

Brussels, 9 February 2018

Dear Member of the Council IP Working Party,

Ahead of the Working Party on Intellectual Property on 12 February on the proposed Copyright Directive, we, EMMA (European Magazine Media Association), ENPA (European Newspaper Publishers' Association), EPC (European Publishers Council) and NME (News Media Europe) – representing the interests of tens of thousands of newspaper and magazine publishers across the EU – hereby would like to share our comments on the most recent draft compromise on Article 11, as presented in the consolidated Presidency compromise proposal from 6 February 2018.

We welcome the Presidency's initiative to move forward on the suggested "Option A" and hence to acknowledge the benefits of a neighbouring right for press publishers. We also welcome in particular the acknowledgment of the increasingly important economic value of uses of extracts of press publications by commercial players including search engines and aggregators. A new neighbouring right for press publishers would grant press publishers an exclusive right with regard to the digital use of their press publications and accordingly this would extend to the use of small excerpts from articles contained in press publications. The protection of **small excerpts** is essential for a proportionate and effective protection of press publishers and their press publications recognizing the way in which our content is distributed by third parties and licensed to commercial entities.

We acknowledge that concerns have been raised that Article 11 as proposed by the Commission may have a negative effect on the legitimate personal non-commercial use of excerpts from press publications by a natural person by way of hyperlinking or sharing. However, we would like to emphasize that it is in publishers' interest to make their products available as widely as possible, on as many platforms as possible and this is why publishers themselves encourage their readers to share articles and news on social media for free.

We wish to point out that, as recognised and further clarified by the Bulgarian Presidency in Recital 34, hyperlinking to articles from press publications, which are freely available on the internet, will in no way be impaired or restricted by the publisher's right. If the European Parliament and the Council adopt the European Commission's proposal, hyperlinking to press content, for example as part of individual online communication in social media, will remain **possible without the press publisher's consent and free of charge as it is today**. We therefore question the necessity of introducing in the new Presidency's compromise text, a reduction of the scope of protection granted to press publishers to acts of reproduction and making available to the public performed by "**service providers**" and excluding "**individual words or very short extracts of text**".

A restriction of the scope of application of Article 11 to **uses by "service providers"** bears the serious risk of creating legal uncertainty and enforceability depending, of course, on the

definition of a “service provider”. In our view it is essential that any commercial entity or organisation, regardless of their business model, including those currently licensed by press publishers, exclusively or collectively, continues to be within scope of protection. Typically these organisations can be aggregators, media monitoring and press clipping agencies, individual companies, or public institutions. Given the fast-changing nature of the internet economy, and the multi-jurisdictional challenges that it brings, we are also concerned that new types of businesses may develop, but that because of narrow definitions of 'service provider', or any definition that could be open to interpretation or abuse, these would not fall under the scope of the right. The current draft is therefore not future-proofed.

According to the definition of a “service provider” provided by the Directive 2006/123/EC for instance ‘service’ implies an activity normally provided for remuneration. It would therefore be questionable whether services that are provided on a commercial basis, although without remuneration, would be included. In addition the definition of ‘provider’ implies establishment in a Member State. It is hence questionable whether the right would apply to foreign based operators.

There is a point of principle about what this right is intended to do - recognise the value that publishers bring and the investment they make and create a right that reflects that. According to the general principles of copyright, the right approach is to start with this broad point of principle, to which the exemptions and limitations to the reproduction right and right of communication to the public shall apply as stipulated in the Directive. Restricting the scope of application to uses by “service providers” would lead to a general reversal of the burden of proof, which runs contrary to these general principles in European Union copyright law. In fact, it would then be the rightholder’s responsibility to prove unlawful use by a service provider and not the contrary.

The restriction to “**service providers**” is therefore in our view inappropriate, if the objective is to guarantee the legitimate non-commercial personal use of press publications by natural persons.

Furthermore, we question the need to provide these service providers with an exemption regarding “**individual words or very short extracts of text**”. The German right provides for a similar exception regarding the use of individual words and smallest extracts. Although the German Right is in itself enforceable, this has led to legal uncertainty and litigation as it is not obvious what individual words and smallest excerpts are precisely. We would advise against any wording that can create any legal uncertainty.

We therefore urge Member States to support a **broad right** as any restriction, limitation and exception to Article 11 would entail legal uncertainty and serious problems with its enforcement. This has to be taken into account if further clarification regarding the **non-commercial individual use of press publications by a natural person** is considered.

In our view, a balanced solution for effective and proportionate means of protecting press publications regarding their digital use can be found in the European Commission's proposal.

We would be pleased to provide you with any additional information you might require on this crucial topic.

Yours sincerely,

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***EMMA**, the European Magazine Media Association, is the unique and complete representation of Europe's magazine media, which is today enjoyed by millions of consumers on various platforms. EMMA represents 15,000 publishing houses, publishing 50,000 magazine titles across Europe in print and digital. See: www.magazinemedi.eu*

***ENPA**, the European Newspaper Publishers' Association, is an international non-profit organisation representing publishers of newspaper and news media on all platforms. In a rapidly changing media environment, ENPA supports publishers with the aim of achieving a successful and sustainable future for independent news media in Europe. See: www.enpa.eu*

***EPC**, the European Publishers Council is a high level group of Chairmen and CEOs of leading European media corporations actively involved in multimedia markets spanning newspaper, magazine, book, journal, internet and online database publishers, and radio and TV broadcasting. See: <http://epceurope.eu/>*

***NME**, News Media Europe (NME) represents the progressive news media industry in Europe – over 2200 European titles of newspapers, radio, TV and internet. NME is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing the newsbrands which are one of the most vital parts of Europe's creative industries. See: <http://www.newsmediaeurope.eu/>*

More information on: www.publishersright.eu and www.empower-democracy.eu/