski (2016), ‘Toward an Efficient Licensing and Rate-Setting Regime: Reconstructing § 114(i) of the Copyright Act’, *The Yale Law Journal*, Vol. 125, No. 5, pp. 1531-1547. This concern was also expressed by the European Copyright Society in its Opinion of 5 September 2015 on the Reference to the CJEU in Case C-572/13 *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, p. 6, available at: http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Opinion_in_Case_C572_13_HP_Belgium_Reprobel_2015-1.pdf (noting that “[a]nother argument against [...] a nationally granted related right for publishers would be that such related right for publishers may negatively affect what authors can obtain as the fair compensation [...]”)

a share of compensation for uses of the work made under exceptions or limitations³⁶—may raise further concerns. The two provisions might bestow upon publishers two revenue streams if the same remunerated exceptions or limitations (e.g., private copying and educational use) are given for authors' and neighbouring rights:

- a first revenue stream due to them as holders of neighbouring rights to their publications, and
- a second revenue stream due to them as transferees or licensees of authors' rights.

Deceptively, while the Impact Assessment states that the introduction of neighbouring rights for publishers will be without prejudice to the rights of authors,³⁷ it turns a blind eye to any impact of the reform on authors' revenues.³⁸ Given that the introduction of neighbouring rights will unlikely increase the amount of compensation that can be obtained under exceptions or limitations, most probably the *publishers' share of compensation will be shifted from the authors'*. The effect of the reform would be ultimately to decrease creators' revenues from remunerated exceptions and limitations. *As the "pie" is not getting any bigger, the authors' share will inevitably decrease.* This might ultimately undermine the overall functioning of the copyright system,³⁹ already suffering from a lack of *legitimacy* in the eyes of young generations⁴⁰ especially because it should primarily *provide fair remunerations to creators rather than only compensating rightholders, while at the same time providing access to users*⁴¹.

³⁶ See also Recital 36.

³⁷ See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, p. 162.

³⁸ See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, pp. 168 and 171.

³⁹ See European Copyright Society Opinion of 5 September 2015 on the Reference to the CJEU in Case C-572/13 Hewlett-Packard Belgium SPRL v. Reprobel SCRL, p. 6 (noting that "in the long term, such optional related rights are undesirable in so far as they create divisions within the internal market and render the law excessively complex").

⁴⁰ See European Observatory on Infringements of Intellectual Property Rights (2013), *The European Citizens and Intellectual Property: Perception, Awareness and Behaviour*, pp. 11-14 and 54-59, available at: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf.

⁴¹ See further on this Christophe Geiger (2010), 'The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information', *Intellectual Property Quarterly*, Vol. 14(1), pp. 1-14.

4. Justification for Protection: The Missing Causal Link and Contrary Empirical Evidence

Most commonly, publishers hold authors' economic rights. The transfer of rights is achieved through customary contracts with authors and legal presumptions. For example, some Member States consider publishers as initial owners of authors' rights in cases of collective works (e.g. newspapers, journals) or work for hire (e.g. journalists writing for press publishers).⁴² For this reason, *inter alia*, there was no unanimity among the publishers themselves regarding the need of additional neighbouring rights.⁴³ Some European press publishers even argued against their necessity.⁴⁴ Unfair competition laws and *sui generis* database rights protecting investments in collecting, verifying and/or presenting the contents of databases are also available for protecting some publishers' interests.⁴⁵ Furthermore, publishers have been widely using constantly improving technological protection measures to restrict access to their publications in electronic form.⁴⁶ Such tools—which are internationally protected⁴⁷—can prevent search engines' scraping and indexing of publishers' online content.⁴⁸

⁴² See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 3/3, Annex 13B, pp. 189-192. For an overview of these provisions as well as contractual practices, see Europe Economics, Lucie Guibault and Olivia Salamanca (2016), *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works*, Study prepared for the European Commission, DG Communications Networks, Content & Technology, pp. 73-83.

⁴³ In 1990, the President of the Committee of Electronic Publishing of the International Publishers Association (IPA) gave a negative response regarding the need or usefulness of neighbouring rights for publishers. See Gérard Lamy (1990), 'Faut-il créer un droit de l'éditeur?', in *Le droit d'auteur - enjeu économique et culturel / Copyright – economic and cultural challenge*, Proceedings of the 2nd symposium of the International Publishing Association, Litec, pp. 253-261.

