Briefing

LEGAL AFFAIRS

European Parliament

The proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16)

Strengthening the Press Through Copyright

KEY FINDINGS

- **The Publisher's Right as proposed under Article 11 of the proposed directive is without alternatives and adequate to secure a free press in a digitalised world.**
- **Press publishers' works are increasingly exploited by aggregators which reduces the scope of quality press that is made freely available to consumers.**
- **Only a new right that enables publishers to prohibit the commercial use of extracts of its publications adequately addresses the current market failures.**
- **A mere rebuttable presumption that a press publisher is entitled to enforce authors' copyright does is not helpful.**
- **The clearly defined scope and the exceptions to the Publisher's Right adequately protect the legitimate interests of consumers.**
- **The proposed Article 14 and 16 of the proposed directive appear unnecessary and disproportionate.**

1. INTRODUCTION

This briefing note demonstrates that the new, related right for press publishers provided in Article 11 of the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market[1] ('**Proposed Directive**', see section 2 below) is required to address pressing market failures in the area of the online press (see section 3 below). The note also outlines why the proposed Article 11 is proportionate and the criticism raised against it by various stakeholders is not compelling (see section 4 below). Finally, the note will touch upon the merits of the transparency obligations under Article 14 and the dispute resolution mechanisms envisaged in Articles 16 of the Proposed Directive (see section 5 below). The note is based on a more comprehensive study entitled `*EU Copyright Reform: The Case for a New Publisher's Right*´ which will be published in the upcoming issue of the journal *Intellectual Property Quarterly* and is already available at SSRN[2].

2. HOW THE PUBLISHER'S RIGHT WORKS

Pursuant to Article 11 (1) of the Proposed Directive '*Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications'*. Article 2 of the mentioned InfoSoc-Directive 2001/29/EC[3] provides for an '*exclusive right to authorize or prohibit direct or*

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indirect, temporary or permanent reproduction by any means and in any form, in whole or in part' (**'Reproduction Right**'). Article 3(2) of the Proposed Directive caters for an '*exclusive right to authorize or prohibit any communication to the public of [..] works'* (**'Right of Communication to the Public'**).

Currently, the InfoSoc-Directive affords these two rights, *inter alia*, to phonogram producers for their phonograms, to the producers of the first fixations of films for their films and to broadcasting organizations for fixations of their broadcasts. Each of these producers operate as media disseminators that produce '*fixations'* of works which may contain material that is protected by copyright itself, for instance the script of a film or the melody of a song. The same applies to the fixation of press publications which contain copyright-protected literary works and images.

In line with the existing rights for the other media disseminators, the '*press publication'*, which shall be protected, is defined as '*a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitute an individual item within a periodical or regularly-updated publication under a single title*'. In addition, this publication must have '*the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider*' (Article 2 (4) of the Proposed Directive).

According to Article 11 (2) of the Proposed Directive, the Publisher's Right shall not affect any rights already provided to authors and other right holders. Neither may the Publisher's Right be invoked against these right holders. Article 11 (3) of the Proposed Directive clarifies that all exceptions and limitations to copyright under Article 5 to 8 of the InfoSoc-Directive and under the Orphan Works Directive[4] shall also apply to the publisher's right. Pursuant to Article 11 (4) of the Proposed Directive, the Publisher's Right shall expire 20 years after the publication of the press publication.

3. WHY A PUBLISHER'S RIGHT IS REQUIRED TO ADDRESS MARKET FAILURES THAT THREATEN THE PRESS

The Publisher's Right pursuant to Article 11 of the Proposed Directive is justified and adequate against its economic background and legal environment.

Current Market Failure: The Publisher's Right Is Economically Justified

First of all, the Publishers' Right addresses a substantial market failure: Today, new technical opportunities for the mass exploitation of press publications go hand in hand with strong economic incentives for companies to take advantage of these technical opportunities, and add up to detrimental effects for press publishers in Europe:

Press publications can be replicated and distributed globally through various digital platforms **in the blink of an eye**. Specialised aggregators can automatically scrape, store, re-combine and display full or parts of online press publications instantly. Printed press products can be scanned and distributed as PDFs.

