

European Copyright Society

Answer to the EC Consultation on the role of publishers in the copyright value chain

15 June 2016

Introduction

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed by any particular stakeholders.

For more information : <https://europeancopyrightsociety.org/>

As the questionnaire for the consultation did not allow for open answers and provided a limited space to answers, the ECS has decided to submit its opinion related to the role of publishers in the copyright value chain as a separate document directly to the Copyright Unit of the European Commission. Only the conclusion of the present document appears in the answer to the questionnaire of the Consultation. The present document is structured as a self-contained opinion and represents the official position of the ECS on the opportunity to create a neighbouring right for publishers.

Opinion

1. A neighbouring right for publishers: why now?

In its call for a *Public Consultation on the Role of Publishers in the Copyright Value Chain* the European Commission says it wishes to consult “all stakeholders as regards the impact that a possible change in EU law to grant publishers [of newspapers, magazines, books and scientific journals] a new neighbouring right would have on them, on the whole publishing value chain, on consumers/citizens and creative industries.”¹ The possibility of a general neighbouring right for publishers was not announced in the Communication of 9 December 2015, setting out the copyright reform programme of the Juncker Commission.² So it comes as a surprise that such a far-reaching intervention is suddenly being considered.

Moreover the Consultation does not tell us what kind of right is envisaged. As a point of process, it is problematic to consult on impacts unless at least the contours of the proposed

¹ European Commission, Public Consultation on the Role of Publishers in the Copyright Value Chain and on the ‘Panorama Exception’ (23 March to 15 June 2016), introductory paragraph “The role of publishers in the copyright value chain”: <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>

² European Commission, Communication: Towards a modern, more European copyright framework, Brussels, 9.12.2015 COM(2015) 626 final.

intervention are understood. What will a new right cover, how long will it last, will it be subject to exceptions? We can't have a sense of the effects of an intervention unless we know what it may be.

There are recent models of ancillary rights for press publishers from Germany (§§ 87f-h UrhG, 2013, "Presseleistungsschutz") and Spain (amendment to quotation exception, Art.32.2, 2014, "Google tax"). The UK has a copyright for the "typographical arrangement of a published edition" lasting 25 years (s. 8, CDPA 1988). Arguably the Database Directive (Council Directive 96/9/EC of 11 March 1996) providing for a *sui generis* right protecting substantial investment in the contents of a database also establishes a publishers' right (for 15 years). These all differ in subject matter, term and scope, and none appears to have had the intended consequences.

While there has been lobby pressure to do something for press publishers for some time³, new proposals for a neighbouring right seem to be triggered by two court cases, *Reprobel* in the Court of Justice of the European Union (CJEU) on a reference from Belgium⁴, and the German *Verlegeranteil* decision by the highest federal civil court Bundesgerichtshof (BGH)⁵. The effect of these decisions was to deprive book publishers of a 50 percent share of "fair remuneration" collected under Article 5(2)(a) and (b) of the 2001 Copyright Directive by collecting societies to compensate rightholders for the exceptions for reprography and private copying.⁶

The CJEU (followed by the BGH) held that publishers are not named among the rightholders of the reproduction right under Article 2 of Directive 2001/29 (only authors, performers, phonogram producers, film producers and broadcasters are listed)⁷, and that collecting societies therefore were not entitled to distribute half of their revenues by default to publishers⁸. The Advocate General's opinion also suggests that any additional national intervention to compensate publishers cannot be to the detriment of the fair compensation payable to authors under Article 5(2)(a) and (b).⁹

The annual revenues of Reprobel (the Belgian collecting society for reprography rights) are in the region of €26 million¹⁰; VG Wort (the German collecting society for writers and publishers) collected €305 million in 2015¹¹. If up to 50 percent of levy revenues were

³ At the Plenary Stage of the Reda Report in the European Parliament (evaluating the Implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) MEP Angelika Niebler supported by a group of German EPP members introduced an amendment that was read as a coded call for an ancillary copyright for press publishers: "57a. Calls on the Commission to evaluate and come forward with a proposal on how quality journalism can be preserved, even in the digital age, in order to guarantee media pluralism, in particular taking into account the important role journalists, authors and media providers such as press publishers play with regard thereto;" The amendment was rejected in the plenary vote which passed the Reda Report (a non-binding resolution) with 445 votes to 65, with 32 abstentions (9 July 2015).

⁴ *Hewlett-Packard Belgium SPRL and Epson Europe BV v Reprobel SCRL*, Case C-572/13, Judgment of the Court (Fourth Chamber) of 12 November 2015.

⁵ Bundesgerichtshof, Case I ZR 198/13, 21 April 2016, ECLI:DE:BGH:2016:210416UIZR198.13.0, available at <http://www.rechtsprechung-im-internet.de> – *Verlegeranteil*.