⁴⁴ For publishers' responses to the Commission's public consultation, see European Commission (2016), *Synopsis report on the results of the public consultation on the role of publishers in the copyright value chain*, pp. 3-4, available at: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=17048 and Letter of a group of European press publishers to the European Commission of 4 December 2015, available at: http://www.aepp.com/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf.

⁴⁵ Examples of such databases can be timetables, sports fixtures and television fixtures. See Estelle Derclaye (2013), 'Database rights: success or failure? The chequered yet exciting journey of database protection in Europe', in Christophe Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, Cheltenham, UK: Edward Elgar, p. 344.

⁴⁶ However, such measures often also limit or prevent altogether access to works for purposes that are not restricted by authors' rights or for uses that are actually privileged. See Séverine Dusollier (2003), 'Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions', in Eberhard Becker, Willms Buhse, Dirk Günnewig and Niels Rump (eds.), *Digital Rights Management. Technological, Economic, Legal and Political Aspects*, Berlin, Germany: Springer, pp. 462-478.

⁴⁷ See Article 11 of the WIPO Copyright Treaty (WCT).

⁴⁸ See Monika Isia Jasiewicz (2012), 'Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators', *The Yale Law Journal*, Vol. 122, No. 3, pp. 837-850.

Overall, according to the Impact Assessment, the main issue that the introduction of neighbouring rights for press publishers aims to resolve is the legal uncertainty related to the licensing negotiations and enforcement of author's rights.⁴⁹ The Impact Assessment gave the following example of difficulties faced by publishers: "a court may ask a publisher, as licensee or transferee, to prove that it owns all the allegedly infringed rights (e.g. in one case reported by the publishing industry up to 22,000 contracts with journalists in order to file a lawsuit for the mass infringement of publishers' rights in DE)."⁵⁰ This example might be misleading as a supporting rationale for the introduction of publishers' neighbouring rights. Actually, the introduction of neighbouring rights will not change the burden of proof for proving ownership of authors' rights in court.⁵¹ While difficulties of proving ownership of authors' rights can be acknowledged, the causal link supporting the introduction of new rights is apparently missing. Systemic licensing and enforcement problems are hardly an effective argument to push for expansion or the introduction of new intellectual property rights.

Furthermore, the *Impact Assessment does not demonstrate a causal link between the legislation* of Member States—some provide for mechanisms facilitating initial ownership of authors' rights by publishers while others do not⁵²—*and revenues* of publishers,⁵³ nor it explains its absence. Some scholars have challenged the causality—and hence the need for granting new neighbouring rights—between the demise of traditional press publishing and the growth of new information society services, such as online news aggregators.⁵⁴

On the contrary, the recent experience in Spain and Germany—the two Member States that granted some rights to press publishers—would call for some additional solid evidence on the merits of such new legislative initiative. In Germany, it has been reported that the law did not achieve the desired results. Actually, German press publishers authorized Google free of charge to index their publications and feature them in Google's news and search services.⁵⁵

⁴⁹ See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, pp. 166-167.

⁵⁰ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, p. 166.

⁵¹ It should be kept in mind that authors are not entitled to any percentage of neighbouring rights' revenues.

⁵² See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 3/3, Annex 13B, pp. 189-192.

⁵³ See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 3/3, Annex 13A, pp. 175-188.

⁵⁴ See Susana Navas Navarro (2015), 'Periódicos digitales y agregadores de contenido informativo en España', *RIDA*, Vol. 246, pp. 120-124.

⁵⁵ See Andreas Becker (2014), 'German publishers vs. Google', *Deutsche Welle*, 30 October 2014, available at: <http://dw.com/p/1DeXc>.