There are strong economic incentives to mass-exploit press publications. It is the standard business model of the internet economy to publish attractive content on one's website in order to attract internet users for advertising purposes or subscription fees. More content attracts more users, and more users mean higher advertising revenues or even subscription fees.[5] These indirect network effects are inherent in multi-sided media platforms.[6] The easiest way to gather attractive content, of course, is to take it from other websites or to encourage one's users to upload third-party content in order to display it on one's own site. There are numerous examples of platforms based on the aggregation of (third party) press content[7]. Typically, these aggregators present the latest news on their homepages with headlines and a text extract, either based on a default or personalised selection of topics. A click on any of the news extracts makes even more content visible. Users

are then invited to comment, review or to otherwise interact with the website. Thus, in contrast to 'passive mediators', many platforms actively select, rank and classify news publications according to their own methods and combine them to create new, tailored products.[8] Many aggregators also deliver news results automatically by e-mail or SMS. This shows that the business model of such platforms aims to use third-party press publications to build up their own customer relationships in order to generate revenues and to ultimately keep users away from the source.

The effects of this exploitation are detrimental to press publishers. According to the Commission's Impact Assessment, today 57 % of online users access newspapers through social media, news aggregators and search engines.[9] Moreover, 47 % of these users only '*browse and read news extracts on these websites without clicking on links to access the whole article in the newspaper page'* [10]. This figure is in line with previous studies. For instance, a study on Google News found that '*a full 44 percent of visitors to Google News only scan headlines without accessing newspaper's individual sites*'[11], thereby '*taking a significant share of traffic away'[12].* The studies suggest that news snippets used by social networks, news aggregators, and search engines suffice to satisfy the primary information demand of nearly half of internet users. This is based on the peculiarities of the consumption of news: news readers are not searching for something (long) to read; they do not want to miss anything relevant.[13] While press publishers address this user preference by investing in meaningful headlines and comprehensive summaries, platforms exploit this investment by themselves presenting its outcome to their users.

Lack of Legal Protection: The Publisher's Right Fills a Regulatory Gap

Despite their exposure to major economic exploitation, press publications are far from being sufficiently protected by existing copyright laws. While rights derived from authors are largely inapt to effectively fight third party exploitation, existing rights originally vested in publishers are not sufficient to address even the most common forms of exploitation.

In practice, rights derived from authors do not help to handle cases of (mass) exploitation. Firstly, many authors only grant non-exclusive licenses which do not enable press publishers to fight exploitation by third parties. Secondly, even where exclusive rights are assigned, publishers have to demonstrate a comprehensive chain of rights for a large number of articles by a vast number of authors for even more cases of infringement; an unmanageable task. Lastly, copyright only protects (parts of) press publications which contain 'original' elements, i.e. '*elements which are the expression of the intellectual creation of the author of the work'*.[14] Therefore, copyright infringements have to be assessed on a case-by-case basis, creating an unsurmountable barrier when it comes to platforms that automatically generate thousands of text extracts with varying sizes and content.

The protection granted by the *sui generis* database right to those press publications which fulfil its conditions is from the outset **not sufficient to address the identified market failure**. The database right generally requires the use of a substantial part of a database or, where only insubstantial parts are used, that the use is repeated and the systematic character is equivalent to the use of a substantial part.[15] For many platforms, this will not be case. In any event, considering that the specifics of every single case of a use of content have to be taken into account and that publishers have no insights into the technicalities of the platforms using their content, addressing the mass exploitation of their publications on the basis of the sui generis database right would be a very tough if not impossible task. As far as can be seen, no publisher has succeeded with such a case.

In contrast, the InfoSoc-Directive 2001/29/EC grants phonogram producers, producers of the first fixations of films and broadcasting organizations a related right for their (mere) first technical fixation of a phonogram, a film or a broadcast, irrespective of any specific minimum investment. Considering the similarities between press publishers, phonogram and film producers as well as broadcasters - both as regards the dissemination of their respective works and the technical means by which their contributions can be taken advantage of by

free-riders - **there is no further justification for denying press publishers the related copyright granted to phonogram producers, film producers and broadcasting organizations** regarding the protection of their works.

Protection of the Publisher's Investments: The Publisher's Right Adequately Addresses the Market Failure

The Publisher's Right effectively addresses the market failure outlined above.

