**15/06/2016**

**EDiMA, the European association representing online platforms and other innovative tech businesses, would like to submit its full response to the European Commission's public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'.**

**We are submitting this document as a pdf as the character limitation set by the online submission form limited our ability to express our full views.**

**Please consider the response provided below as EDiMA's full response to the consultation.**

EDiMA

# Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'

## General information about you

**The views expressed in this public consultation document may not be interpreted as stating an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to differing definitions the Commission may use under current or future EU law, including any revision of the definitions by the Commission concerning the same subject matters.**

Fields marked with * are mandatory.

*I'm responding as:
An individual in my personal capacity
A representative of an organisation/company/institution

*Please provide your first name:

*Please provide your last name:

*Please indicate your preference for the publication of your response on the Commission's website:
Under the name given: I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication.
Anonymously: I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication.
Please keep my contribution confidential. (It will not be published, but will be used internally within the Commission)

(Please note that regardless the option chosen, your contribution may be subject to a request for access to documents under Regulation 1049/2001 on public access to European Parliament, Council and Commission documents. In this case the request will be assessed against the conditions set out in the Regulation and in accordance with applicable data protection rules.)

*Please indicate your country of residence:
Austria
Belgium
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia
Finland
France
Germany

Greece
Hungary
Italy
Ireland
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden
United Kingdom
Other

*If other, please specify

*Please enter the name of your institution/organisation/business.

EDiMA

What is your institution/organisation/business website, etc.?

*What is the primary place of establishment of the entity you represent?
Austria
Belgium
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Italy
Ireland
Latvia
Lithuania
Luxembourg
Malta
Netherlands

Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden
United Kingdom
Other

*If other please specify:

*My institution/organisation/business operates in: *(Multiple selections possible)*
Austria
Belgium
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia
Estonia
Finland
France
Germany
Greece
Hungary
Italy
Ireland
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden
United Kingdom
Other

*If other, please specify

*Is your organisation registered in the Transparency Register of the European Commission and the
European Parliament?

Yes
No

*Please indicate your organisation's registration number in the Transparency Register.

If you are an entity not registered in the Transparency Register, please register before answering this questionnaire. If your entity responds without being registered, the Commission will consider its input as that of an individual and as such, will publish it separately.

## The role of publishers in the copyright value chain

In its Communication Towards a modern, more European copyright framework of 9 December 2015, the Commission has set the objective of achieving a well-functioning market place for copyright, which implies, in particular, "the possibility for right holders to license and be paid for the use of their content, including content distributed online."[1]
Further to the Communication and the related stakeholders' reactions, the Commission wants to gather views as to whether publishers of newspapers, magazines, books and scientific journals are facing problems in the digital environment as a result of the current copyright legal framework with regard notably to their ability to licence and be paid for online uses of their content. This subject was not specifically covered by other public consultations on copyright issues the Commission has carried out over the last years. In particular the Commission wants to consult all stakeholders as regards the impact that a possible change in EU law to grant publishers a new neighbouring right would have on them, on the whole publishing value chain, on consumers/citizens and creative industries. The Commission invites all stakeholders to back up their replies, whenever possible, with market data and other economic evidence. It also wants to gather views as to whether the need (or not) for intervention is different in the press publishing sector as compared to the book/scientific publishing sectors. In doing so, the Commission will ensure the coherence of any possible intervention with other EU policies and in particular its policy on open access to scientific publications. [3]

***Selection**
Do you wish to respond to the questionnaire "The role of publishers in the copyright value chain"?
Yes *(Please allow for a few moments while questions are loaded below)*
No

[1] COM (2015)626 final.
[2] Neighbouring rights are rights similar to copyright but do not reward an authors' original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (for example by a producer) which may also include a participation in the creative process. EU law only grants neighbouring rights to performers, film producers, record producers and broadcasting organisations. Rights enjoyed by

neighbouring rightholders under EU law generally include (except in specific cases) the rights of reproduction, distribution, and communication to the public/making available.
[3] See Communication COM (2012) 401, Towards better access to scientific information: Boosting the benefits of public investments in research, and Recommendation C (2012) 4890 on access to and preservation of scientific information.

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## Category of respondents

*Please choose the category that applies to your organisation and sector.
Member State
Public authority
Library/Cultural heritage institution (or representative thereof)
Educational or research institution (or representative thereof)
End user/consumer/citizen (or representative thereof)
Researcher (or representative thereof)
Professional photographer (or representative thereof)
Professional photographer (or representative thereof)
Writer (or representative thereof)
Journalist (or representative thereof)
Other author (or representative thereof)
Collective management organisation (or representative thereof)
Press publisher (or representative thereof)
Book publisher (or representative thereof)
Scientific publisher (or representative thereof)
Film/audiovisual producer (or representative thereof)
Broadcaster (or representative thereof)
Phonogram producer (or representative thereof)
Performer (or representative thereof)
Advertising service provider (or representative thereof)
Content aggregator (e.g. news aggregators, images banks or representative thereof)
Search engine (or representative thereof)
Social network (or representative thereof)
Hosting service provider (or representative thereof)
Other service provider (or representative thereof)
Other

If other service provider, please specify

If other, please specify

## Questions

**1. On which grounds do you obtain rights for the purposes of publishing your press or other print content and licensing it? *(Multiple selections possible)***

transfer of rights from authors licensing of rights from authors (exclusive or non-exclusive)
self-standing right under national law (e.g. author of a collective work)
rights over works created by an employee in the course of employment
Not relevant
Other

If other, please specify

It is important to note that in many instances, our members license rights for multiple platforms and across multiple jurisdictions. Many of our members obtain rights either through the transfer of rights from authors licensing of rights from authors (exclusive or non-exclusive); self-standing right under national law (e.g. author of a collective work); rights over works created by an employee in the course of employment; and additionally via license from publishers or collecting societies, or without license, pursuant to limitations/exceptions to copyright.

Please explain

**2. Have you faced problems when licensing online uses of your press or other print content due to the fact that you were licensing or seeking to do so on the basis of rights transferred or licensed to you by authors?**
Yes, often
Yes, occasionally
Hardly ever
Never
No opinion
Not relevant

If so, please explain what problems and provide examples indicating in particular the Member State, the uses you were licensing, the type of work and licensee.

Print media has a long history of partnering with third parties and distributing their content on other platforms, via syndication. This has made them adaptive to digital media. They have also been open to novel licensing models, and unlike other content types, it has been easy to conclude licenses for multiple jurisdictions, for example in markets with similar language – UK, IE, Singapore, India.

**3. Have you faced problems enforcing rights related to press or other print content online due to the fact that you were taking action or seeking to do so on the basis of rights transferred or licenced to you by authors?**
Yes, often
Yes, occasionally
Hardly ever
Never
No opinion
Not relevant

If so, please explain what problems and provide examples indicating in particular the Member State, the type of use and the alleged infringement to your rights.

Problems or issues are typically dealt with contractually so that the primary publisher retains editorial control. This has been particularly important for right holders with defamation where they (not syndication partners) want to deal with any claims from third parties.

**IMPACT ON PUBLISHERS**

**4. What would be the impact on publishers of the creation of a new neighbouring right in EU law (in particular on their ability to license and protect their content from infringements and to receive compensation for uses made under an exception)?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

EDiMA would first like to recognise the fact that the consultation does not clearly stipulate what exactly the "new neighbouring right" would be. As highlighted in footnote 2, "(n)eighbouring rights are rights similar to copyright but do not reward an authors' original creation (a work)." Therefore, within the context of this consultation, neighbouring rights are not intended to protect the underlying work, but the public statements from publishers to date aim to suggest that a neighbouring right is akin to ancillary copyright. This overlap requires further clarification.

