

"The role of publishers in the copyright value chain"

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

Answer => **Not relevant**

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?

Answer => **No opinion**

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?

Answer => **Not relevant**

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)?

Answer => **No impact**

The main argument put forward for creating a neighbouring right for publishers is to use it on actors such as Google News, and to force them to obtain an authorisation beforehand and/or agree on a licence fee for aggregating content and publishing excerpts.

Some countries, like Germany or Spain, have already implemented similar measures by introducing new "ancilliary rights", that look very much like the new neighbouring rights suggested in the consultation.

However, these experiments have shown that the new rights have not proven an efficient measure for publishers to balance out the situation between them and websites such as Google News. When the new legislation came into force in the abovementioned countries, Google chose instead to deindex their national newspapers and to exclude them from Google News. This resulted in a decrease in traffic towards these national news websites, and thus a decrease in benefits from advertising revenues, which lead some publishers to ask Google to be reincorporated into its service.

The issue of finding balance in the value chain has thus not been solved at all by the introduction of the new rights for publishers, and has instead resulted in a series of negative side-effects, which are tackled in the following answers to the consultation.

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)?

Answer => **Strong negative impact**

The edition industry does not work in the same way as the music or audiovisual industry, where neighbouring rights have been acknowledged for the benefit of intermediaries such as videogram or phonogram producers.

Traditionally, text publishers do not have their own intellectual property rights, but obtain them through contracts of transfers of copyright. Introducing a neighbouring right for the benefit of publishers would call for a deep reevaluation of the balance between publishers and authors, which are already tipped in favour of the former.

Currently, transfers of copyright by authors to publishers are framed by law and must be defined in detail to be considered valid. In order to protect the authors, every right not explicitly included in a contract is assumed to remain the author's. These principles are supposed to allow authors to control the rights transferred to publishers in order to keep certain elements (such as adaptation, translation, or digital usage).

Introducing neighbouring rights for the benefit of publishers may call into question these principles. If publishers are allowed to enjoy rights over the texts they edit from the outset, authors risk having their position weakened in favour of publishers. Similar neighbouring rights already exist in the music or cinema industry, and rights are easily concentrated in the hands of producers (which are also intermediaries), by mechanisms such as the assumption that rights shall be assigned to producers that are included in production contracts.

Additionally, several EU countries (including France) have adopted mechanisms to allow authors to claim back their rights if publishers do not fulfil some of their obligations as laid down in the edition contract. An example is the fault to normal exploitation and follow-up of the work, which may allow authors to take back their rights. If neighbouring rights are implemented for the benefit of publishers, authors risk having a much harder time reclaiming their rights in case of a breach by the publisher.

Finally, one could argue that introducing new neighbouring rights for the benefit of publishers may increase the selling price of cultural works, while not diminishing the part of the publisher's revenue. Indeed, if new rights are adopted, publishers will have the power to ask for additional revenue. However, this could only be done by increasing the selling price, at the expense of consumers, or by increasing the publishers' share in revenue, at the expense of authors.

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

Answer => **Strong negative impact**

In France, the Hadopi law (2009) already weakened the position of journalists as authors through a mechanism for transfer of rights for digital exploitation to publishers on the outset. The introduction of a neighbouring right would again weaken the position of journalists, for the abovementioned reasons.

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?

Answer => **No opinion**

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?*

Answer => **No opinion**

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

Answer => **Strong negative impact**

Researchers and establishments of higher education and research are nowadays in a tight situation due to the ever-increasing costs of subscriptions to scientific e-journal, which are driven by publishers that enjoy an oligarchic position. As explained before, introducing a new layer of rights could lead to publishers demanding additional revenue and increasing prices even more.

Additionally, new neighbouring rights for publishers may have negative effects for education and research purposes, as well as for innovative practices such as Text and Data Mining. Currently, groups of researchers and libraries are campaigning to request that the EU protects this kind of practices by introducing a new exception to copyright and database law. Creating a new layer of rights to comply to would further complicate the use and development of Text and Data Mining within the Union.

This new neighbouring right for the benefit of publishers would without a doubt prove even more constraining than existing database law. Indeed, it would be easier for publishers to obtain it, considering that they wouldn't need to provide further investment in order to set up a database. Furthermore, while current database law applies to the structure and some methods for content extraction, the new neighbouring right would directly touch upon the content. Hence, it would be systematically enforceable against text mining practices.