The Publisher's Right protects parts of press publications and hence provides publishers with an efficient tool against aggregators. The main reason the existing copyright of authors is insufficient for the protection of press publications against mass copying is the high threshold for demonstrating an infringement of an author's right. A press publication, however, is defined as the 'fixation' of defined elements in Article 2 (4) of the Proposed Directive. To demonstrate a 'reproduction' of a related right such as the Publisher's Right it suffices to show that a part of this fixation has been used, irrespective of any originality of this part. Individual articles and snippets, i.e. short text extracts, may contain such parts of a fixation. This makes it much easier for a press publisher to act against any automated and mass copying of extracts of its publications. This is the key ratio of the proposed right.

The Publisher's Right is an indispensable prerequisite for effectively fighting mass exploitation of press publications in the digital economy. It ensures that press publishers regain the control over the use of their products which is an essential requirement for the marketing of press publications. Instead of being dependent on a proven chain of derived author's rights, publishers can now themselves negotiate with platforms exploiting their content.

Besides, structure and scope of the Publisher's Right are in line with the related rights for other media disseminators under Article 2 and 3 of the InfoSoc Directive. None of these related rights requires a specific minimum investment. The protection is granted for certain activities, namely for the mere first technical fixation of a phonogram, a film or a broadcast, irrespective of the quality, relevance or originality of these activities. The same is the case for press publishers. Equally, the scope of the proposed related right for press publishers is in line with that of other related rights.

4. WHY THE PROPOSED PUBLISHER'S RIGHT IS PROPORTIONATE: SOME COMMENTS ON CRITICISM RAISED AGAINST THE RIGHT

The proposed Publisher's Right strikes a fair balance between the legitimate interests of all parties involved and therefore appears proportionate. This section deals with some of the criticism raised against the proposed right.

Decline in Press Revenues Is Connected to Mass Exploitation of Press Publications

It has been criticised that the decline in newspaper revenues does not have anything to to with the activities of news aggregators or search engines.[16]

However, publicly available data explicitly put forward in the European Commission's impact assessment **demonstrate that today 47 % of the users accessing news online only '*browse and read news extracts on these websites without clicking on links to access the whole article*** *in the newspaper page'* [17]. Other studies confirm this figure. For instance, a study on Google News found that '*a full 44 percent of visitors to Google News only scan headlines without accessing newspaper's individual sites*'[18], thereby '*taking a significant share of traffic away'*[19]. This means that around half of the readers of online press publications are withheld from publishers. By consequence, publishers cannot reach these users with advertisements displayed on their websites or to build up their own client relationships.

The Publisher's Right Does Not Lead to Inadequate Layering of Rights

Opponents of the Publisher's Right criticise that the Publishers Right would lead to a layering of rights. That is because, it is argued, a press publication would be at the same time subject to the journalists' copyright, the *sui generis* database right and the Publisher's Right'.[20]

This accumulation of rights is, however, **nothing unusual.** The same applies to films and phonograms which are also subject to several rights, without this affecting the right holders' positions. The author's copyright and the Publisher's Right have different subject matters and points of reference. They are complementary, not rivalling.

Definition of Press Publication Is Sufficiently Clear

Critics have argued that the definition of a 'press publication' pursuant to Article 2 (4) of the Proposed Directive is not sufficiently clear and that this would lead to legal uncertainty.[21]

However, this criticism ignores that **the current definition of 'press publication' contains crucial criteria to limit the protection to such publications that truly merit special protection**. The definition reflects the substantial economic, organisational and editorial efforts of press publishers which are necessary to create high-quality publications. In particular, the following essential elements of the definition are designed to acknowledge the corresponding investments that are unique to press publications and to limit the scope of the publishers' right to those publications which truly merit protection:

- **'Collection of literary works of a journalistic nature'**: A journalistic work is the very basis for the protection since a network of trained employed or freelance journalists is an essential precondition for quality press. Because there has to be a 'collection' of literary works, it is clear that individual articles cannot constitute a press publication.
- **'Within a periodical or regularly-updated publication'**: In contrast to most blogs or individual articles, the press pursues a long-term information mandate through repeated publications.
- **'Under a single title'**: The title of a press publication is the central element for the creation of trust in the information provided: users rely on the trustworthiness of information published under a certain brand. The set-up of such a brand requires continuing investments. Conversely, anonymous articles or publications of a natural person (under his/her own name) are not covered.
- **'Initiative, editorial responsibility'**: The editorial responsibility of press publishers distinguishes reliable information from unreliable sources. Consequently, this responsibility requires significant investments in the verification of information and the editing of articles. The corresponding legal liability for any false information ensures the maintenance of the necessary high standards.