In light of this consultation, existing EU law, laws adopted in Germany and Spain and the demands of some news publishers association, this right would:

- Cover digital and physical reproductions (Article 2 Directive 2001/29): i.e. from a print copy to an e-book. It is clear from case law that there is a clear distinction between digital communication and reproduction (Articles 2& 3 of Directive 2001/29). The attempt to combine both simultaneously for economic exploitation will give rise to legal uncertainty and negative deleterious economic effects – for example arising out of the increased transactional costs of the duality of rights management for rights clearance. It would require users of content and creative works to seek clearance from many different rights holders as well as collection societies. The question of making or linking to lawful content would become unclear. This would be magnified by the fragmented nature within the EU's current national systems where harm is not adequately defined nor implemented.
- Cover digital transmissions (making available, Article 3(2) Directive 2001/29): i.e. distribution on Amazon, Kobo, Apple Newsstand etc. or any distribution on the Internet. Copyright levy regimes were designed for the analogue age and originally drafted in a

time of physical copying. The single digital market the EU Digital Single Market would greatly benefit from the implementation of a single right of online transmission;

- Short extracts of text ("snippets"): as is the case in Germany and Spain (see "CCIA, Understanding Ancillary Copyright, 2015" for description): i.e. use of short extracts in news aggregators, newsfeeds, apps, social networks like Twitter or Facebook;
- Cover "Linking": news publishers asking for new rights are aiming for linking to be covered e.g. the European Newspapers Association ENPA argues that "A neighbouring right could be considered as a solution for publishers when third parties generate revenue and web traffic based on the unauthorised use of publishers' press content" (2015, see http://www.enpa.eu/app/download/6224898062/ENPA%20Copyright%20E-pub%202015.pdf?t=1453731892); The European Publishers Council argues that Svensson, an CJEU ruling stating that linking does not require copyright permission, should be "clarified": "The EPC calls for legal clarification as to why the provision of hyperlinks should be compliant with license terms of websites (or other platforms) to which they link. It must be clear at law that rights owners may by their licence terms define, or limit access to and use of the content made available on an "open website"" (see http://epceurope.eu/wp-content/uploads/2014/03/EPC_response_to_the_copyright_acquis_final_5March2014_final1.pdf, http://epceurope.eu/wp-content/uploads/2014/11/EPC-Copyright-Vision-2014_final.pdf also pointing to links to illegal content and deep-framing as requiring legislative intervention).
- This right would Last between 50 to 70 years, as is the case for existing rights.
- All "literary" works, i.e. all creations that are in written form: the consultation mentions book publishers, science publishers, news publishers. However, it's improbable that a law could be devised to protect only things considered "as news" or "books", and it is highly unworkable to draw distinctions according to subjective, value based categories.
- … and so cover, and re-copyright, the Internet: the vast majority of works created and published today are on the internet. That is one billion websites and billions more webpages subject to new rights.
- Collecting societies: in Germany, collective rights management is not mandatory for this new right, but in practice, a collecting society has been entrusted by some publishers with the task of enforcing those new rights. In Spain, collective rights management is mandatory (the right gives rise to a "compensation claim"). It is important to understand that the collection societies across the EU take very different approaches to collection of levies within fragmented regimes. These fragmented systems have been tested through the courts many times and raised within the Vitorino report. When assessing national laws, it is difficult to ascertain whether you are dealing with an exception or a limitation and whether this aligns to the (unworkable) distinctions made by the CJEU. There is also a potential conflict within the logic to have a simultaneous application of rights under Article 2&3 of Directive 2001/29/EC and principles provided by the CJEU: Whereby the incompatibility of the provisions of Directive 2001/29/EC under Article 6.4.4 and Recital 45 arises with the EU's international commitments with regard to full protection of digital work exploitations under the 1996 WIPO Treaties. It is beholden therefore for any new rights and protections that they are singular and allow for the digital exploitation to be led by the commercial activities not by some restrictive set of rights which overcomplicate the ability to manage or regulate the system. For example streaming and downloading services can adequately protect across borders through the use of the appropriate

licenses granted by the rights holders rather than seeking a duality of protection under Article 2 &3. The protections already exist in Article 3 alone.

Despite these assumptions, it remains unclear how such a right could ever be articulated from a legal standpoint bearing in mind the breadth of areas/issues covered and the implication thereof.

Second, legislative proposals should only be carried out on the basis of clear and well documented criteria, including the clear identification of: i) the problems facing publishers, ii) cause(s) for such problems and iii) potential solutions to solve the imbalance between the perceived problem and the cause. Without these clear elements, a proposal would go against the European objective of Better Regulation and 'solutions cannot be tabled in search of a problem'.

Within this context, EDiMA's answer to question 4 can be articulated as below:

First of all, it is critical to assess if there is a need to fix the EU copyright chain to create the ability for publishers to license and protect their content from infringements and to receive compensation for uses made under an exception in the online environment.

Publishers are already copyright owners and already have copyright protection. Works created by employees are usually transferred to the employer; freelancers assign their rights to the publisher. Moreover, almost every news publisher enjoys the protection of the sui-generis right for database producers (a neighbouring right). Copyright law already gives right holders the ability to license and protect their content from infringements. If a whole article or image is used by someone other than the rights holder, without permission and without being within copyright limitations and exceptions, that use can be pursued as an infringement. Publishers - especially press publishers - who can offer resources and additional layers of distribution channels to promote a creator and his or her content, are able to acquire such rights contractually from authors, photographers and the like without much difficulty. A new right makes no difference to enforcement or licensing and it still makes it indispensable for publishers to obtain the rights of their authors - otherwise they would infringe the copyright of authors.

Some evidence has come to light that publishers aim to reclaim some of the losses from levies through neighbouring rights. Considering situations where copying is currently permitted, either that there is no infringing act, such as linking following CJEU ruling on Svensson, or through an existing copying exception, then there is no justification for compensation. Therefore, any potential neighbouring rights should not unnecessarily be considered as a replacement for claimed loss of income.

A key argument to support the demand for the creation of a neighbouring has been that publishers are similarly situated to other entities which already hold EU neighbouring rights. This is misleading as publishers are not necessarily comparable to other stakeholders such as music producers. Neighbouring rights for music producers, for example, are in the sound recording, an effort separate and apart from the performance right (another neighbouring right). Both the sound recording and the performance right are separate and apart from the right in the underlying musical composition (the original work). Publishers, for example, already are the beneficiaries of a number of rights, including an economic right, the sui generis database rights, and in a number of countries including the UK, a right in typographical arrangements.

There is no foreseen policy justification to grant additional rights for publishers, as they are not the author nor the owners of copyright works, and any claim to a database right requires that publishers can provide evidence of a significant investment, which currently has yet to be confirmed. Recently, publishers seem to consider that a neighbouring right would not be an

ancillary copyright covering snippets, or a right addressing linking, but appear to be seeking rights in the same underlying original work created by the author. There is no basis in copyright or related rights for the same work to be doubly protected (and deserving of double compensation, levy or licensing fee) by both creators and publishers.

Also, a broad definition of neighbouring right can be damaging and is not suited for the online environment. There seems to be an attempt to explain or define neighbouring rights by listing the specific rights historically provided to other entities given neighbouring rights: reproduction, distribution, and making available or acts of communication to the public. But the question remains, reproduction, distribution and making available of - what? In the absence of greater clarity as to exactly what a neighbouring right would entail, and how it would apply between publishers and creators, a positive outcome cannot be assumed, and in fact, the opposite, a strong negative outcome, is far more likely.

Second, even before fixing the copyright chain, it is critical to assess if there is a need to fix a dysfunctional online market for publishers.

Publishers currently already have control and decide whether their news content is indexed in aggregators or search engines, whether it is freely available online, or behind a paywall (or metered pay wall), or included in an app.