Finally, considering researchers as authors of their own, one could fear that establishing a neighbouring right for publishers would extremely limit or hinder their options to put their articles and other scientific content in open archives with the intent to encourage Open Access to their results. This aspect would contradict the promotion of Open Access that the European Commission introduced in the Horizon 2020 programme.

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

Answer => **Strong negative impact**

Press material gathers content that lends itself particularly well to text mining practices used by researchers. Introducing a new neighbouring right targeting press publishers in particular, would have even more damaging consequences for research, making these contents harder to exploit, for no particular reason.

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)?*

Answer => **Strong negative impact**

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)?

Answer => **Strong negative impact**

Creating a neighbouring right on press content would directly affect online service providers such as search engines, monitoring services, etc. As explained above, the most powerful actors in these sectors such as Google (with Google News) have reached a dominant position so that they are even able to put pressure on press publishers by removing their services. This was the case for Belgium, Spain or Germany, where publishers have tried to enforce their neighbouring right without good results, showing that a player like Google is unlikely to be affected by a new layer of rights. However, smaller actors that do not enjoy a dominant position in the market will be touched directly by this neighbouring right for publishers, and especially those that seek to promote a business model that respects users' rights and will see their capacity to innovate restrained. Hence, a neighbouring right for publishers would indirectly hamper the appearance of European alternatives to Google and the like, which would in turn further reinforce their dominant position.

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

Answer => **Strong negative impact**

Introducing neighbouring rights in Spain and Germany has shown that these measures could have significant negative side effects on online practices. In these countries, such measures apply to practices such as content indexation, hyperlinks or quotation of excerpts. New neighbouring rights for publishers would help weaken or jeopardise such practices, which could actually be considered "the building blocks" of the functioning of the Internet. Hindering the use of hyperlinks or quotations would be a restriction of the freedom to access information or of the freedom of expression.

Luckily, in last years, the European Court of Justice (ECJ) has helped to clarify the relationship between such practices and copyright. The Court has for example ruled that setting an hyperlink towards legally uploaded copyrighted content is not a violation of copyright¹ It has also ruled that "caching" (storing information in the cached memory of browsers) and browsing itself are covered by the exception on transient copying as laid down in Directive 2001/09 on Copyright, and as such do not require *a priori* authorisation².

Modifying the existing European legislation to introduce a neighbouring right for publishers is likely to question the legal balance clarified by the ECJ, and in particular put into question the exercise of fundamental freedoms in the digital space.

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

Answer => **Strong negative impact**

Press contents are specially important in relation to the right to access information and to the freedom of speech and expression. As already explained, a new neighbouring right for publishers may hinder the freedom to set hyperlinks or quotations to copyrighted content. As such, this measure is likely to be especially negative for final users.

1 See the Court's [Svensson judgement](#), 2014.

2 See the [Meltwater judgement](#). 2014.

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?

Answer => **No opinion**

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

Answer => **Yes**

The issue of rebalancing the value chain should not be tackled through neighbouring rights. This is the wrong track, because it will be irrelevant for dominant players, while gravely hindering the possibilities for alternative (more socially-oriented) actors to develop. It will weaken the position of authors *vis-à-vis* publishers and will negatively impact the exercise of freedoms in the digital space.

In order to face potentially problematic players such as Google and other similar platforms, getting to the root of the issue would be more efficient. Tackling the causes of their dominant position could better be done through competition law, fiscal reform, or better data protection rules.

The fact that the Commission has launched a new consultation on the possibility to create a new neighbouring right for publishers is actually very surprising, considering that this issue was already examined by the Parliament at the vote on the Reda Report. MEPs had clearly rejected the idea of a new tax on hyperlinks. The final text actually asked the Commission to work on exceptions to copyright instead, in order to balance out the situation to the benefit of current practices, of educational and research purposes, the availability of e-books in libraries, or Text and Data Mining.

The Commission should have mainly reacted on these issues instead of launching a consultation on neighbouring rights for publishers, that does not answer either the demands of most European citizens, or the real need to balance out the sharing of the value.

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

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?

Answer => **Yes, often**

There is currently widespread insecurity for internet users when they want to post pictures that feature architectural buildings or monuments under copyright and located in the public space.