The terminology used in the definition is self-explanatory and sufficiently clear, hence avoiding legal uncertainty. Courts will have little difficulty in distinguishing publications that fulfil all conditions of a 'press publication' from those that do not. It is not unusual for a statute to leave some room for interpretation. On the contrary, it is essential for a future-proof law to be open to new (technical or social) developments which cannot be foreseen at the time of its implementation, but which need to fall into its scope.

Publisher's Right Will Not Hamper Innovation

Some fear that the Publisher's Right may reduce incentives to innovate, because the right could increase the entry costs for new market entrants.[22]

However, **it is difficult to see how the new right could hinder innovation.** Already today, press publications are not free of rights, but may be covered by the intellectual property rights of journalists, photographers, editors or a publisher. Hence, prior to using any press

publications, any start-up and other new entrant would have to assess and comply with these rights regardless. This process is only hampered by the fact that the level of protection of press publications varies throughout Europe. Harmonised copyright protection of press publications would increase legal certainty in this respect to the benefit of everyone, including start-ups. At the same time, the Publisher's Right will create new opportunities for innovation within a revived press sector. Conversely, there is no legitimate reason to legally safeguard and shield actual or potential innovations that merely seek to make a business out of free-riding off publishers' investments. Innovations for which there is a real consumer demand will find their way to market despite the Publisher's Right. The highly innovative areas of film and music platforms where a related right already exists is an indication of that.

The Publisher's Right is neither designed to restrain nor capable of controlling the flow of information. Any published ideas and facts remain unprotected. Only the way the information is presented falls under the Publisher's Right. Press publishers vigorously defend the right to freedom of expression, as enshrined in Article 10 (1) ECHR. The Publisher's Right does not restrict anyone's freedom of expression. Without the Publisher's Right, press publishers would be forced to: *i)* invest less in quality content, *ii)* make less content available online (focusing on print), and *iii)* hide all digital content behind paywalls and subscription models. Each of these alternatives would interfere with freedom of expression and consumers' access to information more significantly than the introduction of the Publisher's Right.

Presumption of Representation Would Not Resolve the Market Failure

As an alternative to a Publisher's Right, it has been proposed to introduce a mere presumption of representation. instead of a full ancillary right for press publishers.[23] Press publishers would then be able to bring proceedings in their own name before courts – however, within the limits of the copyright held by the authors of the works contained in their press publication.

While a presumption of ownership would confer the burden of proof on the respective defendant, **such procedural reform still would not resolve the market failure described above**. Firstly, it would create a false and easily rebuttable presumption for the works of freelancers, who typically do not transfer exclusive rights or the right to bring claims on their behalf to press publishers. Secondly, and more importantly, the authors' rights also have significant, substantial shortcomings in addressing the identified market failure. For example, the press publisher, in spite of such a presumption, would have to demonstrate on a case-by-case basis that every part of a press publication used in the case at issue meets the high originality threshold of copyright protection. This would still be an unsurmountable barrier to bring effective claims.

Protection of Snippets Is Necessary

Opponents of the Publisher's Right allege that the inclusion of snippets into the scope of the right would go beyond the protection granted by other rights and would endanger the freedom of expression.[24]

First, however, it is crucial to note that **if the Publisher's Right did not cover snippets, it would add almost nothing to the current protection of press publications**. The main reason why the existing copyright of authors is insufficient for the protection of press publications against mass copying is the high threshold for demonstrating an infringement of an author's right. To show that an article has been reproduced 'in part', the publisher must prove that the extract taken by the aggregator covers a part of the article that itself is 'original'. As discussed, this creates an insurmountable burden for publishers who would have to demonstrate for hundreds or thousands of automatically generated text extracts that each of them contains an 'original' part of the original article.