Some smaller news aggregation services operating in Germany (e.g., Bing News) delisted press publishers or stopped using snippets (e.g., Rivva).⁵⁶ In Spain, the adoption of the law also led to some unexpected results. First, Google shut down its Spanish Google News service—most likely the primary target of the legislative action.⁵⁷ In addition, ***recent empirical evidence confirmed that news aggregators had a positive effect on online news sites*** in Spain, rather than the opposite as implied by the Impact Assessment and the Directive Proposal. The study found that in the first 3 months of 2015, the closing of Google News and a number of smaller news aggregation services led to a decline of internet traffic to Spanish newspapers above 6%. The Internet traffic decline had harsher impact in terms of “market expansion effect”⁵⁸ on small publications. It also created, the study found, barriers to innovation for other information intermediaries that compile customized services based on users’ online activities or aggregate content for mobile phones, or algorithmic aggregators designed to deliver dynamic content.⁵⁹ These findings show troubling potential negative externalities of the reform, especially in terms of access to information and innovation policy. On one hand, the proposal might impact heavily on smaller publishers, therefore promoting a process of re-centralization of online news outlets. This would have repercussions on plurality of sources on the Internet, limiting users’ access to information, thus impacting negatively on the democratization process. On the other hand, this proposal would back up property owners’ attempts to leverage their hold-out power to block progress.⁶⁰ As already occurred multiple times throughout the history of copyright,⁶¹ this might disincentivize innovators from developing technologies that compile and aggregate content on the Internet.

⁵⁶ See Martin Kretschmer, Séverine Dusollier, Christophe Geiger, P. Bernt Hugenholtz (2016), ‘The European Commission’s Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society’, *EIPR*, Vol. 38, No. 10, p. 594.

⁵⁷ See Alexandre Piquard (2015), ‘Google élargit son fonds d’aide à la presse. La structure sera dotée de 150 millions d’euros à destination des éditeurs européens’, *Le Monde*, 29 April 2015, p. 7.

⁵⁸ Meaning the effect of driving visitors to news websites that would otherwise not end up there.

⁵⁹ See Pedro Posada de la Concha, Alberto Gutiérrez García and Hugo Hernández Cobos (2015), *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)*, July 9, 2015), available at: <http://www.aeepp.com/pdf/InformeNera.pdf>.

⁶⁰ See Carol M. Rose (1986), ‘The Comedy of the Commons: Custom, Commerce, and Inherently Public Property’, *U. Chi. L. Rev.*, Vol. 53, pp.749-50, 752 (discussing how large public projects such as highways or railroads are vulnerable to the hold-out power of single property owners).

⁶¹ See Hannibal Travis (2006), ‘Building Universal Digital Libraries: An Agenda for Copyright Reform’, 33 *Pepp. L. Rev.* Vol. 33, pp. 786-792 (sketching a quick history of hold outs on cultural technological advancements); *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908) (piano rolls); *Amstrad Consumer Electronics plc v. The British Phonographic Industry Ltd* [1986] FSR 159 (CA) (tape recorders); *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) (VHS recorder); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (peer to peer software); *Vorschaubilder*, I ZR 69/08 (Bundesgerichtshof, 29 April 2010) (ruling that Google Image Search does not infringe copyright).

In conclusion, a final observation regarding the justification for protection should be made. Neighbouring rights are commonly justified as a reward for the *investment* in the production and distribution of creative works. In this regard, it might be argued that the publishing industry needed far more financial and human resources to publish a work in the past than it needs today. Pre-digital press business required the possession of expensive machinery, technical know-how (e.g. typesetting), production and storage sites, large workforce, organisation of distribution channels, etc. By contrast, today, modern digital editing and graphical design tools allow a faster, easier and cheaper publishing process. Many activities, such as printing or proofreading, are outsourced—sometimes outside the EU—for cost optimisation, therefore limiting core publishers’ activities to mere marketing, branding and rights management. Even if solid empirically-supported independent studies could prove that the overall share of publishers’ contribution to the final publication (e.g., newspapers, journals) has decreased in the last decades—and no such studies are presently available—**by granting neighbouring rights to any publications, the Directive Proposal would still not uphold a solid “investment reward”- rationale.** According to the present proposal, making available on a “news website” trivial information would attract the same protection as the publication of an article resulting from months of investigative journalism.

5. An Overbroad Scope of Protection

The scope of protection of the proposed publishers’ neighbouring right might be overbroad from multiple perspectives.

(a) According to the Impact Assessment, authorship rights’ licensing and enforcement pitfalls would be the main justification for this legislative intervention.⁶² However, ***despite this stated goal, the proposal does not limit the subject matter to works and uses presently protected by authors’ rights.***⁶³ This follows from the consideration that requirements applying to neighbouring rights are independent from those which are necessary for granting authors’ rights. By consequence, while authors’ rights are always subject to an originality requirement, unoriginal works might be protected by neighbouring rights. Also, the public

⁶² See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 1/3, pp. 166-167.

