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Dear Baroness Neville-Rolfe, Dear Ms Lynch,

Call For Views: Modernising the European Copyright Framework

We, the undersigned group of thirty seven professors and leading scholars of Intellectual Property, Information Law and Digital Economy, are responding to the IPO's request for views in relation to the above. Although many of us have comments on various elements in the proposed package, this response is limited to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled '**Protection of press publications concerning digital uses.**'

The proposed right is apparently intended to offer press publishers three benefits: (i) to increase returns on their investments; (ii) to simplify licensing; (iii) to render enforcement easier. The evidence supporting the first proposition, that the new right will increase returns, is speculative, based upon wishful-thinking and is contradicted by experience with similar initiatives in Germany and Spain (which have yielded no licences or payments). As regards (ii) and (iii), the proposal fails to consider alternative strategies to reduce the supposed impediments to licensing and enforcement. As a result, we believe the proposed right is unnecessary, undesirable, would introduce an unacceptable level of uncertainty and be unlikely to achieve anything apart from adding to the complexity and cost of operating in the copyright environment. We elaborate these objections over the following paragraphs, and in an appendix explain the very considerable concerns we have over the definition of 'press publication' in Article 1 of the Proposed Directive.

We hope the UK Government will feel able to oppose the Commission's proposal.

Unnecessary

We understand and are sympathetic to the concerns that have prompted the proposed Article and which are set out in recital 31. We value a plural press and recognise its vital contribution to democracy. Like the Commission, we are concerned by the decline in revenues from advertising and subscription and the failure of many print newspapers to locate profitable business models in the digital environment (*Impact Assessment*, p. 156, p. 160). However, we are surprised by the lack of analysis of the causes of the declines in the period for what data has been gathered (see *Impact Assessment*, Vol 3, pp. 175-6, Annex 13) and find unconvincing the implication that the proposed new right would have made any difference to these figures. In considering these claims, the UKIPO will find much useful material collated by Dr Richard Danbury, as part of an AHRC funded project on copyright and news, at <http://www.civil.law.cam.ac.uk/projects/copyright-and-news-project-2014-16>

Recital 31 of the proposal states ‘In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.’ The *Explanatory Memorandum* (p. 3) and *Impact Assessment* (p. 160) also refer to facilitation of licensing and enforcement. The idea is that the grant of a new right might save press publishers from having to take and keep records of assignments and prove them in enforcement proceedings that are commenced against infringers.

However, if the real problems facing press publishers relate to licensing and enforcement, the best answer is surely to focus on licensing and enforcement rather than to create new rights. More specifically, the goal of simplifying enforcement might be achieved by a much simpler and proportionate strategy: the amendment of Article 5 of the EC Enforcement Directive, to create a presumption that a press publisher is entitled to bring proceedings to enforce the copyright in any article or other item appearing in a journal of which it is the identified publisher. This would be a presumption that a defendant could rebut by showing that the material used was in the public domain or licensed by the author. The Commission nowhere considers this option.

Moreover, it is worth noting that the Commission in its *Impact Assessment* is wrong to assume that European press publishers have no right ‘of their own,’ and thus that it is necessary to locate a solution to remedy different licensing practices in relation to underlying rights (*Impact Assessment*, p. 161). In so doing, the Commission completely overlooks the existence of the database right under Directive 96/9/EC, which already ensures publishers have rights that protect their investments. According to Hugh Jones, Charles

Clark “always referred to the database right which ensued as a rare example of a specific publishers' right.” Although many commentators harbour doubts about the desirability of this right, it seems clear that as a matter of positive law, the Directive gives the maker of a collection of literary or other works, including press publishers, rights including the right to prevent systematic extraction or reutilisation of insubstantial parts (Art 7(5)). There is a single EU definition of the holder of the database right, namely, the ‘maker’, so that it is clear that press publishers are the relevant rightholder of the *sui generis* database right in their publications. Given that one of the alleged advantages of the Proposed press publishers’ right is that it operates at EU level, it is remarkable that the Commission nowhere addresses in what way or for what reason the existing publishers’ right is ineffective to achieve that aim.