⁶ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

⁷ *Reprobel* at 47: "However, publishers are not among the reproduction rightholders listed in Article 2 of Directive 2001/29."

⁸ *Reprobel* at 48; *Verlegeranteil* at para 47.

⁹ Opinion of Advocate General Cruz Villalón in *Reprobel* (11 June 2015) at 143: "Directive 2001/29 must, therefore, be interpreted as not precluding Member States from establishing remuneration specifically for publishers, intended to compensate for the harm suffered by the latter as a result of the marketing and use of reprography equipment and devices, provided that that remuneration is not levied and paid to the detriment of the fair compensation payable to authors under Article 5(2)(a) and (b) of Directive 2001/29."

¹⁰ Annual Report 2014. Income from copyright levies amounted to almost €24m.

¹¹ Annual Report 2015. Total revenues in 2014 were €144m; 2013: €128m; 2012: €115m. Income from copyright levies has increased dramatically, from €77 million in 2014 to €230 million in 2015.

distributed to publishers in contravention of EU law, there will now be claims that publishers repay this compensation to authors, in addition to the loss of future revenues. Understandably publishers do not like this, and there may be adjustments needed to their contractual practices and business models. Severe and sudden losses of revenue can be part of a case for transitional measures of industrial policy but, in itself, they are not a good basis for policy, or provide valid justification for introducing a novel right of intellectual property.¹²

If indeed the new neighbouring right is designed to turn back the clock to the situation before the CJEU *Reprobel* and BGH *Verlegeranteil* judgments, the Consultation should say so. It should also explain how this is to be done, without depriving authors of the fair compensation they are due under Article 5(2)(a) and (b) of Directive 2001/29.

2. The rationale for neighbouring rights

Neighbouring rights typically have different thresholds of protection and a different term than authors' rights. They are given, the Consultation says, for "organisational or financial effort"¹³. The prime example of a neighbouring right comes from Article 10 of the 1961 Rome Convention under which producers of phonograms "shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms" for a minimum term of twenty years (Article 14).¹⁴ Do publishers have a case for "equal treatment" with phonogram producers?

Whereas the case for neighbouring rights for performers has always been strong, since performing artists are excluded from the domain of authors' rights even though performing a work of authorship is usually a creative act, the same cannot be said for the other three categories of neighbouring right holders traditionally protected in the EU (phonogram producers, broadcasters and film producers). The primary rationale here is economic; by granting temporary exclusive rights investment in phonogram production, broadcasting and film production is presumably fostered and rewarded.

Note that at the time when neighbouring rights for these industries were introduced – in the Rome Convention of 1961 – producing records and broadcasting required usually large up-front investment in technical infrastructure, such as recording and broadcasting studios. This was still the case when neighbouring rights were first harmonized in Europe (and extended to film producers) in the Rental and Lending Right Directive (Council Directive 92/100/EEC of 19 November 1992, codified as Council Directive 2006/115/EC of 12 December 2006). According to its 7th Recital (now Recital 5), "the investments required particularly for the production of phonograms and films are especially high and risky". Whether this is still true today, now that digital technologies have reduced the costs of sound recording, broadcasting and video production by several orders of magnitude, is however questionable.

¹² Martin Vogel first brought the case against VG Wort in 2011. So in Germany the industry will have had many years to anticipate and make provisions for the decision. Moreover, income from reprography levies under Article 5(2)(a) of Directive 2001/29 is limited to "reproductions on paper or any similar medium", and is expected to decline with traditional photocopying giving way to digital uses.

¹³ Consultation, introductory paragraph "The role of publishers in the copyright value chain", note 2. The German Constitutional Court speaks of the "economic, organisational and technical contribution" as the object of protection of the neighbouring right for phonograms: Bundesverfassungsgericht, Case 1 BvR 1585/13, 31 May 2016, ECLI:DE:BVerfG:2016:rs20160531.1bvr158513, available at <http://www.rechtsprechung-im-internet.de>, para 77 – *Metall auf Metall* [grundsätzliche Anerkennung eines Leistungsschutzrechts zugunsten des Tonträgerherstellers ..., das den Schutz seiner wirtschaftlichen, organisatorischen und technischen Leistung zum Gegenstand hat ...]

¹⁴ Rome Convention; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; Done at Rome on October 26, 1961. It is noteworthy that the term is modelled on industrial rights.

The Consultation tentatively justifies extending neighbouring rights to publishers by equating them with phonogram producers. In our opinion such an extension would be unjustified. In 2016 publishing requires very limited up-front investment in technical infrastructure. Formerly cost- and labour-intensive activities such as typography, lay-out, and typesetting have become largely redundant thanks to low-cost digital word-processing and formatting technology. Investment in printing facilities is also largely a thing of the past; large and expensive printing presses have long been replaced by easily affordable digital printing facilities. In many sectors printing has been outsourced, or even been replaced by low-cost digital dissemination. Most of the investment in publishing today is in content aggregation, branding and marketing; these activities, however, have never justified neighbouring rights protection in the past, and should not do so today.