Publishers online are already thriving without the need for any neighbouring rights. Digital sales of The Economist have risen 47% in one year. Over two thirds of the FT's total paying readership is online (and its digital circulation is growing 33% per year) and mobile is not generating 50% of total traffic. At the Guardian, print revenues remained stable in 2014 but digital revenues increased 24%. In Germany, Axel Springer reported that more than half of revenues for 2014 were generated from digital activities and an increase in profits of over 13%. In Italy, two of the larger national newspapers have successfully implemented paywall strategies. Italy's RCS Media Group, owner of the Corriere della Serra, reported that for the first nine months of 2012, some 20% of paid circulation came from digital subscribers and that digital revenues accounted for around 15% of group revenues.

News publishers continue benefit from traffic driven by online services (social networks, news aggregators, instant messaging, email etc.). According to one estimate, the total value of web traffic to news publishers in four markets (France, Germany, Spain and the UK) amounted to €746m (Deloitte, 2016) in 2014. The value generated for publishers by such platforms also explains why most publishers in Germany opted to stay in Google News - something they could already do prior to the creation of a new right. (See Table 'Starting point for news – Europe percent of online news consumers' Reuter Institute Digital News Report 2015, p.76)

Third, the creation of a neighbouring right, because of its broad and unclear nature, will be used by publishers to challenge online models leading to litigation in numerous Member States and creating tremendous legal uncertainty in Europe for decades to come. It is clear that such a neighbouring right for publishers will ultimately be used in a similar way as an ancillary copyright concept that has already ravaged the German and Spanish markets, as highlighted below.

The introduction of an ancillary copyright for press publisher in Spain resulted in publishers losing traffic. This was more than 6% on average; 14% for smaller publishers (AEEPP/NERA, 2015). The loss for the news publishing industry, suffered predominantly by smaller, free or online

publishers, is estimated to reach €10 million a year. The reduction in traffic threatens their advertising revenues (AEEPP/NERA, 2015).

The property rights and freedom to conduct a business of publishers has been negatively impacted by the creation of these rights. Publishers are forced, through the Spanish law, to charge a fee, through the intermediary of a collecting society, for the dissemination of their news products online (EDiMA, The Impact of ancillary rights in news products, 2015).

Finally, only a portion of publishers - and mainly large publishers - are advocating for development of neighbouring rights/ancillary copyright. It is intriguing to discuss the creation of a right that could ultimately reinforce some positions on the market that are already 'dominant', compared to smaller publishers who value the need for online partners to be discovered. This cannot be seen as a legitimate goal for a DSM regulatory action.

Smaller publishers, regional publishers or new online news publishers in particular are disproportionately affected, suffering a competitive disadvantage. In Spain, the decline in traffic following the adoption of the ancillary copyright law there, and search engine and news aggregator responses in an effort to respect or comply with the law, saw smaller publishers losing twice as much traffic as large publishers (AEEPP/NERA, 2015). This loss of traffic dramatically reduces their advertising revenues in an amount estimated to reach as much as EUR 10 million a year; perhaps not much for larger publishers, but this would be the difference between sustaining a business and folding, for a small publisher. (AEEPP/NERA, 2015).

Clearly, the property rights and freedom to conduct a business of publishers is negatively impacted by the creation of these rights. The global competitiveness and diversity of domestic European publications would suffer, and European publications such as the Daily Mail and The Guardian – respectively the 4th and 5th largest global audiences for news in 2014 (Comscore) - would find it harder to use online channels to reach their audiences.

According to the Max Planck Institute the availability of local domestic content will be reduced and non-domestic content will be more visible (MPI, 2012). Ultimately, such laws undermine media pluralism and competition, are in direct conflict with the goals of the DSM, and make larger, successful publishers even larger and even more successful at the expense of smaller local or regional publishers. As a consequence, some publishers have expressed their concerned over the past years again these developments:

- "There is a formidable consensus that no-one likes the law"; "as long as I am president of Prisa, no part of the media group will collect the [Ancillary Copyright] fee", Juan Luis Cebrián, CEO of Prisa (owner of leading Spanish publication such as El País, Diario AS and Cinco Días).
- Rainer Esser, CEO of German weekly "Die Zeit", refers to the German law as a "hazardous construction".
- "This legislation is a step away from a competitive and diverse press. It will only make it harder for us to compete with other news outlets", Arsenio Escolar, Spanish Association of Periodical Publications, Benedetto Liberati, President of the Italian Online Publishers Association, Alexandre Malsch, Cofounder and CEO of meltygroup, Tomasz Machała, CEO and Editor-in Chief, naTemat, Łukasz Mężyk, Founder & Editor-in Chief, 300polityka.
- "The very few large and international publishing houses […] want to prove that despite their dwindling journalistic influence, they are still in a position to instrumentalise

parliaments in Europe for their purposes and to create obstacles for unwelcome competition. In my opinion, those few large companies have never been after the ancillary copyright per se, but after strengthening their future bargaining position [...]" Wolfgang Blau, The Guardian, Director of Digital Strategy.

- Hanspeter Lebrument, President of the Swiss media Association: the adoption of the Spanish law is "shooting yourself in the foot".

**5. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on authors in the publishing sector such as journalists, writers, photographers, researchers (in particular on authors' contractual relationship with publishers, remuneration and the compensation they may be receiving for uses made under an exception)?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

Notwithstanding, the lack of precision around the definition of neighbouring right and what it means in practice, we note that this is a very broad and vague question. In today's world, "publishers in all sectors" would encompass virtually anyone who authors content and is active online: the blogger, the email user, the person who posts comments in response to a news article, as well as the more traditional commercial, academic, book or other long-standing category of publisher. A clear, narrow definition of exactly which publishers seek a new neighbouring right is essential before there can be a comprehensive and meaningful conversation about the need for, appropriateness and impact of such a right on any other party.

The current state of the law in some Member States is trending towards a re-evaluation of existing business practices pursuant to which creators have often been forced to share their income with publishers (e.g. Federal Court's of Justice (BGH) ruling on the case "Martin Vogel vs. VG Wort"). This trend is consistent with the DSM goal of fair remuneration for authors. However, creating a new neighbouring right will reverse that trend. A legal obligation, as in Spain, to charge a fee administered by a collecting society infringes the right of right holders to conduct a business and their right of property – or to dispose thereof in the manner they choose (Xalabarder, 2014). It would over-ride publishers' ability to apply creative commons or other creative licences to their works, or to otherwise have the autonomy to allow for a wide and innovative variety of uses of one's works. It also takes away the incentive for publishers to enter into creative agreements and new business models with authors, who will most likely be forced into a very specific collecting society model, with the accompanying very specific remuneration model, to their detriment. It would also limit publishers' ability to engage in to alternative distribution and monetisation models for their content, which may diminish that value of content for all contributors.

Broad and undefined neighbouring or ancillary rights generate legal uncertainty, as they create rights which are ill-defined and overlap with the existing rights of authors, photographers and journalists. As previously noted, in their quest for a neighbouring right, publishers appear to be

seeking rights in the same underlying original work created by the author. This effort to obtain rights in the exact same thing creates a conflict with the rights of the author and cannot help but create a negative impact on the author's remuneration. It also opens up any potential licensee to the unfair requirement of seeking 2 sets of permissions and paying twice for the same thing.

**6. Would the creation of a neighbouring right limited to the press publishers have an impact on authors in the publishing sector (as above)?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

The impact would be similar to those pointed out in the previous question. A new right cannot be limited to "news" or "press publishers" or similarly subjective concepts. It is futile and impossible to seek to create new rights with a specific business community in mind, or a specific genre of content. For instance, film producers do not receive different neighbouring rights according to whether they make documentaries, fiction or commercial advertising. What triggers their right is the fixation of moving images - whatever the genre.

Furthermore, today, everyday citizens have become crucial parts of the "press", as made possible by platforms like Medium, Tumblr, Blogger, Twitter, and YouTube. And public service broadcasters (think BBC) would also likely qualify.

