EU CONSULTATION REGARDING THE ROLE OF PUBLISHERS IN THE COPYRIGHT VALUE CHAIN AND ON THE ‘PANORAMA EXCEPTION’

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On 23 March 2016, the European Commission launched a “public consultation on the role of publishers in the copyright value chain and on the ‘panorama exception’”. Whereas the latter issue may play an important role as well, the former aspect not only bears complex legal questions, it moreover carries an explosive effect for the entire sector involved in the transmission of creative content in the digital era.

All interested parties may participate in the consultation. The survey will be closed on 15 June 2016. Stakeholders should be aware of the scope of the consultation and the potential (negative) effects of an ancillary copyright for publishers on them.

I. What are the purpose and the background of the consultation?

At first glance, the Commission aims at understanding the difficulties publishers may have “in the digital environment as a result of the current copyright legal framework with regard notably to their ability to license and be paid for online uses of their content”1. However, a closer look reveals two crucial aspects. First, the consultation is a concrete step towards an ancillary copyright for publishers who will then be able to control not only the content they are already providing (i.e. through copyrighted texts of their authors etc.), but will obtain an autonomous, original right for their own service or product. Second, the consultation is not linked to current developments in the aftermath of the recent Reprobel-judgement of the European Court of Justice (C-572/13), but rather focuses on a participation of publishers in the revenues made in the online context. It is common sense that the crisis of the established press publishers is attributed to the emergence of new sources of information through the Internet – a development that led to sinking numbers in print media and that made publishers conceive new revenue streams.

1 Public consultation on the role of publishers in the copyright value chain and on the ‘panorama exception’ (https://ec.europa.eu/eusurvey/runner/Consultation_Copyright?surveylanguage=EN#).
Having regard to the emergence of already existing examples of ancillary copyrights for (press) publishers in two EU Member States (Germany and Spain), there is reasonable grounds to believe that the effort to potentially extend an ancillary copyright for publishers to the EU level was triggered and has been influenced by lobbyists of certain groups of publishers.\(^2\) Fierce criticism as to the need and lack of justification of such a right went unheard on the national level.\(^3\) Moreover, all of the predicted bad results in these academic statements materialised: In Germany, the particular law – as the Max-Planck-Society has predicted\(^4\) – remains a shell without practical utility, because many relevant publishers soon realised that e.g. Google News helps to create traffic for publisher’s websites and does not free-ride on the investment of others. In Spain, the compulsory and non-waivable fee for linking the content of publishers (which is to be collected by a copyright collecting society) led many online service providers (including Google News) to shut down their services, the detriment of which is being obvious: Service providers, publishers and consumers alike lost in this particular story, and the law created an artificial barrier to establish and maintain sources of information and to find and access information in an efficient way.

Yet, the Commission seems unimpressed by the flawed outcome that can be observed in Germany and Spain, or draws the wrong conclusions from these experiences. While the Commission recognises that, “for news aggregators, in particular, solutions have been attempted in certain Member States, but they carry the risk of more fragmentation in the digital single market”\(^5\), the Commission does not remove such risks of fragmentation, but rather seems to entertain the idea to repeat these experiences on the EU level. Extending a bad idea to the EU-level and making it worse, however, does not solve problems, it rather creates additional ones.

\(^2\) Cf. meetings of Commissioner Oettinger with major publishing companies such as Axel Springer, Hubert Burda, and others: [http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=f24e4f06-d181-4f58-9604-3aaf3ce91ea&d=6679426-p=1](http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=f24e4f06-d181-4f58-9604-3aaf3ce91ea&d=6679426-p=1)


\(^4\) Ibid., footnote 3, p. 5.

The scope of the consultation may have an even greater impact on beneficiaries and affected stakeholders alike than the German and Spanish role models, since the questions are drafted in a very broad fashion and surpass the scope of the already existing regimes in Germany and Spain.

II. Ancillary copyright as a consequence of the Reprobel-judgement of the CJEU?

One might assume that the current EU consultation is linked to and a consequence of the recent judgement of the Court of Justice of the European Union (CJEU) in the Hewlett Packard v Reprobel case of 12 November 2015 (C-572/13), in which the CJEU held that publishers were not entitled to a share of the levies for reprography as they were not the beneficiaries listed in Directive 2001/29/EC, leaving the publishers without a claim for levies in the event their products are copied. With regard to the legal reasoning, a similar decision was handed down by the German Federal Court of Justice on 21 April 2016 (I ZR 198/13).