Second, **with view to the scope of protection of other related rights it is only consequent if not inevitable that the Publisher's Right includes snippets**. Pursuant to Recital 34 of the Proposed Directive, *'the rights granted to the publishers* […] *should have the same scope as the rights of reproduction and making available to the public provided for in*

Directive 2001/29/EC'. This recital refers to the scope of the right of reproduction for other related rights (that are based on a 'fixation') in Article 2 lit. (b)-(e) InfoSoc-Directive 2001/29/EC. Related rights for phonograms and films, however, already cover the reproduction of even the smallest part. While the case law of the European Court of Justice offers little guidance in this regard, the German Federal Supreme Court (*Bundesgerichtshof*) has already clarified that the threshold for the reproduction 'in part' of a subject matter of a related right (in that case of a phonogram producer) may be significantly lower than the threshold for the reproduction 'in part' of a copyright-protected work (in that case for a music composer)[25]. The reason for this is that – other than a copyright – a related right protects the economic, organizational and technical effort for the fixation of works, tones, films, etc.[26] The underlying effort is, however, made for the whole subject matter (e.g. a phonogram) and there is no part of the subject matter, no matter how small, which does not relate to a part of this effort and which does not benefit from the protection.[27] The same is true for the Publisher's Right: The editorial responsibility required under the definition in Article 2 (49 of the Proposed Directive goes hand in hand with the substantial organisational and financial efforts required to ensure a thorough verification of any published content. As even short text extracts can trigger legal liability for a publisher, its editorial responsibility relates to all parts of a press publication. Therefore, it is appropriate that the Publisher's Right covers all parts of a press publication that are subject to the publishers' editorial responsibility and corresponding liability, including any snippets.

Third, **the inclusion of snippets would not threaten the freedom of expression**. According to Article 11 (3) of the Proposed Directive, all existing exceptions and limitations of the InfoSoc-Directive (and the new ones under the Proposed Directive) would also apply to the Publisher's Right. Hence, the use of press publications for quotation purposes such as for criticism or review will remain permissible. Besides, the Publisher's Right protects rather than threatens the freedom of expression (see above).

Hyperlinks Are Not at Risk

It has been alleged that the Publisher's Right may threaten the freedom of hyperlinking.[28]

However, Recital 33 of the Proposed Directive sufficiently clarifies that the '*protection does not extend to acts of hyperlinking which do not constitute communication to the public*'. In several decisions, the Court of Justice has outlined that in principle a hyperlink does not constitute a 'communication to the public' within the meaning of Directive 2001/29/EC. In addition, the court laid out in which (rare) scenarios a hyperlink may constitute such communication. Further clarifications on this point are expected.

Moreover, from a legal point of view, it is difficult to find hyperlinks that could ever fall under the proposed right. Sharing news posts in social media, for example, would not be hindered. Firstly, this is because any type of hyperlinking, including framing, is explicitly precluded from the Publisher's Right (Recital 33 of the Proposed Directive). Secondly, it is typically the press publisher that enables the 'sharing', namely through the corresponding sharing buttons on its website (e.g. from Facebook, Twitter and Google+). By doing so, press publishers provide at least implied consent to the use of their works by consumers via 'sharing'. Thus, even if 'sharing' was considered as a communication to the public, it would be legal due to the publisher's consent.

Spanish and German Publisher's Rights Have Not Failed

Some point to the Spanish and German versions of a publisher's right and claim that these rights have failed.[29]

The German legislation has succeeded in preventing the further rise and expansion of news aggregators. The landscape for news aggregators would look much different today without the right. It remains to be seen whether in addition to blocking harmful business models, also significant revenue streams will follow.