Undesirable: Costs Associated with Any New Right

At no point in the *Explanatory Memorandum* or *Impact Assessment* are costs mentioned, but the introduction of any new intellectual property right is accompanied by costs. The most obvious of these are costs to those who wish to exploit material over which multiple rights might exist. These costs are those involved in identifying and negotiating licences from all rightholders (obtaining permission from only some will not suffice). Multiple rights are associated with clogging and opportunistic behaviour (hold outs) – what Michael Heller called ‘the gridlock economy’. Moreover, even were the new right regarded, as the Proposal supposes, as a simplifying measure (simplifying the variations in rules and practices of assigning rights in works and other subject matter contained in press publications), there are nevertheless transaction costs involved in modifying agreements and standard forms to ensure they encompass licences of the new rights. In addition, the Proposal will create costs associated with huge uncertainties, particularly in respect of the field of application, that the right creates. These costs will need to be incurred by the very many operators who have no interest in the right, but fall within the broad definition of press publication (see appendix to this letter), who will need henceforth to amend even open-access licences and Creative Commons licences to permit reuses.

The proposal is that the right lasts for 20 years from publication (*Impact Assessment*, p 162). It appears that the right will apply to press publications already in existence, though the relevant date is not as yet determined: Art 18(2). Although it is difficult to see an incentive-based justification for applying the right to existing ‘press publications’, and it is unexplained why harmonization of a right recognised in one Member state (Germany) where it lasts for 1 year should require a twenty year term, the key point is that such a lengthy duration means the social costs associated with the proposed experiment will be unnecessarily high.

In particular, if enacted but found to be wrong-headed, it may take 20 years before such rights can be eliminated.

Uncertainty of Subject Matter

The definition of the subject matter of the new right is extremely poorly drafted. Details of the doubts and uncertainties associated with the definition are explained in the appendix to this letter. While the definition of 'press publication' would include a print newspaper such as *The Sunday Times*, it seems eminently arguable that the definition would include *The Garden* magazine (a monthly publication of the Royal Horticultural Society), a football fanzine (or match-day programme), an auction catalogue (e.g. from Sotheby's), the *IPKat* blog, the *Cambridge Law Journal*, a multi-edition cases and materials book, a Research Centre website, *Who's Who*, *The Oxford Dictionary of National Biography*, *The Time Out Guide to London Restaurants* or the *Rough Guide to Peru*.

One might ask whether there is any need to, or desire for, or public benefit from granting additional rights to publishers of such collections. Moreover, one might wonder whether this is the 'press' referred to in recital 31 as making a fundamental contribution to public debate. Most importantly, the effect of the breadth of Article 11 is to impose unnecessary transaction costs on those wanting to reproduce and make available items. There will apparently be a need not only to obtain permission from the copyright owner in the item (usually the author) but from the publisher. Often, with blogs and websites, it will not be clear who the publisher is. In contrast to the Commission's *Impact Assessment*, which frequently claims that the new right will 'enhance legal certainty', we suggest that the opposite is the case.

Unlikely to Be Effective

It is unclear how, as currently worded, the proposed right will enhance press publishers' ability to recoup their investments (*Explanatory Memorandum*, p. 3). Article 11 proposes that publishers of press publications benefit from the rights in Articles 2 and 3(2) of Directive 2001/29/EC for the digital use of their press publications. Recital 33 states that 'this protection does not extend to acts of hyperlinking which do not constitute communication to the public.' Article 11(3) indicates that Article 5-8 of Directive 2001/29/EC also apply, and recital 34 indicates that the rights granted to press publishers should have the same scope as the 'rights provided for' in Directive 2001/29/EC, and specifically refers to the exception for quotation.

Given the definitional problems explained in the appendix, it is not all that clear when the two rights (reproduction and making available) will bite. A press publication is 'a fixation of a collection of works...under a single title.' The reproduction right will apply to the reproduction of the totality (eg a whole newspaper) but might also apply to 'a part' (Art 2 Information Society Directive). Prior experience with the typographical arrangement right under UK law suggests that difficulties may surround the identification of what counts as 'a part' of a publication: *NLA v. Marks and Spencer* [2003] 1 AC 551. It is certainly not evident that a part of a 'press publication', understood as a collection, will include any single article or photograph.