However, when taking a closer look, it becomes apparent that the Commission publicly considered a neighbouring right for press publishers far in advance of the CJEU’s decision.6 This reveals that thoughts in Brussels about a publisher’s ancillary copyright emerged with a view to the efforts especially in Germany and without a connection to the recent judicial developments. Therefore, the current situation regarding collecting levies for publishers cannot be used as a simple explanation for the Commission’s activities in this regard. The starting point of the consultation is heavily influenced by the same ideological background as implemented in the regimes in Germany and Spain, which is underpinned by the publishers’ desperate search for new sources of revenues in the online context.

In addition, the recent judgement does not call for an overhaul or a radical modification of the existing copyright regime. A participation of publishers in the collection of levies according to Art. 5(2)(a) and (b) of Directive 2001/29/EC could easily be accomplished by clarifying that assignments of claims to fair compensation from an author to the publisher are compatible with the provisions set out in Directive 2001/29/EC. Furthermore, a passage could be included that states that publishers should be regarded as right holders as well. Hence, an autonomous ancillary copyright for publishers is neither necessary nor helpful.

III. Nature and scope of an ancillary copyright

1. What could be the subject matter?

Currently, it is unclear how an ancillary copyright on the EU level would be structured and what exactly the subject matter would be. The consultation remains silent on this point. As the Legal Counsel of the German Publishers and Booksellers Association (Börsenverein des deutschen Buchhandels) correctly points out, a right for publishers cannot be linked to the work of the author, because this work is already protected by copyright laws and such an approach would inevitably lead to unsolvable conflicts between the two laws and their right holders.\(^7\) Also, he questions the layout of the publication or other areas of investment of the publisher as a suitable link for an ancillary copyright.\(^8\) The concept that underpins other ancillary copyrights, such as the one’s for producers of audio recordings and films or broadcasting companies cannot be transferred to the case of publishers. While in the former cases no conflict arises between the interests of the copyright owner and the holder of the ancillary right, because the protected work and the sound recording, the film and the broadcast can be distinguished from each other, the subject matter of an ancillary copyright for publishers does overlap with the text of the author, as it captures the text \textit{per se}.\(^9\)

Similarly, in the German legislative process it turned out that it was impossible to satisfactorily define the subject matter of this ancillary copyright for (press) publishers. Instead, vague legal concepts were used – an approach that is in stark contrast to the required sufficient degree of legal certainty regarding absolute rights.\(^{10}\) Given this experience on a national level, there is reason to believe that in reality there is no such thing as a sufficiently clear product that can be extracted as the subject matter of an ancillary copyright for publishers.


\(^8\) Sprang, ibid., footnote 7.

\(^9\) Cf. Ohly, Opinion for the 70th German Jurist's Conference (Gutachten zum 70. Deutschen Juristentag), 2014, p. F35.

\(^{10}\) Cf. Stieper in: Schricker/Loewenheim, Urheberrecht, 5\(^{\text{th}}\) ed. 2016, § 87f margin no. 7.
2. Who are the potential beneficiaries of an ancillary copyright?

It should be noted that the consultation is not confined to press publishers only. Instead, many questions relate to all publishers without limitation ("publishers in all sectors"). The drafting of the consultation reveals that the Commission may have had publishers of written texts in mind, because it states that the purpose of the consultation was to "gather views as to whether publishers of newspapers, magazines, books and scientific journals are facing problems in the digital environment [...]". However, in its categories of respondents the consultation form does not distinguish between different types of publishers. Such broad wording may theoretically even encompass music publishers and the like, probably leading to an even greater impact of the results of the consultation on various publishing sectors.

3. Who might be affected by an ancillary copyright?

Currently, it is unclear which rights would be conferred upon publishers. Since the Commission states that neighbouring rights typically "include the rights of reproduction, distribution, and communication to the public/making available" it is fair to assume that if the Commission deems such an ancillary copyright necessary, it will be broad in scope.

If publishers will be granted the above-mentioned exploitation rights, an ancillary copyright will likely have a widespread impact on a variety of different players, not confined to online service providers. Instead, every user of published products will be the addressee of such a neighbouring right, as already a simple reproduction might infringe the rights of the publisher. Also, currently it cannot be predicted whether the existing regime regarding exceptions and limitations as set out in Directive 2001/29/EC will equally apply to such a neighbouring right as well. There might be rather much leeway for the Commission that needs to be calculated with, so limitations that apply to copyright might not be applicable to such an ancillary copyright, questioning the balancing of interests of right holders, intermediaries and users. Moreover, where exceptions would apply but were subject to the mandatory payment of fair compensation, transaction costs would inevitably increase.