The enforcement of a new right always takes time as disputes have to go through the various judicial authorities and instances. To be sure, while some licence agreements with aggregators have been concluded, thus far, the German legislation has not been able to promote effective licensing agreements with Google. One crucial disadvantage in the negotiations was the fact that the collecting society, VG Media, did not represent all German publishers. Google took advantage of this situation by announcing that it would render the publishing content of companies that insist on their right less visible as compared to content of rival publishers that waive their right. In contrast to other commercial users, Google refuses to enter into licensing agreements. By doing so, Google has succeeded in pressuring publishers who afraid of becoming unfindable online into explicitly waiving any rights to compensation for Google's use of their content. In light of Google's de facto monopoly on the search market, the individual publishers saw no alternative but to consent in order to remain findable. As a result, Germany's related right is currently not as effective as has been hoped by the legislator when it comes to the largest search engine. This may not, however, be construed as a conceptional weakness of a Publisher's Right which could not be overcome. The situation is merely a result of the exceptional bargaining power that platforms which act as gatekeepers to a certain audience have in playing off content providers against each other that are dependent on reaching this audience. It is primarily an issue of market power, less so of copyright law. In any case, competition law alone cannot resolve these issues; protection of press publications is also indispensable for dealing with dominant platforms.

5. FAIR RENUMERATION: MERITS OF TRANSPARENCY OBLIGATIONS AND DISPUTE RESOLUTION MECHANISMS (ARTICLE 14 AND 16)

Articles 14 to 16 aim at "*rebalancing contractual relationships between creators and their contractual counterparts while respecting contractual freedom*"[30].

While the 'best-selling' clause in Article 15 appears appropriate to achieve such target, it is questionable whether the same is true for the transparency obligations under Article 14 and the introduction of an Alternative Dispute Resolution in Article 16.

In several respects, Article 14 appears to go further than what is necessary to secure authors' bargaining positions. In order to determine a claim for remuneration, an author may need to know the ultimate extent of the use of his or her works. However, instead of granting an author a claim to such information, Article 14 amounts to a consecutive reporting obligation of the licensee irrespective of any corresponding request of an author, let alone a justified claim for remuneration. Licensees will have to provide "*timely, adequate and sufficient information [..] as regards modes of exploitation, revenues generated and remuneration due*" "*on a regular basis*". Neither is there any limit regarding the confidentiality and the costs of accumulating such information.

In contrast, under the corresponding German transparency provision, "*the author may [only] once a year request [..] information in respect of the extent of the use of the work [..] on the basis of information which is generally available in the ordinary course of business activities*." (Sec. 32b Urheberrechtsgesetz).

Article 14 does not appear to sufficiently differentiate between the types of exploitation and the respective sector. While regular reporting obligations may be suitable for some types of licensing arrangements in certain sectors, they are impracticable and too costly in sectors like press publishing. The Commission's Impact Assessment rightly points out that here "reporting on all works of all creators may not be proportionate considering the large number of works used in their daily output". Considering the thousands of authors contributing thousands of images and articles to press publications every day, any obligation to report to all authors about the extent of all their works on a regular basis, i.e. without a particular occasion, is disproportionate. Instead of firm reporting obligations, it should be up to the contractual freedoms of authors and privately financed users of works to determine how the key factors for an adequate remuneration can be monitored and assessed.

The disproportionality of the reporting obligation under Article 14 (1) is particularly striking when considering the exception under Article 14 (2). According to Article 14 (2) even where the administrative burden resulting from a transparency obligation "*would be disproportionate in view of the revenues generated by the exploitation of the work*", Member States may only "*adjust*" – but not preclude – such transparency obligations and only to the extent "*that the obligation remains effective and ensures an appropriate level of transparency*". In other words, Article 14 (2) imposes a reporting obligation even when the costs of providing transparency exceed the revenues generated by the exploitation of the respective work.

The reporting obligation under Article 14 creates transaction costs to the detriment of less established authors. Any costs for implementing the transparency obligations under Article 14 will unnecessarily increase the costs of engaging into licensing agreement with copyright holders. This in turn will reduce incentives to enter into licensing agreements in the first place. This will be felt, in particular, where there is a risk that due to Article 14 (2) any transparency obligation may cost more than the revenue generated by the exploitation. Thus, Article 14 discourages companies from entering into smaller sized licensing contracts, to the detriment of less established authors. The costs can be entirely disproportionate and a threat to any business model where a large number of works is used on a daily basis.

Against this background, if Article 14 is not scrapped entirely, it will be paramount that at least the exception of Article 14 (3) is upheld. Article 14 (3) allows Member States to decide that Article 14 (1) does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance. It could be clarified in the Recitals that contributions to journals and newspapers are such works.