The examples in Germany and Spain show how futile it is to define "news" (by analogy, it would be futile to define "science" for the purpose of granting a right to STM publishers (science, technical and medical publications). In Germany, the new Article 87f para 2 of the German Copyright Act targets "articles and illustrations which serve to provide information, form opinions or entertain". Spain, the law targets "periodic publications or […] websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining (new Article 32.2 of the Spanish Copyright Act).

Which website is not "regularly updated"? Which written publications are neither informing, entertaining nor shaping public opinion? Even on the basis of the Spanish or German law, it is clear a blog or a science journal are covered for example, despite a law supposedly limited to "news".

**7. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on rightholders other than authors in the publishing sector?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

A new neighbouring right may appear to be superficially attractive but it would in practice have counter-productive effects for publishers. It would fatally undermine existing business models which rely on cost-free referrals from online providers and which provide significant value to publishers wishing to grow their audience in new markets and leverage that larger audience to improve monetisation.

**8. Would the creation of a neighbouring right limited to the press publishers have an impact on rightholders other than authors in the publishing sector?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

The impact would be similar to those pointed out in the previous question. A new right cannot be limited to "news" or "press publishers" or similarly subjective concepts. It is futile and impossible to seek to create new rights with a specific business community in mind, or a specific genre of content. For instance, film producers do not receive different neighbouring rights according to whether they make documentaries, fiction or commercial advertising. What triggers their right is the fixation of moving images - whatever the genre.

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Which website is not "regularly updated"? Which written publications are neither informing, entertaining nor shaping public opinion? Even on the basis of the Spanish or German law, it is clear a blog or a science journal are covered for example, despite a law supposedly limited to "news".

## IMPACT ON RESEARCHERS AND EDUCATION

**9. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on researchers and educational or research institutions?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

Over the past few years the market has introduced a variety of innovative tools, products and services that are tailored to promote and push content for educational purposes. Ubiquitous connectivity, the wide variety of accessible new smart devices as well as initiatives such as Open Educational Resources (OER) and open licensing models (i.e. creative commons) have fed the development of thousands of educational applications that are available across various platforms. The number is growing every day and cover text books, language learning tools and access to massive open online courses (MOOC) for all educational levels.

As stated in previous consultations and partly recognised by the Commission in its recent Communication (COM (2013)), open licensing models, educational initiatives (OER) and the current exception, provide essential flexibility for the market to develop innovative offerings/services.

Although, there are no known benefits for researchers and educational or research institutions, there are strong negative consequences.

83 Members of the European Parliament (https://juliareda.eu/wp-content/uploads/2015/12/open-letter-ancillary-copyright.pdf) have written: "The European Parliament has on many occasions positioned itself against the introduction *of such an ancillary copyright. We urge the Commission to remain focused on a reform of copyright rules that strengthens the European Digital Single Market, fosters creativity and research while being aware of the dangers of undermining the foundations of one of the greatest revolutions in Information Technology".*

**Negative: Use of copyright exceptions:** researchers and educational or research institutions rely heavily on copyright exceptions as provided under Directive 2001/29 to further their mission - from using materials in the classroom to using them for research purposes or making copies of materials for example.

1. There is no guarantee that these new rights would have the same scope, and the same exceptions, than existing copyright.
2. Where these exceptions require the payment of fair compensation, it is expected that the creation of a new right would lead to an increase in overall amount of compensation, as there would be a new right to compensate for, available to collecting societies and licensing agencies. As we have already seen highlighted within a number reports and within Member States, the manner in which copyright levies are currently applied result in huge additional costs to the consumers.
3. Moreover, an ancillary copyright usually does not have a minimum threshold below which no protection is granted, e.g. while copyright only grants protection for texts that are long enough to show a minimum of individual creativity of the author, an ancillary copyright might already protect single words or even letters and thus might create a protection of small pieces of information that are - for good reasons - not subject to copyright.

Therefore an ancillary copyright is more likely to create barriers to the free flow of information than (regular) copyright.

**Negative: Licensing obligations and costs:** In some countries, researchers and educational or research institutions rely on licensing arrangements for certain activities including reprographic copying of articles. They also rely on paid-for licences to access online journals and academic data-bases, etc.

Transactions costs will also inevitably increase with the creation of a new parallel set of rights for publishers, which come atop the rights of authors. It is hard to predict whether the costs of the licences will also increase as a result of the creation of a new right. It would indeed be intriguing to create a new right for scientific publishers if this is not designed to allow them to extract more value for their customers, which include researchers and educational or research institutions.

**Negative: Open access, access to information:** The right created in Spain is particularly detrimental to open access, as it imposes a payment for use of "text snippets" irrespective of whether the owner of the copyright in the underlying work so wishes. See Paul Keller, Did Spain just declare war on the Commons? Therefore, if you index open science publications, you still have to pay. Whether in Spain or Germany, both set of rights target "text snippets' and their use online. These are typically important tool for research as researchers share information online, create indexes for science repositories, use specialised aggregators (Divulgame, Barrapunto, Links.Historische etc).

Further, all the information that researchers use will eventually get this new neighbouring right. Considering scientific publications alone, one estimate is that there are 1.5 million new academic articles created a year (back in 2010, see http://onlinelibrary.wiley.com/doi/10.1087/20100308/full); another is that there in the region of 160 million (based on estimates of the size of Google Scholar, see http://link.springer.com/article/10.1007%2Fs11192-015-1614-6). That is a staggering number of new rights to manage. Knowing who owns what, and what is permitted, will become highly complex. In addition, material published for the first time online would also get a new right - 1 billion websites, many billions more webpages - with no clarity as to who owns the rights, or when they expire.

Finally, creating rights which target a specific type of information - news, science - comes dangerously close to protecting information itself.

**Negative: Text and data-mining (TDM):** Text and data mining is critical for the development of European research and innovation, and the competitiveness of European research centres on the global stage. Increasingly, academic literature points to the way copyright (in works and databases) and contracts are used to limit the possibility for European researchers to engage fully in TDM. (Christian Handke, Lucie Guibault and Joan-Josep Vallbe, "Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research," Social SSRN, 20 May 2015.) The Ann Frank diaries provide a recent illustration - combining lack of clarity as to copyright status with attempts to restrict research activities on the basis of copyright claims, see http://www.communia-association.org/2016/01/08/what-the-diary-of-anne-frank-can-tell-us-about-text-and-data-mining/.

A new right for STM publishers seems to go in the opposite direction as recent calls to allow TDM (e.g. the Hague Declaration http://thehaguedeclaration.com/). Whatever its shape or form, it will, at the minimum, give publishers more power to impose licensing conditions to TDM (including restriction on number of works, number of words, mining of images, use of the outcomes of the

TDM based research). If the new right includes a "snippet" element, it effectively makes TDM activities unlawful.

**Negative: Open publishing by researchers:** Currently, researchers may publish directly into open repositories or open research publications; or in a more traditional scientific publication which is available against payment and requires exclusivity; or a combination of both, with researchers publishing first in a traditional paid-for publication, and then publishing it in an open journal or under a creative commons licence.

A new right would make this more complex for researchers. In a situation where they publish in a journal, the journal would get a separate, additional copyright in the researcher's article. This new right would last for 50 to 70 years (the current duration of neighbouring rights in the EU). Anything the researcher wishes to do subsequently with his article would require the permission of the publisher: whether publishing or re-publishing in an open repository or in a compilation of essays for example.

**10. Would the creation of a neighbouring right limited to press publishers have an impact on researchers and educational or research institutions?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

The impact would be similar to those pointed out in the previous question. A new right cannot be limited to "news" or "press publishers" or similarly subjective concepts. It is futile and impossible to seek to create new rights with a specific business community in mind, or a specific genre of content. For instance, film producers do not receive different neighbouring rights according to whether they make documentaries, fiction or commercial advertising. What triggers their right is the fixation of moving images - whatever the genre.

Furthermore, today, everyday citizens have become crucial parts of the "press", as made possible by platforms like Medium, Tumblr, Blogger, Twitter, and YouTube. And public service broadcasters (think BBC) would also likely qualify.