Even if the new right were understood to relate to any individual article in a press publication, in general, these are rights that press publishers already possess, either because they employ journalists or because of assignments (or other exclusive grants in those countries that do not allow outright transfers of copyright). Given that the press publishers already possess the rights, a question remains as to how far there is a concrete benefit in creating an additional right. In so far as news aggregators are involved in providing hyperlinks and quotation of sections from particular newspaper articles, the Proposed provision adds nothing of substance new to the armoury of the press publishers.

It is very difficult to take seriously the suggestion that the new right will increase revenues by 'suppressing piracy' (*Impact Assessment*, p. 167, fn 514). No definition of 'piracy' is offered, nor any explanation of the efforts made to suppress piracy using the many existing tools available and why those tools and existing rights might have failed; focusing on why they have fallen short might indicate where sensible reforms should be targeted. Nor has any evidence been offered that reducing piracy would increase sales of newspapers from legitimate sources or increased subscriptions or licensing fees. No verifiable data has been presented to substantiate the purported analysis .

Indeed, data that is available suggests completely the contrary. As is accepted by the Commission (*Impact Assessment*, pp. 159-160) similar initiatives in Germany and Spain have proved ineffective. (See also the contributions of Professors Xalabarder and Gruenberger to a conference on the topic in April 2016 in Amsterdam, at http://resources.law.cam.ac.uk/cipil/documents/potential_legal_responses_complete_transcript.pdf). The *Impact Assessment* (pp. 166-7) suggests that the legal certainty offered by the right being European may confer greater bargaining power, but it is far from clear that that is what doomed the existing German and Spanish initiatives. Nor has any evidence been offered to support the proposition in situations where the transactional rules on ownership are common (as in the United States where ownership of copyright is governed by Federal law. Section 201 of the 1976 Act) there is any less 'piracy' or more effective 'licensing.'

Other Uncertainties

While the proposed right will not add usefully to the rights of the press publishers, it is limited in a manner that adds a level of uncertainty. More specifically, it applies only to ‘digital use’ (Art 11(1)). It needs to be further clarified whether this technology-specific limitation refers to all uses in digital form (which might include for example the OCR and searching activities at issue in the *Infopaq* case) or is limited to ‘online uses’ as recital 31 seems to intend.

A further level of uncertainty is introduced by the carve out from the right relating to the acts of authors. Article 11(2) provides that “Such rights” (meaning presumably the press publishers’ rights) “may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.” As the proposed Directive does not confer on authors any right to exploit works that are incorporated in press publications, presumably this is intended as a saving for rights (and freedoms) retained under national law. This, however, is left obscure because the first sentence of Article 11(2) refers to the “rights provided for in Union law to authors and other rightholders.”

If the author has retained the freedom to republish the work (under contract or as a matter of national law), the new right leaves that freedom unaffected. This leaves open the possibility that a service that wants to offer a digital reproduction online need only seek the permission of the author of the article. However, this possibility is left to the vagaries of national copyright contract law and individual contract. As a result, the Proposal does nothing to remove the uncertainty than exists at present in clearing rights.

Yet another uncertainty concerns how the new right will relate to existing harmonized EU or unharmonized national rights. Absent clarification, the implication is that press publishers will now benefit from the new right in addition to

(a) three sets of harmonized rights (i.e. (i) the copyright and (ii) sui generis rights in newspapers and periodicals as databases; (iii) EU authors’ rights in individual articles, original photographs, etc. that are granted to authors and transferred (either automatically or by contracts)) and

(b) a bunch of national rights (e.g. (i) any national related rights (for example, in non-original photographs) conferred on the publisher or others but transferred (either automatically or by contract); (ii) rights granted under national law to the creators of collective works; and (iii) any national rights in typographical arrangement (such as that in the UK)).

Presumably, the German press publishers' right cannot be maintained alongside a harmonized EU press publishers' right, as this would conflict with the harmonization objective. Even operating with the latter assumption, one could hardly regard the addition of the new right as a much needed simplification of the rights-landscape.