Regarding the Alternative Dispute Resolution (ADR) proposed in Article 16, it should be kept in mind that authors that are granted a remuneration for their works are not consumers but entrepreneurs active in a B2B environment. While the increasing activity of the EU institutions in promoting ADR in relation to consumer disputes are understandable due to consumers' reluctance to go to courts[31], it is questionable whether there is also a need for ADR in copyright-contract disputes.

Moreover, it is difficult to see the legal basis for an intervention at EU level as the Internal Market does not appear to be affected. There is no evidence that the availability of ADR in some Member State or the lack of it in others is in any way affecting or likely to affect the choice of who to enter copyright contracts with and where. In fact, due to the territoriality of copyright protection it is very unlikely that any ADR mechanism could have such effect. Copyright-contract disputes have been dealt with by courts and tribunals for years throughout the EU without any signs of a shortcoming. Hence, Article 16 would appear to only increase the procedural complexity of copyright enforcement without providing additional substantial tools to those affected.

[1] COM (2016) 593 final
[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081733
[3] 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 ('**InfoSoc-Directive**'), OJ L 167, 22 June 2001, p. 10.
[4] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works ('**Orphan Works Directive'**), OJ L 299/5, 27 October 2012.
[5] See Rosenberg, J., Google, Inc., Inside the Black Box Technology and Innovation at Google, 2008, p. 4: 'Users go where the information is, so people bring more information to us. Advertisers go where the users are, so we get more advertisers.'
[6] Evans, D., 'The Antitrust Economics of Multi-Sided Platform Markets', Yale Journal on Regulation, 2003, pp. 325, 338.
[7] See a list in Chowdhury, S. / Landoni, M., 'News aggregator services: user expectations and experience', Online Information Review, Vol. 30, No 2, p. 100.
[8] See the judgment of the Brussels Court of Appeal of 5 May 2011, Google v. Copiepresse, R.G. 2007 AR 173, paragraphs 28, 32, 55: 'With Google News, Google does not restrict itself to publishing references that solely allow Internet users to gain access to publishers' websites. [...] Google News does not restrict itself to the placement of hyperlinks; rather, it reproduces significant sections of the articles of the publishers. [...] It selects the information, classifies it in a sequence and according to its own method, in particular by selecting one article in disfavour of another, printing it in bold, duplicating a section, and sometimes changing its content. Thus, Google is not a 'passive mediator''.
[9] Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules of 14 September 2016, p. 157.
[10] Commission, ibid.
[11] Outsell, Annual News Users' Report, 2009, quoted after Wauters, R., 'Report: 44% Of Google News Visitors Scan Headlines, Don't Click Through', TechCrunch, 19 January 2010, https://techcrunch.com/2010/01/19/outsell-google-news/.
[12] Outsell, ibid.
[13] See the result of the eye-tracking study of the Stanford-Poynter Institute.
[14]ECJ 16.7. 2009, Infopaq, C-5/08, ECLI:EU:C:2009:465, paragraph 39.
[15] ECJ 9.11. 2004, Fixtures Marketing I, C-338/02, ECLI:EU:C:2004:696, paragraph 37.
[16] Cf. by way of example Bently, L. / Kretschmer, M., 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive', p. 18.
[17] Commission, Footnote 9.
[18] Outsell, Footnote 11.
[19] Outsell, Footnote 11.
[20] Cf. by way of example Bently, L. / Kretschmer, M., p. 20.
[21] Cf. by way of example Bently, L. / Kretschmer, M., p. 21.
[22] Cf. by way of example Bently, L. / Kretschmer, M., p. 35.
[23] Cf. in particular Amendment 52 proposed by the Committee on Legal Affairs, Draft Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market.
[24] Cf. by way of example Bently, L. / Kretschmer, M., p. 40.
[25] Judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of 20 November 2008, Metall auf Metall I, I ZR 112/06.
[26] German Federal Court of Justice.
[27] German Federal Court of Justice.
[28] Cf. by way of example Bently, L. / Kretschmer, M., p. 42.
[29] Cf. by way of example Bently, L. / Kretschmer, M., p. 33, 34.
[30] Proposed Directive, Explanatory Memorandum, p. 6.
[31] See 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115/31, 17 April 1998; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Direcive 2009/22/EC, OJ L 165/63, 18 June 2013.

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