In France, case law has set a sort of exception for accessory portrayal to the main subject of the picture, which enables posting pictures online on the condition that copyrighted work is not the

main targeted subject on it. In theory, this would apply to a picture featuring a person posing in front of a copyrighted monument, or to the picture of a public square where one of the many buildings around is copyrighted. In practice however, it would be difficult to establish with legal certainty the thin line between accessory and principal portrayal of a copyrighted work. This sort of mechanism does not effectively ensure legal security for users.

Additionally, it would be far too complex for the average user to be aware of copyright dispositions on buildings or monuments located in the public space. Indeed, current practices actually facilitate and promote online sharing of pictures, so citizens would be supposed to know when architectural works fall or not into the public domain, which would for example require to know the author's exact date of death. Another possible implication would require to be able to judge at what point a building is original enough to be under copyright.

These questions are too complex to force users to take them into account every single time they share a picture on the Internet.

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?*

Answer => **Yes, often**

One of the main issues to be addressed is the display of pictures of copyrighted buildings or monuments on websites such as Wikipedia, which enjoys a strong visibility and could be considered as an important window for the promotion of European culture.

In countries like France, which do not implement freedom of panorama, internet users cannot freely share their pictures to contribute to Wikimedia Commons. Wikimedia regularly launches contests (e.g. Wiki Love Monuments) to encourage users to contribute to the encyclopedia with pictures of monuments. In France, these pictures can only feature buildings or sculptures in the public domain, which results in an incomplete of the country's landscape.

Even in countries that do accept freedom of panorama, sharing pictures in Wikipedia can be hampered. Recently, the Swedish Supreme Court has ruled that Wikipedia should pay licence-fees for displaying pictures featuring copyrighted buildings. It further ruled that the circulation of these images over the Internet infringed copyright, even if Wikipedia itself does not use the content it hosts for commercial purposes. However, in that same country, selling postcards with images of the same copyrighted monuments is allowed under freedom of panorama. This logic discriminates between online and offline uses, which results in punishing the Internet users' sharing and contributions.

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?*

Answer => **Not relevant**

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?*

Answer => **No**

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?

Answer => **Strong negative impact**

Currently, Directive 2001/29 on Copyright allows Member States to include freedom of panorama in their national legislation, without specifying whether it is limited to non-commercial purposes or not. In practice however, more than half of the EU countries have chosen to limit the exception to non-commercial purposes. Establishing an exception only for non-commercial purposes would hence be a step-back from current European Law.

Moreover, an exception only for non-commercial purposes would prove very complex to implement, especially for online circulation of pictures. As such, it could be very difficult to differentiate between commercial and non-commercial purposes on the Internet. Would the publication of a picture in a blog that gets revenues from ads be considered as a commercial purpose, especially if the revenue is very small? Would a company that uses pictures on its website, without selling those pictures, be considered a commercial purpose, only based on the fact that it is an economic player? What if an individual posts a picture on a social network such as Facebook or Twitter? Is it a commercial purpose, considering that this kind of platforms do enjoy advertising revenues from exploiting the content posted by their users?

These incertainties are too complex to solve, and in practice, an exception limited to non-commercial purposes would be too random to implement efficiently.

Additionally, sticking to non-commercial purposes has another negative side effect. Indeed, it stops individuals from sharing pictures of copyrighted buildings or monuments under a free licence that allows commercial use. This prevents the publishing of pictures on websites like Wikipedia, that only accepts content under a free licence.

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?

Answer => **Strong positive impact**

For the reasons explained above, only an exception for both commercial and non-commercial purposes would be genuinely applicable and operational on individuals, especially for publishing pictures on the Internet. It is also the only way to allow authors to share pictures under a free licence, which automatically allows commercial purposes.

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?

Answer => **Yes**

It is essential to consider that public spaces may be subject to extensive uses. Imposing exclusive rights to copyrighted buildings or monuments would result in a kind of "privatisation" of the public space. There are many copyrighted buildings in some urban centres, which means that most of the environment is copyrighted for citizens there. Nowadays, individuals have at hand many devices to take pictures and share them online, so imposing limits based on copyrighted works permanently

located in the public space gravely hinders freedom of expression and has a strong negative influence on the environment where individuals evolve.