⁶³ In general, there is a difficulty with differentiating the object of protection of neighbouring and authors’ rights in case of digital literary works. See Jean-Michel Bruguière (2013), ‘Quand les éditeurs de presse revendiquent un Canada dry des droits voisins’, *Recueil Dalloz*, No. 1, p. 27 and Jean-Michel Bruguière (2013), ‘Projet de loi Allemand – « Proposition de loi » française – Editeurs de presse – Droit d’autorisation de l’indexation des contenus de presse – Agrégateurs d’actualité’, *Propriété intellectuelle*, No. 46, p. 73.

domain status of a work would not be an obstacle to the grant of neighbouring rights to publishers for digital uses of publications. Again, works published under public copyright licenses, such as Creative Commons, might also be restricted by publishers' neighbouring rights over the original publication.

The Impact Assessment wholly undermines these negative externalities for economic and cultural actors other than publishers as well as the public at large. In particular, expanding rights and lifting materials out of the public domain has unwanted consequences impinging greatly on freedom of expression and democratization.⁶⁴ This argument—and the concerns that this reform raise—goes hand in hand with the argument made earlier when discussing the empirical data showing a negative impact of the Spanish reform on small publishers. The enclosure of the public domain enhances the market power of centralized information producers, while proportionally disincentivising decentralization. The public domain is a metaphysical public forum that belongs “to everyone, because [it] belong[s] to no one, from which people cannot be excluded on the grounds that a property owner wishes to exclude them.”⁶⁵ In particular, the public domain propels rich and diverse expressions regardless of the market power of the speakers. Any decrease in the public domain will produce the most relevant repercussions on people with less ability to finance creation and dissemination of their speech, favouring large-scale organizations that own information inventories over other types of information producers.⁶⁶ An organization that owns a large information inventory, in fact, can respond to the loss of public domain material by increasing the reuse of its own inventory. Other organizations and individuals must buy on the market information that are no longer available in the public domain.⁶⁷ Thus, any contraction of the public domain will push away from the goal of bringing “the millions of dispossessed and disadvantaged [...] in from the margins of society and cultural policy in from the margins of governance.”⁶⁸

⁶⁴ For a discussion of the negative effects of the enclosure of the public domain for European citizens, see Giancarlo Frosio (2011), COMMUNIA Final Report on the Digital Public Domain, Report prepared for the European Commission on behalf of the COMMUNIA Network and the NEXA Center, available at: <http://www.communia-project.eu/final-report>.

⁶⁵ Rebecca Tushnet (2007), ‘Domain and Forum: Public Space, Public Freedom’, *Colum. J. L. & Arts*, Vol. 30, p. 598.

⁶⁶ Yochai Benkler (2001), ‘A Political Economy of the Public Domain: Markets in Information Goods vs. The Marketplace of Ideas’, in *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Rochelle C. Dreyfuss, Diane Leenheer Zimmerman & Harry First. (eds.), Oxford, UK: Oxford Univ. Press, p. 270-274

⁶⁷ *Ibid*, at 274.

⁶⁸ The European Task Force on Culture and Development (1997), *In from the margins: A contribution to the Debate on Culture and Development in Europe*, Report prepared for the Council of Europe, p. 276.

(b) Among the subject matters attracting neighbouring right protection, Recital 33 of the Directive Proposal lists “*news websites*” in addition to “daily newspapers, weekly or monthly magazines of general or special interest”. First, the terminology adopted might pose interpretative challenges. Which websites are “news websites” and which are not? The proposal does not say. Furthermore, the wording of Article 2(4) apparently implies that the neighbouring rights granted would not be limited to literary works but would cover all subject matters.⁶⁹ If the Directive Proposal is adopted, posting any type of work on a “news website” would trigger 20 years of exclusive protection for publishers—regardless of whether the work is in the public domain or not. Apparently, no adequate assessment of these short and long-term consequences of the legislative provisions was made.

(c) The scope of protection of the proposal is overbroad also from an additional perspective. Germany—which is so far the sole Member State deploying a neighbouring right arrangement for digital uses—limits the scope of the rights to uses for *commercial purpose*.⁷⁰ The Directive Proposal does not contain any such limitation. Therefore, the scope of protection would apparently extend to commercial as well as non-commercial uses.