The examples in Germany and Spain show how futile it is to define "news" (by analogy, it would be futile to define "science" for the purpose of granting a right to STM publishers (science, technical and medical publications). In Germany, the new Article 87f para 2 of the German Copyright Act targets "articles and illustrations which serve to provide information, form opinions or entertain". Spain, the law targets "periodic publications or […] websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining (new Article 32.2 of the Spanish Copyright Act).

Which website is not "regularly updated"? Which written publications are neither informing, entertaining nor shaping public opinion? Even on the basis of the Spanish or German law, it is clear a blog or a science journal are covered for example, despite a law supposedly limited to "news".

EDiMA

## IMPACT ON ONLINE SERVICES

**11. Would the creation of new neighbouring right covering publishers in all sectors have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press or other print content)?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

The lack of clarity around the definition and overarching purpose of a neighbouring right, the extension of copyright law in the way articulated by publisher groups would have a significant impact on a broad range of online providers, both licensees of press content and providers of technology services which support the publishing ecosystem:

**Online service providers**

- Services that licence books, news, etc. such as Kobo, Amazon, Apple, Google etc.: The Creation of a new neighbouring right in favour of a broad range of publishers would create a new layer of licensing obligations for these services, who now would potentially need to license materials not just from authors/owners, but now also license those same materials again from publishers. There will invariably be situations where the rights of the authors are not with the publisher - or no longer with the publisher. When a publishing contract is limited in time and the author gets another publisher for example, or self publishes: both publisher and author will have to be identified separately, to conclude separate agreements, although this is for one single work.

  All this would increase transaction costs, the fragmentation of online offerings and slow the roll-out of online services across the EU, and may also increase territorial fragmentation.

- Having now licensed these two rights, these online services may also have to conclude a third arrangement specific to "snippets". This would be a consequence of following e.g. the Spanish model (or indeed the case where the "snippet rights" are entrusted to a collecting society, which acts a separate licensor. Consider a service like Blendle, or apps offering access to paid content, but which all "index" the news articles they have licenced.

- An additional layer of collectively licensed rights: Online services that rely on short extracts of text ("snippets") including for the provision of links be negatively affected - from news aggregators to social networks. As they face unclear restrictions - or in some cases plain requests to pay despite the consent of publishers - they may have to change their services in Europe; close them; deal mainly with non-European content; face litigation; etc.

**Device and equipment providers**

- Given the way private copying and reprography levies are set, it is likely that the creation of new rights will be relied upon by collecting societies to increase the levies charged on various devices and equipment.

**Online intermediaries:**

- The creation of billions of new rights and right owners in all written content on the internet will cause great confusion and legal uncertainty - including for intermediaries that process large volumes of requests to remove content that is alleged to infringe copyright.
- This comes very close to making links to allegedly infringing content illegal per se - and would trigger droves of new copyright claims to take down or otherwise remove content online for intermediaries. The news publishers who argue for this new right state "copyright law should thus be amended to treat as infringements only those acts of making available hyperlinks to copies which are clearly and obviously unlawfully-produced" (see European Publishers Council, page 27); this objective is also pursued by publishers before the courts (*GS Media v Sanoma*).

**Innovation:**

- The new rights create new barriers to entry, hindering competition and innovation - as noted by the Spanish competition authority (PRO/CNMC/0002/14, Study on article 32.2, May 2014)
- New legal uncertainties act a strong deterrent to innovation and investment. Who is a publisher who receives the new neighbouring right? What happens to the one billion websites, and billion more web-pages, where new works are published every day - who owns those rights?

**Start-ups, app developers, SMEs:**

- Businesses that analyse data on the web, rely on UGC content, for example, would all face new risks in the face of this new right - in addition to higher barriers to entry which only large, established digital players can afford to overcome. There is a wealth of opinions supporting this view, from the Max Planck Institute to a report from the Spanish Competition authority. (EDiMA, 2016)
- For smaller European companies ancillary right provisions represent a strong deterrent because of the legal uncertainty and the enforcement through collecting societies. In Spain, Planeta Ludico, NiagaRank, InfoAliment and Multifriki were already affected (AEEPP/NERA, 2015).
- Services and publications that rely on disseminating content under creative commons-type licenses cannot escape the law. Similarly, scientific publications that rely on open access, e.g. Public Library of Science, would see a fee collected for the circulation of their information (Xalabader, 2014).
- "The development of mobile apps sorting information and data, an area with an interesting future, will remain curtailed in Spain", Niagarank, a now closed product of Spanish start up CodeSyntax, employing 15.
- "A legal dispute with [the German publisher association] would have dragged on for years, finally leading to bankruptcy of tersee.de - regardless of the outcome. Four years of intensive research and development would have been for vain. We thought about removing German media from our search index and to relocate our headquarters abroad", Mikael Voss, from tersee.de, a German start-up.
- Other start-ups and services already affected in Germany and Spain include Radio Utopia (news agency), Unbubble.eu, Links.Historische (news for historians), Rivva (blog aggregator), Nasmua.de (news search engine), Newsclub.de, commentarist.de, DeuSu.de, Planeta Ludico, NiagaRank, InfoAliment, Multifriki, Meneame, Astrofísica y Física, Beegeeinfo…

By first identifying the objectives of the policy or the market failures observed, governments can determine if new rights or regulations are needed. At the outset, however, there is no evidence of a copyright issue between publishers and online service providers. As previously noted, right holders already have the tools to enforce copyright. The neighbouring rights given publishers in Germany and Spain in the form of ancillary copyright over snippets have failed in large part by harming much of the very publishing industry they were meant to assist; these laws were imposed despite publishers' own ability to control use of this content via exclusion protocols, and in the absence of any evidence of market failure. Ancillary rights for publishers distort copyright law, using copyright to subsidise a part of the news publishing industry (Xalabarder, 2014). The Max Planck Institute adds that "[i]ndustrial property rights are only required where such a market failure is imminent. This situation does not exist in the case of published works in relation to aggregators."

Ancillary copyright in snippets are also legally indefensible as conflicting with the mandatory EU copyright exception for quotations. The 1886 Berne Convention protects the right to quote from newspaper articles, the only mandatory exception under international law. Incorporated under EU law via the TRIPs agreement, restrictions against quotations rights infringe EU and international law (Xalabarder, 2014).

Publishers' positions have revealed an ongoing concern over snippets, and a deep desire to reverse the law of the CJEU in Svensson and the Advocate General in GS Media to tackle linking as some form of copyright infringement. Any focus on linking is untenable. Restricting the ability to link meaningfully with accompanying words of context infringes the right to freedom of information and the right to link (MPI, 2012) and undermines the ecommerce Directive which rejected royalties for linking.

Again we ask, if neighbouring rights are not about ancillary copyright on snippets, and not about linking, and don't need to be about wholesale copying protected already by copyright law, what is it meant to be and do?

In fact, the Internet is transforming the media and content industries. Content discovery is facilitated by online services which allow publishers to disseminate and monetise content, and readers to engage with this content. Search engines, social networks, news aggregators, instant messaging apps, micro-blogging services all drive traffic to other news sites as consumers find it easier to access content that interests them. A recent study from Deloitte indicates that over 66% of traffic to news publishers' sites is driven there by search engines and news aggregators.

Driving traffic to publisher's site has always been, is, and will remain a key goal for news aggregators and online service providers. As we value and nurture our relationships with publishers, we continue to innovate and develop new models for a sustainable online ecosystem where all the key players can benefit from the current and future technologies and offerings.

For example:

- Facebook Instant Articles - enhances user access and experience by loading publishers' content more quickly on Facebook and offers substantial revenue share to publishers.
- YouTube - for quite some time, has allowed monetization of video by content owners.
- Blendle - Dutch digital company that cooperates with major publishers which allows users to make "micropayments" to pay for individual pieces of content instead of requiring a more expensive, whole subscription to access content, drawing in a different

demographic that otherwise would not be interested in subscriptions and do not tolerate advertising.

