



**Position Statement of the
Max Planck Institute for Innovation and Competition
on the Proposed Modernisation of European Copyright Rules**

PART F

Claims to Fair Compensation

(Article 12 COM(2016) 593 final)

[Version 1.2]

Executive summary

The proposal is in principle welcome but it impacts on the *acquis* without clarifying it, thereby causing further fragmentation of EU copyright law.

Alternatively, it would be worthwhile to:

- clarify the notion of “rightholder” within the European copyright *acquis*;
- define the terms “fair compensation” (as used in Directive 2001/29) and “(equitable) remuneration” within the European copyright *acquis*;
- clarify the allocation of both fair compensation and remuneration against uncertainties that have been exacerbated by the *Luksan* and *Reprobel* decisions of the CJEU. In particular, the EU legislature should
 - ensure that both authors (and performers) and derivative rightholders who take on the risk of making the necessary investment for the work to yield revenues, including publishers, obtain a share of fair compensation in proportion to the harm resulting from use of the work;
 - ensure that authors obtain in any case a remuneration for the use of their work made under an exception or limitation where such use requires fair compensation.

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I. Background

1. The Commission’s intention behind the proposed Article 12 – although not explicitly mentioned in Recital 36 – seems to be aimed at restoring the *status quo* from before the decisions of the CJEU in the *Luksan* (C-277/10, *Martin Luksan v Petrus van der Let Reference for a preliminary ruling from the Handelsgericht Wien*) and *Reprobel* cases (C-572/13, *Hewlett-Packard Belgium SPRL/13 v Reprobel SCRL, Epson Europe BV intervening*).
2. In the first case mentioned (*Luksan*), the Court held that “European Union law must be interpreted as meaning that, in his capacity as author of a cinematographic work, the principal director thereof must be entitled, by operation of law, directly and originally, to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the ‘private copying’ exception. [...] European Union law precludes a provision of domestic law which allows the principal director of a cinematographic work to waive his right to fair compensation. [...] The principal director, in his capacity as holder of the reproduction right, must necessarily receive payment of that compensation” (see *Luksan*, para. 95). The second case arose in Belgium when the collective rights management organisation *Reprobel* requested that Hewlett-Packard pay a €49.20 levy for every “multifunction printer” it sold. The Belgian Court requested a preliminary ruling concerning the interpretation of Article 5(2)(a) and (b) of the InfoSoc Directive. One of the issues raised before the CJEU was the allocation of the right to fair compensation. The Court held that Article 5(2)(a) and (b) precluded national legislation from allocating a part of the fair compensation to the publishers of works created by authors, unless those publishers are under obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.
3. On 12 May 2017, the **Court of Appeal of Brussels** ruled in favour of *Reprobel*. According to the national Court the Belgian Law can be interpreted

in conformity with European law since it does not affect the authors' own "fair compensation". Following the reasoning of the Court, the Belgian law does not reduce the "fair compensation" due to authors for the benefit of publishers, but rather it **grants publishers a supplementary remuneration**. In the Court's opinion the remuneration due to publishers is ontologically different from that due to authors, even though included in the "*rémunération*" of Article XI. 235 of the Code of Economic Law, which reads: "*Les auteurs et les éditeurs ont droit à une rémunération pour la reproduction sur papier ou sur un support similaire de leurs oeuvres, y compris dans les conditions prévues aux articles XI.190, 5° et 6°, et XI.191, § 1er, 1° et 2° [...]*". The Belgian decision pivots on the use made by the Belgian Law of the word "*rémunération*" instead of fair compensation. The Court considers that such "*rémunération*" can and must be interpreted as a broad concept including "fair compensation" for harm ("*dommage*") suffered by authors. Furthermore, the fact that the Belgian system collects the remuneration for both the author and the publishers together does not diminish the "fair compensation" for authors.