3. Double layering of rights

Exploitation rights are already available for publishers who acquire these contractually from authors, often for the full term of copyright (life plus 70 years). An extra layer of rights for publishers is therefore deeply problematic.

As a general principle, multiple layers of rights should be avoided for at least three reasons. (i) They increase transaction costs by generating uncertainties and complexities in rights negotiations and clearance. (ii) They create confusion for users with respect to limitations and exceptions, in particular if these are not aligned between neighbouring and authors' rights.¹⁵ (iii) They have distributional consequences that are difficult to foresee. For example, they may diminish the revenues available for each category of rightholder, as the same revenues from exploitation will be split in different ways (and the pie may not get bigger). We can be certain that a neighbouring right for publishers will affect the income of authors.

Equating publishers with phonogram producers may also lead to conceptual problems. The neighbouring right of phonogram producers focuses on the 'first fixation' of sounds (i.e. the initial recording), which in the past occurred at the initiative and under the responsibility of the phonogram producer. It will be difficult to identify the appropriate connecting factor for a neighbouring right for publishers. The 'first fixation' of a published work will in many (if not most) cases be made by the author of the work, not its publisher. A neighbouring right similar to the phonographic right would therefore in most instances vest in the author, not the publisher of the work – in other words, a neighbouring right analogous to the phonographic right may defeat its purpose.

While the history of neighbouring rights is complex, apart from performers' rights, they should be treated as incentives. They make investments possible which otherwise would not have happened. And they should only be available where there are no other rights that already deliver.

4. Open access costs

One possible unexpected impact of granting a neighbouring right to publishers might be a significant hindrance to open access policies.

In its research strategy and regulatory framework, the European Union advocates a mandatory publication in open access of all published research outcomes that result from EU funding. This is an obligation that appears in all funding schemes related to Horizon

¹⁵ As the copyright exceptions for authors' rights are currently under intense scrutiny, and under review within the current reform package (Commission Communication of 9 December 2016), any intervention is also premature.

2020¹⁶. Similarly an increasing number of Member States and of national research agencies have started to impose an open access mandate to publicly-funded researchers.

A great proportion of scientific publishers are still reluctant to authorise the authors of scientific articles they publish to communicate the published version in open access after the initial publication in the journal, when researchers have given exclusive licences or transferred their rights (which is customary in major scientific journals).

Researchers are then stuck between their obligation towards their university or funding contract and their contract with publishers of renowned journals. A recognition of a neighbouring right to publishers in the final edited lay-out of the journal might run counter to the open access strategy of the EU research policy and of the researchers themselves. Should a specific and exclusive right be granted to publishers, a contract authorising open access publication would be useless. Indeed publishers would be entitled to oppose any making available of the published versions of the articles, including in open access, irrespective of the contractual provision preserving that right of authors.

One could argue that such opposition might not happen if the related right of publishers is limited to a remuneration right. Yet, it would not immunize open access repositories or journals from compensating publishers whose articles have been included without their authorisation. The obligation for such compensation would greatly impair the open access model and would particularly prejudice universities that manage open access repositories of all articles published by their professors and researchers. Following the CJEU case law (CJEU, 27 June 2013, *VG Wort*, C-457/11 & C-460/11; CJEU, 5 March 2015, *Copydan*, C-463/12), rights of fair compensation are left untouched by a possible authorisation from copyright or neighbouring rights holders.

The only open access road that would remain untouched by a new right of publishers would be the so-called gold road of open access, where an article is immediately published in open access mode in dedicated journals. However, even though open access publications are expanding and flourishing in all scientific disciplines, they have not yet dethroned (and will arguably not in a near future) ranked scientific journals, in which scientists need to publish for career advancement and which routinely require copyright assignment.

5. A neighbouring right for press publishers?

There have been serious regulatory design flaws, and unintended consequences from the recent attempts to introduce ancillary rights for press publishers in Germany and Spain.

In Germany, press publishers were granted “an 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” (new § 87(f)(1) UrhG, amendment of 7 May 2013) for a term of one year.

Google, the target of the intervention, refused to engage in licensing discussions, and required instead an opt-in from publishers for snippets and thumbnails to be included on Google News. Traffic to publishers’ sites fell, and they eventually granted a non-exclusive, royalty-free licence via collecting society VG Media (to which publishers had transferred their rights). VG Media and 41 publishers filed a competition complaint against Google for abuse of a dominant position which the federal competition authority Bundeskartellamt

¹⁶ Article 29.2 of the Model Grant Agreement. See also, Guidelines on Open Access to Scientific Publications and Research Data in Horizon 2020, 15 February 2016; Commission Recommendation on access to and preservation of scientific information, Brussels, 17.7.2012, C(2012) 4890 final.

rejected in 2015, as did the Berlin regional court in February 2016. The court does not mince words.¹⁷

The outcome is to restore, with respect to Google, the situation before the 2013 Presseleistungsschutz intervention – but with considerably increased transaction costs.