- Accelerated Mobile Pages Project (AMP) - an open source initiative involving publishers around the world and technology companies like LinkedIn, Google, Pinterest and Twitter. The project aims to make publishers' webpages with rich content load faster on mobile devices to retain users.
- Google new feature in testing. http://www.wsj.com/articles/google-tests-feature-that-lets-media-companies-marketers-publish-directly-to-search-results-1461874322
- Yahoo (wide array of individualised deals with publishers, ranging from traditional pure syndication to numerous variations on advertising revenue share)
- LinkedIn https://www.buzzfeed.com/alexkantrowitz/linkedin-exploring-its-own-version-of-facebooks-instant-arti?utm_term=.lm9oYxDLX#.ycZYdoOmp

Start-ups are also now investing quickly in the digital news space, and, like the more established online service providers, experimenting with publishers on new ways to disseminate and monetise news online. In Europe, this collaboration and wave of innovation is underway. As with all innovation and experimentation, there will be failures as well as opportunities, but these efforts are the best place to deliver the solutions that will satisfy consumers and sustain the creation of news, and collaboration will foster much more positive and long term success than government regulation could hope to drive.

Finally, the legal uncertainty created by such broad right and the very likely use of this right to replicate approaches similar to the Belgium, German and Spanish attempts will have for sure the effect of reinforcing the 'dominant' market position of certain platforms on the EU Market, as smaller services will not be able to overcome those barriers and uncertainty. Ultimately, the publishers will be left with fewer options to distribute and monetise their work outside their own websites and might complain even more with the negotiating power of the few remaining stakeholders. Again, this appears to be going against the DSM objective, but even more, against a key argument - that should be assessed by competition authorities - raised by publishers to justify the creation of a neighbouring right.

**12. Would the creation of such a neighbouring right limited to press publishers have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press content)?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

The impact would be similar to those pointed out in the previous question. A new right cannot be

limited to “news” or “press publishers” or similarly subjective concepts. It is futile and impossible to seek to create new rights with a specific business community in mind, or a specific genre of content. For instance, film producers do not receive different neighbouring rights according to whether they make documentaries, fiction or commercial advertising. What triggers their right is the fixation of moving images - whatever the genre.

Furthermore, today, everyday citizens have become crucial parts of the “press”, as made possible by platforms like Medium, Tumblr, Blogger, Twitter, and YouTube. And public service broadcasters (think BBC) would also likely qualify.

The examples in Germany and Spain show how futile it is to define “news” (by analogy, it would be futile to define “science” for the purpose of granting a right to STM publishers (science, technical and medical publications). In Germany, the new Article 87f para 2 of the German Copyright Act targets “articles and illustrations which serve to provide information, form opinions or entertain”. Spain, the law targets “periodic publications or […] websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining (new Article 32.2 of the Spanish Copyright Act).

Which website is not “regularly updated”? Which written publications are neither informing, entertaining nor shaping public opinion? Even on the basis of the Spanish or German law, it is clear a blog or a science journal are covered for example, despite a law supposedly limited to “news”.

## IMPACT ON CONSUMERS

**13. Would the creation of new neighbouring right covering publishers in all sectors have an impact on consumers/end-users/EU citizens?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

Ancillary right type laws create increased search costs for consumers in terms of time and resources as it makes it harder for them to access news from aggregators, apps, blogging services, social networks etc. In Germany, 57% of the consumers find text “snippets” helpful (Bitkom, 2015), yet the effect of the ancillary copyright law and the way it has been implemented disincentivises licensing of links and snippets so users lose valuable contextual information in search results. As users are less likely to click on links without snippets, publishers also lose out on valuable referrals.

The choice and diversity of news sources available to consumers is also reduced. Reduced access to online news aggregation services results in users being less likely to investigate additional,

related content in depth (Chiou and Tucker, 2015). Concretely, in Spain alone, this means a loss of EUR 1.85 billion a year for consumers – in so-called "consumer surplus" (AEEPP/NERA, 2015).

Links, without context, are practically useless to consumers on the Internet or app users. Without small extracts of text, links in apps and on the Internet would be reduced to "blue URLs". URLs themselves often include text for instance using the title of an article. This is why the Max Plank Institute clearly states that "copyright law cannot be applicable in such cases, as otherwise the use of links which contain minimum indications of the content to be found would often be blocked".

There would be a clear impact on the ability of Europeans to exercise their right to information (accessing information online), a chilling effect on freedom of expression and broader social and economic consequences from such a course of action.

EU citizens also exercise their own freedom of expression online, using many online tools and services that will be affected by an ancillary right. As an indication of the scale of those activities, in 2013, over 20% of EU news users engaged in some form of news commentary every week. Close to 8% commented on news stories online, over 2% wrote blogs on news or political issues, over 3% sent news videos or pictures to a news website (Reuters Institute, 2014).

**Costs to consumers of a new neighbouring right in online "snippets":**

- Liability for linking to allegedly illegal content: It is important to note that publishers have existing remedies against commercial scale infringements. The Newzbin case ([2010] EWHC 608) for example, found that Newzbin was liable that it was 'only linking' to infringing copies of films. The news publishers who argue for this new right state that "the making available of a hyperlink to an infringing copy is the single most egregious act enabling piracy on a large scale – and copyright law should thus be amended to treat as infringements only those acts of making available hyperlinks to copies which are clearly and obviously unlawfully-produced" (see European Publishers Council, page 27); this objective is also pursued by publishers before the courts (*GS Media v Sanoma*). On the consumer side, this would also essentially make European consumers liable for sharing hyperlinks to unlawful content.
- Un-usable links on the internet: Links, without snippets that provide context, are practically useless to consumers and Internet or app users. Without small extracts of text, links in apps and on the Internet would be reduced to "blue URLs". Even URLs themselves often include text for instance using the title of an article and "copyright law cannot be applicable in such cases, as otherwise the use of links which contain minimum indications of the content to be found would often be blocked" (Max Planck Institute, 2012).
- Reduced access to information and reduced media pluralism: Ancillary rights create increased search costs for consumers, as it makes it harder for them to access news from aggregators, apps, blogging services, social networks etc. In Spain alone, this means a loss of **EUR 1.85 billion** a year in "consumer surplus" (NERA, 2015, study for Spanish publishers association AEEPP).
- Ancillary copyright make it harder for publishers of news to be found online. As a result, smaller news publishers, new entrants, online-only news publishers who rely on the internet to reach new readers find it harder to build their audience. Conversely, large, well known publishers suffer less from the new barrier to entry and rely on their brand to

continue to reach readers. In Spain, the decline in traffic following the adoption of the law saw smaller publishers losing twice as much traffic as large publishers (AEEPP/NERA, 2015). Some publishers have opposed the law and flagged that "this legislation [in Spain] is a step away from a competitive and diverse press. It will only make it harder for us to compete with other news outlets" (see here).

- The creation of ancillary rights in Member States also have the negative effect of creating barriers to the entry on the market, as the **Spanish Competition Authority found** (PRO/CNMC/0002/14, Study on article 32.2, May 2014)

- Reduced access to alternative news sources: Reduced access to online news aggregation services results in users being less likely to investigate additional, related content in depth (Chiou and Tucker, 2015).

- Reduced innovation in Europe - fewer new services: For smaller European companies ancillary right provisions represent a strong deterrent because of the legal uncertainty and the enforcement through collecting societies. These concerns were already raised before the adoption of the law in Germany, but were not taken into account. In Spain, Planeta Ludico, NiagaRank, InfoAliment and Multifriki have already closed down, in addition to Google News (AEEPP/NERA, 2015).