Conclusion

We appreciate that the UK position in the Council Working Group has been to some extent undermined by the result of the Referendum of June 23, 2016, and the Government's stated intention to trigger Art 50 TFEU in 2017. However, we are conscious both that the UK may remain in the EU at the date by which the Proposed Directive is to be implemented and/or that the UK's subsequent relations with the EU may well require the UK to approximate its laws with those of the EU. Thus the UK is not only entitled as an existing Member of the Union to participate fully in these legislative discussions, but has a legitimate interest in influencing their outcome. In this respect, it is important that the UK emphasises the importance of a coherent, justified and evidenced-based policy making process for copyright in the interests of society as a whole (authors, content holders, intermediaries, users and consumers).

Yours sincerely,

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Appendix:
The Definition of Press Publication

Article 2(3) defines a 'press publication' as

'a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having 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.'

The structure of the definition makes it particularly difficult to understand. There are five clauses, each separated by a comma. The second clause seems to constitute an alternative to the first ('which may also include'). The third clause appears as an example ('such as'). The relationship between the clauses is unclear. In addition the various clauses often are in the alternative ('periodical or regularly-updated publication', 'newspaper or a general or special interest magazine', 'news or other topics') and sometimes open ended ('or other topics', 'in any media'), so as not to prescribe any limitation at all. Ultimately the clause creates a subject matter of unacceptably uncertain, and very possibly awesome, breadth. It is not fit for purpose.

We consider each clause in turn.

1. 'A fixation of a collection of literary works of a journalistic nature'

The first clause, which one would expect to be critical in defining the subject matter refers to 'a fixation of a collection of literary works of a journalistic nature.'

The phrase 'journalistic nature' appears to suggest that it is the works, rather than the collection, that must be of a journalistic nature. One effect might be to exclude the publication of collections of fixture lists or rail timetables from protection, given that it would be difficult to describe such productions as 'journalistic' (though they might also not be 'literary works', depending on whether an originality component is implicit in the definition). That said, the terms 'journalistic nature' seem poorly selected to limit the subject matter covered, given the well-recognised shifts in the nature of 'journalism' over the last decades. The breadth of the term is illustrated by CJEU decision in Case C-73/07 *Satamedia* (CJEU, Gr Ch), on 'journalistic purposes' in Article 9 of Directive 95/46/EC. There the Court stated at [64] that 'activities ... may be classified as 'journalistic activities' if their object is the disclosure to the public of information, opinions or ideas,

irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for profit-making purposes'. As a consequence, the reference to 'journalistic nature' hardly seems to exclude any literary work, except perhaps those that are purely intended to convey literary enjoyment, such as, perhaps novels and books of poetry.

If instead the journalistic quality in issue relates to the collection, matters seem no more certain. In this respect it is worth recalling that Member States such as the UK have historical experience trying to define the term 'newspaper' (in the UK in the context primarily of taxation of such papers between 1712 and 1854: 10 Anne, c. 19, s. 101; 60 Geo III, c 9, s 1; 6 & 7 Will IV, c. 76). Needless to say the history demonstrates the real difficulty with building a legal regime around a commercial form that perpetually reinvents itself.

The requirement that there be a fixation of the collection raises further difficulties. There is no further definition of 'fixation' but under US law, the requirement of fixation is further elaborated as referring to fixation 'in any tangible medium of expression, now known or later developed.' Section 101 elaborates that a work is 'fixed' in a tangible medium of expression 'when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.' These definitions have, however, raised serious problems of interpretation of their own.

It might be that the 'fixation' requirement is intended to ensure that blogs and websites are excluded from protection. If that is the intention, one might wonder whether the term 'fixation' is the best one to achieve this. Certainly, it is not obvious that a collection created in digital form and arranged on a website is not 'fixed' in the sense that its form is stable enough to be perceived/communicated for more than a transitory period. If the aim is to limit the right to printed publications, that could be achieved through clearer wording. If not (as the later phrase 'published in any media' might imply), it remains unclear what role is intended for the fixation requirement. Another possible aim might be to exclude from protection 'broadcasts' from the scope of protection (given that broadcasts receive protection as related rights). If that is the aim, perhaps that might be achieved through a more explicit carve out.