Even more concerning is the effect of the ancillary right on smaller news aggregators. In Germany, they have delisted press publishers (Bing News) or completely stopped using snippets (Rivva). These negative effects on the freedom of information were predictable¹⁸, and indicate the sensitivity of intervening in news markets through an intellectual property rights regime.

In Spain too, Google was the target of an amendment to the ‘quotation exception’ (amendment to Art.32.2 Intellectual Property Law, 5 November 2014) authorising the making available to the public by providers of (news) aggregation services of contents available online subject to unwaivable equitable compensation, mandatorily managed by collecting societies.

In response, Google closed googlenews.es immediately (December 2014) in order to avoid what had been widely termed the “Google tax”. Traffic to news publishers’ websites declined by an average of 6%, for small publishers by 14%.¹⁹ Collecting society CEDRO has not negotiated a single licence.

6. Conclusion: Presumption against new rights

There can be legitimate debate about the changing nature of investments and business models by publishers. But this is not in itself a valid rationale for granting intellectual property rights. There has been a tendency to see all value generated as a case for protection. It is a slippery slope from press publishers and scientific publishers to music publishers, to museums, festival organisers and so on. And why not search engines and online platforms and aggregators? They all invest and create value. There is a potentially endless list of value generating activity in the copyright sphere.

The potential costs of new intellectual property rights typically are of two kinds: higher prices and loss of innovation. In the UK, the Hargreaves and Gower Reviews therefore recommended making the policy process more transparent and rigorous. Recommendation 1 of the Hargreaves Report reads (2011, p. 8): “Government should ensure that development of the IP system is driven as far as possible by objective evidence. Policy should

¹⁷ Landgericht Berlin, Case 92 O 5/14 kart, 19 February 2016, opinion p. 19: “The search engine provides a combination of value and money flows as well as non-monetary benefits for all parties and this constitutes a win-win situation. This well-balanced system is disturbed by the neighbouring right, under which the press publishers now demand that the defendant, as the operator of the search engine, pays remuneration for something that is also in the economic interest of the website operator.”

[Die Suchmaschine erweist sich insgesamt als Kombination von Leistungs- und Geldströmen sowie der Erbringung geldwerter Leistungen für alle Beteiligten und entspricht damit für diese einer Win-Win-Situation. Dieses ausballancierte System wird durch das Leistungsschutzrecht aus dem Gleichgewicht gebracht, in dem die Presseverleger nunmehr verlangen, dass die Beklagte als Betreiberin der Suchmaschine etwas vergütet, was diese im wirtschaftlichen Interesse auch der Webseitenbetreiber erbringt.]

<http://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2016/pressemitteilung.481361.php>

¹⁸ Cf. Opinion by the Max Planck Institute for Innovation and Competition [Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger] Munich, 27 November 2012:

http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht_fuer_verleger_01.pdf

¹⁹ Study by Nera Consulting commissioned by Spanish Association of Publishers of Periodicals AEPP (2015): <http://www.nera.com/publications/archive/2015/impact-of-the-new-article-322-of-the-spanish-intellectual-proper.html>

balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.”

IP rights, once created, have proved almost impossible to abolish. In a period of rapid technological and industrial change, the standards of evidence required must be particularly high. A fundamental point relates to the onus of proof.²⁰ Any new intellectual property right is likely to bring costs. That is the point of rights, otherwise they could not perform an economic function. Someone needs to pay. It is therefore for the proponents of new rights to show what these costs are, who will carry them, that the costs are necessary and proportionate, and provide verifiable evidence.

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²⁰ Cf. What constitutes evidence for copyright policy? (eds. M. Kretschmer and R. Towse, ESRC Social Science Festival 2012: <http://www.create.ac.uk/publications/what-constitutes-evidence-for-copyright-policy-digital-proceedings-of-esrc-symposium/>). In his contribution, Professor Paul Heald argues (pp. 110-1) that the “petitioner for legislation bears the burden of providing empirical evidence that its proposal is in the public interest. I think we can argue as long as we want about what constitutes evidence, but without a presumption as to who bears the burden of proof, we really only get so far in the ultimate policy question. Hopefully post-Hargreaves this means providing credible empirical proof of a net public benefit. (...) when Monsanto comes asking for patent protection for GMO plants, claiming that protection is necessary to stimulate innovation, one cannot even begin to evaluate that claim without access to data that only Monsanto has about its R&D budget...”.