6. A Way Too Long Term of Protection

Another important element for assessing the impact of the introduction of neighbouring rights for publishers is their duration. Unlike authors’ rights, there is no international minimum standard establishing the duration of publishers neighbouring rights. At the EU level, Article 4 of the Term Directive establishes 25 years of protection for publication of *previously unpublished works* after the expiry of authors’ rights. Article 5 of the same Directive limits the maximum term of protection in case of introduction of the optional neighbouring right for *critical and scientific publication* to 30 years. In Spain and the UK, duration of publishers’ rights tied to typographical arrangements is 25 years from the year of publication (the term was probably modelled on the aforementioned term for the protection of publications of previously unpublished works).⁷¹

⁶⁹ Article 2(4) recites “‘press publication’ means a fixation of a collection of literary works of a journalistic nature, which *may also comprise other works or subject-matter* and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.” (emphasis added).

⁷⁰ See Articles 87f(1) and 87g(4) of the Law on Authors’ and Neighbouring Rights.

⁷¹ See Article 130 of the Spanish Law on Intellectual Property and Article 15 of the CDPA of the UK.

However, these terms might be misleading. The commercial value of works published by the press and the book/scientific publishing sector decreases over different periods of time. A rejected draft of a French law on neighbouring rights for press publishers envisioned a duration of 5 years.⁷² The German term of protection of press publishers' neighbouring rights for digital uses is *1 year from the date of publication*.⁷³ Given the short commercial cycle under consideration, previous national legislations or bills, and multiple counterpoising interests at stake, *the proposed period of 20 years of protection is certainly way too long*.⁷⁴

Also, it worth stressing that any retroactive grant of neighbouring rights, as provided by Article 18(2) of the Directive Proposal, will not incentivise publication of new content. This was amply demonstrated in the past by copious literature discussing retroactive term extensions to which we remand.⁷⁵ Finally, an additional point can be made regarding the practical effects of this retroactive grant, which should be of concern and demonstrating the overbroad temporal extension of the right: Basically, given the timeline of the emergence of digital publications, all press publications originally published in digital form will be covered by the provision and granted neighbouring rights.

⁷² See Michel Vivant and Jean-Michel Bruguière (2016), *Droit d'auteur et droits voisins*, 3rd edition, Paris, France: Dalloz, p. 1036.

⁷³ See Article 87g(2) of the German Law on Authors' and Neighbouring Rights.

⁷⁴ See Article 11 (4) of the directive proposal: "The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication".

⁷⁵ For a similar discussion on the term of protection related to the neighbouring rights for phonogram producers, see Nadine Klass, Josef Drexl, Reto M. Hilty, Annette Kur and Alexander Peukert (2008), 'Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law Concerning the Commission's Plans to Prolong the Protection Period for Performing Artists and Sound Recordings', *IIC*, Vol. 39(5), pp. 586-596, Reto M. Hilty, Annette Kur, Nadine Klass, Christophe Geiger, Alexander Peukert, Josef Drexl and Paul Katzenberger (2009), 'Comment by the Max-Planck Institute on the Commission's proposal for a Directive to amend Directive 2006/116 concerning the term of protection for copyright and related rights', *EIPR*, Vol. 31(2), pp. 59-72, Centre for Intellectual Property and Information Law, University of Cambridge (2006), *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, Review for Gowers Review of Intellectual Property, available at: http://webarchive.nationalarchives.gov.uk_/+http://www.hm-treasury.gov.uk/d/gowers_cipilreport.pdf, Christopher Buccafusco and Paul J. Heald (2013), 'Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension', *Berkeley Technology Law Journal*, Vol. 21, Issue 1, pp. 1-44; Christophe Geiger (2009), 'The Extension of the Term of Copyright and Certain Neighbouring Rights – A Never Ending Story?', *IIC*, Vol. 40, No. 1, pp. 78-82.

Conclusion

After scrutinizing the European Commission's proposal to introduce neighbouring rights for press publishers in EU law, having examined involved challenges for the creation of the Digital Single Market associated with the creation of an additional layer of 28 national rights, the likely impact of the proposal on the interests of European creators, and the problematic relationship between the put forward justifications for protection, causal links and existing empirical evidence, we recommend to refrain from advancing this legislative action.

The introduction of the neighbouring rights for press publishers will not solve any systemic issue of the EU copyright system while inevitably creating new ones. More generally, given the current politico-economic circumstances, the proposed legislative measure risks having undesired repercussions for the acceptability and legitimacy of the copyright system as a whole.