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11 Public consultation on the role of publishers in the copyright value chain and on the ‘panorama exception’ (https://ec.europa.eu/eusurvey/runner/Consultation_Copyright?surveylanguage=EN#).
Against this background, addressees of such an ancillary copyright are search engine providers, news aggregators, but also social networks, e-commerce platforms, e.g. providing reviews and/or excerpts from offered publications, hosting incl. cloud services, platforms for text (blogging and chat services), audio- and video-content, libraries, archives and databases, and even access providers, as all of them to a certain extent may reproduce and/or make available publishers’ products in that they give users the opportunity to access the subject matter of this right generally found on other websites.

However, it would be erroneous to limit the category of addressees. For example, if the distribution right were to be included, all distributors of publishers’ products would potentially be affected as well as they would have to obtain licenses or – dependent on the exact implementation of such a right – pay levies. Distributors such as Amazon and other online marketplaces would be the primary targets, but also offline distributors should be cautious as it is completely uncertain whether the right would be confined to online distribution.

Furthermore, educational and research institutions might be negatively affected by such a right as they would be constrained to make copies of publishing products and to make them available to the public. Research and education may thus face significant additional financial burdens if an ancillary copyright for publishers leads to further levies or license fees.

With the European Commission calling for a review of the communication to the public right (see below V.), the potential addressees of such right would even further extend to any services allowing for hyperlinks, such e.g. chat or other social media services, where users can share information via hyperlinks, web-catalogues and hyperlink collections.

In this context, it should also be noted that consumers would be affected as well. First, it is likely that an ancillary copyright would lead to higher prices for publishers’ products, as any costs incurred by distributors and the like would be passed on to the consumer. Furthermore, if the publishers exercised far-reaching exploitation rights, there would be a real risk of restricting access to information and thus limiting the free flow of information.

13 Cf. [http://www.boersenblatt.net/artikel-analyse_von_boersenverejnsjustiziar_christian_sprang.1141624.html](http://www.boersenblatt.net/artikel-analyse_von_boersenverejnsjustiziar_christian_sprang.1141624.html); the German Federal Court of Justice in its recent judgement left open the question whether Art. 5 of Directive 2001/29 allowed a compensation (for publishers) in excess of the fair compensation owed to the copyright owner, BGH, judgement of 21 April 2016, I ZR 198/13.
V. An overhaul of the definition of communication to the public / making available?

Over the past years, the CJEU has established a set of criteria as to the question when a work is being made available to the public.\textsuperscript{14} The Court of Justice very clearly ruled that a right holder cannot prohibit links that direct to a copyrighted work if the work has first been made available to the public via the Internet. AG Wathelet specifically spelled out that the posting of hyperlinks by users is both systematic and necessary for the current internet architecture: “If users were at risk of proceedings for infringement of copyright whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.”\textsuperscript{15}

The consultation puts this distinct case law and the underlying rationale at risk. In its communication of 9 December 2015 the Commission points to “contentious grey areas and uncertainty about […] which online acts are considered ‘communication to the public’ (and therefore require authorisation by right holders)” and, as a result of this uncertainty, sees “the basic principle of copyright that acts of exploitation need to be authorised and remunerated” put into question.\textsuperscript{16} This appears to refer to the CJEU’s several judgements on hyperlinks. As the communication then announces that the Commission will examine whether the existing definitions of the right of communication and of making available to the public need to be adjusted\textsuperscript{17} and specifically calls into question whether actions are needed with regard to “news aggregators”, it cannot be ruled out that the results of this public consultation may also trigger a reform of these rights. As such, the outcome of the current consultation may therefore create a dimension that shakes the entire copyright regime and that goes far beyond the question of whether publishers should be provided with an ancillary right.

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\textsuperscript{14} CJEU, case C-466/12 – Svensson; case C-348/13 – BestWater; cf. also opinion of AG Wathelet in case C-160/15 – GS Media.
\textsuperscript{15} Opinion of AG Wathelet in case C-160/15 – GS Media, margin no. 78.
\textsuperscript{16} European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 9 December 2015, COM(2015) 626 final, p. 9.
\textsuperscript{17} European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 9 December 2015, COM(2015) 626 final, p. 9.