- Ancillary rights also create a competitive advantage for already established, successful online services, making it harder for new European companies to compete and develop new services. There is a wealth of scientific opinions supporting this view, from the Max Planck Institute to the report of the Spanish Competition authority. (EDiMA, 2016)

- A law against creative commons: Services and publications that rely on disseminating content under creative common type licenses cannot escape the law. Similarly, scientific publications that rely on open access, e.g. Public Library of Science, would see a fee collected for the circulation of their information (Xalabader, 2014). This hampers innovation and knowledge sharing in Europe (Keller, Did Spain just declare war on the commons?). It affected the over one billion Creative Commons licensed works in 2015 (https://stateof.creativecommons.org/2015/) as well as news publishers themselves when they rely on CC licences, for instance ElDiario.es.

**Costs to consumers of a new neighbouring right (not limited to online snippets):**

- More costly content: works in copyright are less widely available than out of copyright works. For books, Paul Heald shows (How Copyright Keeps Works Disappeared, 2013) how books reappear in increased numbers once they are no longer copyright protected. For example, more than twice as many new books originally published in the 1890's (and thus in the public domain) are for sale by Amazon than books from the 1950's, despite the fact that many fewer books were published in the 1890's. Similar effects have been found for musical compositions (Paul Heald, 2008, here) sound recordings (Tim Brooks, Survey of Reissues of U.S. Recordings (2005), images (Create, Copyright and the Value of the Public Domain, 2015). Therefore, a new neighbouring right will increase costs which will ultimately be borne by the consumer.
- Increased cost of access to content and culture: for books, for example, copyright protection increases the costs for consumers of purchasing a work. (Find more

information on the table from the UK Gower's review of intellectual property on price comparison of durable public domain and copyright books in print 2006).

- Lack of increase in the creation of new works / no incentive effect: It is particularly unlikely that new neighbouring rights would increase incentives for the creation of new works as publishers already hold copyright via contract with authors. Research also shows the strengthening of copyright does not increase the production of creative works (Png, Wang, Copyright law and the supply of creative work: Evidence from the movies (2009); Handke, Digital copying and the supply of sound recordings, 2012; Waldfogel, Bye, bye Miss American pie? The supply of new recorded music since Napster, 2011). For copyright protection to be in the public interest, it needs to trade off the costs of copyright protection against a longer term incentive to the creation of works. The Commission itself for instance found the creation of a specific property right for EU databases - "the economic impact of the 'sui generis' right is unproven" according to the Commission's evaluation report of the Database of Directive. The European Parliament's Digital Single Market Report called for the abolition of the new right (para. 108).

**Additional impacts of a new right**:

- Increased levies: Given the way private copying and reprography levies are set, it is likely that the creation of new rights will be relied upon by collecting societies to increase the levies charged on various devices and equipment. While this is unlikely to be significant for press publishers (who currently receive no income from levies e.g. in Spain, a very little share in France), book and scientific publishing involves more significant amounts of levies. Therefore, these costs risk being borne by consumers. There are numerous studies showing that the current systems of levies as applied by various Member States are overly expensive on consumers – who often pay more than once for the same permission of use from right holders, especially where the levies are based on devices and the definition of harm is based on a lack of objectivity. The Belgium case of HP v Reprobel is a good example of an illegal levy based system.

It is also important to consider the efficiency of the collection societies in copyright levy management and not to introduce additional systems which perpetuate additional costs and a lack of accountability. In 2013 Eurimag reported that The Commission's Impact Assessment illustrated that while collecting societies collect more money in the EU than in any other region of the world, (approximately three times as much as in the US and four times as much as in Asia), much of this money fails to reach artists. Only 27-45% of the monies collected is distributed in the year of collection and in some cases, part of the income collected is never distributed at all. In 2010, major collection societies had accumulated € 3.6bn that they owed to right holders.

- Appropriation of Internet and UGC content: Consumers who post content online will find that a "publisher" now owns a new copyright in their creations. Would the owner of a news website own a new right in the comments posted on his website? If so, he can stop the author using that content himself.
- Increased transaction costs - slower roll out of online services, reduced availability: As "literary" works receive a new copyright, agreements for distribution of books, magazines, newspapers etc. will have to be re-visited to cover these new rights. There will be additional complexity in managing those rights. For example, identifying owners in particular in a transition phase may be challenging. There will invariably be cases where the rights of the author/ creator are no longer owned by the publisher - but the publisher will still own a publisher right: more rights to clear. Also, those rights would be territorial.

All this would increase transaction costs, the fragmentation of online offerings and slow the roll-out of online services across the EU.

- Reduced availability of European content: Non-European publishers have not asked for similar rights, nor do they claim to enforce new copyrights in links. As a result, European publisher content is likely to come with significant red-tape and copyright risks, while non-European content will be "safer" to use, share online, etc. This risk of seeing less local content online was highlighted by the Max Plank Institute in relation to the German law.
- Millions of new unusable "orphan works": Orphan works are works whose owners cannot be identified or found. Consider archives of email newsletters, blogs that are no longer maintained, and defunct online magazines whose content remains available. The question would be: Who owns the "publisher neighbouring right" in those works?
- To the extent that the creation of a neighbouring right for all publishers requires online service providers to remunerate publishers, this could threaten the availability of free, ad-supported services (such as search, social networks, and news aggregation) that Europeans enjoy today, requiring European users to pay a fee to use these services.

**14. Would the creation of new neighbouring right limited to press publishers have an impact on consumers/end-users/EU citizens?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

The impact would be similar to those pointed out in the previous question. A new right cannot be limited to "news" or "press publishers" or similarly subjective concepts. It is futile and impossible to seek to create new rights with a specific business community in mind, or a specific genre of content. For instance, film producers do not receive different neighbouring rights according to whether they make documentaries, fiction or commercial advertising. What triggers their right is the fixation of moving images - whatever the genre.

Furthermore, today, everyday citizens have become crucial parts of the "press", as made possible by platforms like Medium, Tumblr, Blogger, Twitter, and YouTube. And public service broadcasters (think BBC) would also likely qualify.

The examples in Germany and Spain show how futile it is to define "news" (by analogy, it would be futile to define "science" for the purpose of granting a right to STM publishers (science, technical and medical publications). In Germany, the new Article 87f para 2 of the German Copyright Act targets "articles and illustrations which serve to provide information, form opinions or entertain". Spain, the law targets "periodic publications or [...] websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining (new Article 32.2 of the Spanish

Copyright Act).

Which website is not “regularly updated”? Which written publications are neither informing, entertaining nor shaping public opinion? Even on the basis of the Spanish or German law, it is clear a blog or a science journal are covered for example, despite a law supposedly limited to “news”.

**15. In those cases where publishers have been granted rights over or compensation for specific types of online uses of their content (often referred to as "ancillary rights") under Member States' law, has there been any impact on you/your activity, and if so, what?**

Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain, indicating in particular the Member State.

Ancillary rights act as a barrier to competition and pluralism, by making it harder for publishers to reach their readers online. Smaller, regional publishers or new online news publishers are disproportionally affected, suffering a competitive disadvantage. In Spain, the decline in traffic following the adoption of the law saw smaller publishers losing twice as much traffic as large publishers (AEEPP/NERA, 2015).

Ancillary rights make it harder for news publishers to generate online traffic, creating more obstacles to the dissemination of their content. In Spain, the loss for the news publishing industry, suffered predominantly by smaller, free or online publishers, is estimated to reach EUR 10 million a year and the reduction in traffic significantly threatens their advertising revenues (AEEPP/NERA, 2015).

The property rights and freedom to conduct a business of publishers is negatively impacted by the creation of these rights. The global competitiveness and diversity of domestic European publications suffers. European publications such as the Daily Mail and The Guardian – respectively the 4th and 5th largest global audiences for news in 2014, (Comscore) – would find it harder to use online channels to reach their audiences. According to the Max Plank Institute the availability of local domestic content will be reduced and non-domestic content will be more visible (MPI, 2012).