- 2. 'which may also comprise other works or subject matter and constitutes an individual item within a periodical or regularly-updated publication under a single title'**

The second clause appears as an alternative, expanding the subject matter beyond that identified in the first clause. However, it is grammatically unclear, and thus only adds to the confusion and uncertainty as to what is encompassed by the new right.

The first part 'which may also comprise other works or subject matter' appears to be intended to recognise that newspapers and magazines can include other works, such as drawings or photographs, or other 'subject matter', such as not original photographs (and possibly non-original databases). However, the use of the word 'comprise' (as opposed to 'include') implies that the collection might consist only of such other subject matter. As there is no qualification that these other subject matters be of a 'journalistic nature', the impression is given that the right cover (i) collections of literary works of a journalistic nature and (ii) collections of other works and subject matter of any sort.

The phrase 'and constitutes an individual item within a periodical or regularly-updated publication under a single title' also lacks a clear referent, perhaps because of the absence of a comma after 'subject matter.' The better reading seems to be that for the right to exist there must be (i) a periodical or regularly updated publication; (ii) that publication must have a 'single title'. The right then seems to inhere in and 'individual item' within the publication, but only if it is a 'fixation of a collection' of relevant works.

The reference to the item being 'within a periodical or regularly-updated publication under a single title' means it is apt to cover many reference works that are annually or periodically updated, such as the *Time Out Restaurant Guide* or *Who's Who* or indeed the *Oxford Dictionary*. It might even include *Wikipedia*. On the basis that each entry is a literary work, and the publication collects these under a single title, and it is 'regularly-updated', these collections seem to count as press publications. Moreover, as there is no indication as to how often 'regular' implies, the possibility exists that any edition of a textbook, such as Aplin and Davis, *Cases and Materials on Intellectual Property Law*, might be covered.

3. 'such as a newspaper or a general or special interest magazine'

The referent of the third clause appears to be 'a periodical or regularly-updated publication under a single title.' Given that the third clause offers as example it does not in fact impose any limitation on the prior clause. If that were the intention, a word such as 'being' rather than 'such as' would make more sense.

4. 'having the purpose of providing information related to news or other topics'

It is not clear whether this is intended as a qualification to the first clause ‘collection of literary works of a journalistic nature’ or the reference to ‘a periodical or regularly updated publication’ or the immediately preceding clause ‘such as a newspaper or a general or special interest magazine’. However, the addition of ‘other topics’ means that, whatever the referent, the clause adds nothing.

Recital 33 seeks to clarify that the definition of press publications does not include academic journals, indicating the publications such as the *Cambridge Law Journal* are not intended to benefit from the new right. The recital states that ‘periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications.’ (See also *Impact Assessment*, p. 158). However, while recitals can assist interpretation, any implied limitation by reference to ‘purpose’ directly conflicts with the broad open-ended definition of purpose in the proposed Article, namely, ‘having the purpose of providing information related to news or other topics.’ This would potentially encompass any publication, including scientific news. The *Cambridge Law Journal*, for example, includes case-notes that are designed to provide information about recent decisions. It is therefore not clear that the drafters have achieved their goal of limiting the subject matter of the proposed right to the sphere where the Commission alleges it is needed.

5. ‘published in any media under the initiative, editorial responsibility and control of a service provider’

The final clause requires ‘publication’ but seems to allow for publication on the Internet (‘in any media’), as well as in hard copy. As mentioned, this sits in tension with the condition that the subject matter comprises ‘a fixation.’

It is also unstated where the publication must occur. Must it be in the EU, or an EEA state, or is the right conferred on publications outside the EEA? If so, is there any limitation, e.g. that the country of first publication be one with whom the EU has reciprocal relations? If not, might press publications eg from Iran be protected, even though the articles and works therein are not (Iran not being a member of Berne)?

The clause requires the publishing take place ‘under’ the initiative, editorial responsibility and control of ‘a service provider.’ It is not clear why the term ‘service provider’ is used rather than the more obvious ‘publisher’ which appears in Article 11(1). The three requirements – initiative, editorial responsibility and control - seem to relate to the collection or publication *in toto*, and thus seem to be met by the *Wikipedia*

Foundation or editors of the *IPKat* blog, as much as by more conventional print publishers. Is this the intended result?