The creation of ancillary rights in Member States also have the negative effect of creating barriers to the entry on the market, as the Spanish Competition Authority found (PRO/CNMC/0002/14, Study on article 32.2, May 2014)

Driving traffic to publisher’s site has always been, is, and will remain a key goal for news aggregators. As we value and nurture our relationships with publishers, we continue to innovate and develop new models for a sustainable online ecosystem where all the key players can benefit

from the current and future technologies and offerings.

The Internet is transforming the media and content industries. Content discovery is facilitated by online services which allow publishers to disseminate and monetise content, and readers to engage with this content. Search engines, social networks, news aggregators, instant messaging apps, micro-blogging services all drive traffic to other news sites as consumers find it easier to access content that interests them. Web portals and search engines frequently offer 'snippets' – brief excerpts and headlines from new stories – that are important drivers of traffic to publications' websites.

This is supporting the rejuvenation of traditional print media. Digital sales of The Economist have risen 47% in one year. Over two thirds of the FT's total paying readership is online (and its digital circulation is growing 33% per year) and mobile is now generating 50% of total traffic. At the Guardian, print revenues remained stable in 2014 but digital revenues increased 24%. In Germany, Axel Springer reports that more than half of revenues for 2014 were generated from digital activities and an increase in profits of over 13%.

In Italy, two of the larger national newspapers have successfully implemented paywall strategies. Italy's RCS Media Group, owner of the Corriere della Serra, reported that for the first nine months of 2012, some 20% of paid circulation came from digital subscribers and that digital revenues accounted for around 15% of group revenues.

**16. Is there any other issue that should be considered as regards the role of publishers in the copyright value chain and the need for and/or the impact of the possible creation of a neighbouring right for publishers in EU copyright law?**

Yes

No

If so, please explain and whenever possible, please back up your replies with market data and other economic evidence.

## Use of works, such as works of architecture or sculpture, made to be located permanently in public places (the 'panorama exception')

This section is beyond the scope of our current copyright positioning but I do think that potentially we should respond to it- but we will need membership input on this

EDiMA

EU copyright law provides that Member States may lay down exceptions or limitations to copyright concerning the use of works, such as works of architecture or sculpture, made to be located permanently in public places (the ‘panorama exception’) [1] . This exception has been implemented in most Member States within the margin of manoeuvre left to them by EU law.
In its Communication Towards a modern, more European copyright framework, the Commission has indicated that it is assessing options and will consider legislative proposals on EU copyright exceptions, among others in order to "clarify the current EU exception permitting the use of works that exceptions, among others in order to "clarify the current EU exception permitting the

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[1] Article 5(3)(h) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May
2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

use of works that were made to be permanently located in the public space (the ‘panorama exception’), to take into account new dissemination channels.”[2]

This subject was not specifically covered by other public consultations on copyright issues the
Commission has carried out over the last years. Further to the Communication and the related stakeholder reactions, the Commission wants to seek views as to whether the current legislative framework on the "panorama" exception gives rise to specific problems in the context of the Digital Single Market. The Commission invites all stakeholders to back up their replies, whenever possible, with market data and other economic evidence.

***Selection**
Do you wish to respond to this questionnaire "Use of works, such as works of architecture or sculpture, made to be located permanently in public places (the 'panorama exception')?
Yes *(Please allow for a few moments while questions are loaded below)*
No

## Category of respondents

***Please choose the category that applies to your organisation and sector.**
Member State
Public authority
Owner or manager of works made to be located permanently in public places (or representative thereof)
Library or Cultural heritage institution (or representative thereof)
Educational or research institution (or representative thereof)
End user/consumer/citizen (or representative thereof)
Visual artist (e.g. painter, sculptor or representative thereof)
Architect (or representative thereof)
Professional photographer (or representative thereof)
Other authors (or representative thereof)
Collective management organisation (or representative thereof)
Publisher (or representative thereof)
Film/audiovisual producer (or representative thereof)
Broadcaster (or representative thereof)

Phonogram producer (or representative thereof)
Performer (or representative thereof)
Advertising service provider (or representative thereof)
Content aggregator (e.g. news aggregators, images banks or representative thereof)
Content aggregator (e.g. news aggregators, images banks or representative thereof)
Search engine (or representative thereof)
Social network (or representative thereof)
Hosting service provider (or representative thereof)
Other service provider (or representative thereof)
Other

If other service provider, please specify

If other, please specify

[2] COM (2015) 626 final.

## Questions

**1. When uploading your images of works, such as works of architecture or sculpture, made to be located permanently in public places on the internet, have you faced problems related to the fact that such works were protected by copyright?**
Yes, often
Yes, occasionally
Hardly ever
Never
No opinion
Not relevant

If so, please explain what problems and provide examples indicating in particular the Member State and the type of work concerned.

**2. When providing online access to images of works, such as works of architecture or sculpture, made to be located permanently in public places, have you faced problems related to the fact that such works were protected by copyright?**
Yes, often
Yes, occasionally
Hardly ever
Never
No opinion
Not relevant

If so, please explain what problems and provide examples indicating in particular the Member State and the type of work concerned.

**3. Have you been using images of works, such as works of architecture or sculpture, made to be located permanently in public places, in the context of your business/activity, such as publications, audiovisual works or advertising?**

Yes, on the basis of a licence
Yes, on the basis of an exception
Never
Not relevant

If so, please explain, indicating in particular the Member State and what business/activity, and provide examples.

**4. Do you license/offer licences for the use of works, such as works of architecture or sculpture, made to be located permanently in public places?**
Yes
No
Not relevant

If so, please provide information about your licensing agreements (Member State, licensees, type of uses covered, revenues generated, etc.).

**5. What would be the impact on you/your activity of introducing an exception at the EU level covering non-commercial uses of works, such as works of architecture or sculpture, made to be located permanently in public places?**
Strong positive impact
Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

Labelling the impact of this suggestion is difficult for us, because we support the creation of an exception, but not one where an attempt is made to limit the scope to non-commercial use.

In the digital economy, distinguishing commercial and non-commercial activities is unworkable and a source of legal uncertainty. Existing copyright exceptions, for example, do not rely solely on a distinction between commercial and non-commercial to operate. For examples, looking only at Wikipedia data and information, it is often used or re-used in a commercial context; similarly, the public domain is open to all uses, not just commercial or non-commercial. In effect, an exception limited to non-commercial would limit freedom and innovation on the Internet, does not fit with the online ecosystem and would not serve Internet users well.

Additionally, if the Commission's introduction of a non-commercial exception EU-wide overrode the laws of Member States where commercial freedom of panorama is already permitted, the impact could even be strongly negative, as citizens of those Member States would lose rights they have previously enjoyed.

**6. What would be the impact on you/your activity introducing an exception at the EU level covering both commercial and non-commercial uses of works, such as works of architecture or sculpture, made to be located permanently in public places?**

Strong positive impact

Modest positive impact
No impact
Modest negative impact
Strong negative impact
No opinion

Please explain

The current patchwork of laws across the EU relating to images of items in public spaces serves no-one well. Even if the average user is aware of this law at all, it is far from clear which rule applies if a citizen of Country A visits Country B on holiday, and uploads their holiday snaps to a service hosted in Country C which is then viewed by a user in Country D. In a world where the main conduits for people to share their experiences are advertising-supported and therefore commercial, trying to make a commercial/non-commercial distinction would lead to either great uncertainty or, if clarified, greatly limited freedom.

When the only people distributing images of works of art and buildings in public spaces were picture postcard manufacturers, this law may have been reasonable and/or enforceable. Now anyone can share such pictures worldwide in an instant, it is neither.

We encourage the Commission to support legal certainty, freedom to create and share without fear, and freedom of expression by implementing a full freedom of panorama exception EU-wide.

**7. Is there any other issue that should be considered as regards the 'panorama exception' and the copyright framework applicable to the use of works, such as works of architecture or sculpture, made to be permanently located in public places?**

Yes
No

If so, please explain and whenever possible, please back up your replies with market data and other economic evidence.