4. The Belgian Court's aim of ensuring that part of the amount collected for use of works made under an exception or limitation goes to both authors and publishers is understandable. However, the decision leaves a number of questions open, in particular how to construct a mere remuneration right of a party that does not dispose of its own exclusive right.
5. The decisions of the CJEU are based on a legislative **concept of fair compensation** that was deliberately introduced as a **compromise solution** aimed at respecting national legal traditions. The history of negotiations of the InfoSoc Directive reveals that the use of the expression "fair compensation" in the context of exceptions and limitations (instead of the term usually used, "remuneration") is due to the compromise between most Continental European countries, which are familiar with statutory remuneration rights for private reproduction and similar uses, on the one hand, and the United Kingdom and

Ireland, which do not have this tradition and were reluctant to introduce such remuneration rights, on the other. Accordingly, the term “fair compensation” allows for other forms of compensation than remuneration. But at the same time those Member States that already followed the tradition of remuneration schemes were allowed to maintain them (see *von Lewinski/Walter* (eds.), *European Copyright Law. A Commentary*, 2010, 1028; *Reinbothe*, *Private Copy Levies*, in *Stamatoudi* (ed.), *New Developments in EU and International Copyright Law*, 2016, 299). Consequently, the obligation of Member States to provide for **fair compensation** was **flexible** as to its content and attribution (i.e. distribution). And on a practical level this has resulted in the absence of guidance from the EU legislature on both the calculation of fair compensation and the assignment of that compensation.

6. However, in the years following the national implementation of the InfoSoc Directive the CJEU held that the concept of “fair compensation” introduced by the InfoSoc Directive must be regarded as an **autonomous concept of European Union law** to be interpreted uniformly throughout the European Union (see C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España* (SGAE)). Concerning the **quantification criteria**, the CJEU argued that “the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work without his authorisation” (see *Padawan*, para. 40).
7. It goes without saying that the system of “fair compensation” in the context of exceptions and limitations in the European *acquis* has become highly confusing: on the one hand, the European legislature in 2001 intended to leave a margin of flexibility to the States on this matter; on the other hand, the CJEU, ignoring the historical background, eliminated the given flexibility through its attempt to harmonise the fair compensation system throughout Europe.
8. In addition, a statutory remuneration for authors, who are prevented by law from prohibiting some exclusive rights, is provided in Directive 2006/115

(Rental Directive), Article 6 (“Derogation from the exclusive public lending right”). However, in this provision the European legislature uses the word “remuneration” whereas, as mentioned, in the InfoSoc Directive the same legislature uses the term “fair compensation” (see part A, para. 20).

9. In view of this situation, the goal of distributing the amount collected for use of works made under an exception or limitation between original rightholders and derivative rightholders who take the risk and make the investment needed for the work to yield revenues may in principle be welcome. But the approach suggested in the proposed Article 12 is more than doubtful. Firstly, it impacts on the *acquis* without effectively clarifying it, thereby causing further fragmentation of European copyright law. Secondly, it fails to solve general problems concerning financial participation in the value chain derived from the use of works and subject matter in cases where exclusive rights are reduced to a right to remuneration.
10. Furthermore, it must not be overlooked that statutory remuneration for the reprography and private copying exceptions are a **significant source of revenue** and raise **single-market issues**. Based on the fact that they are set, applied and administered in a variety of different ways by Member States and that “persisting national disparities can be problematic”, the Commission has announced an assessment of the need for action on several issues, including the “link between compensation and harm” to rightholders and “how levies can be more efficiently distributed” to rightholders, avoiding double payments (see Commission Communication “Towards a modern, more European copyright framework”, COM(2015) 626 final, 9 Dec. 2015, pp. 8, 9. See also *Victorino*, Recommendations resulting from the mediation of private copying and reprography levies, 31 Jan. 2013). Nevertheless such issues have not yet been addressed by the Commission.

II. The Commission's proposal: Concerns

1. Need for clear and consistent concepts

a) Fair compensation vs. (equitable) remuneration

11. As mentioned above, the EU legislature presumes a distinction, without however clarifying it, between the notions of fair compensation and (equitable) remuneration (see Part A). According to the CJEU, while (equitable) remuneration should be determined based on the value of use of a work in financial transactions (see cases C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*; C-271/10, *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat*), fair compensation is associated with the “harm” suffered by rightholders (C-467/08, *Padawan SL v SGAE*). Also, the determination of the amount of the remuneration provided for in Article 6 Rental Directive concerning the derogation from the exclusive public lending right cannot be dissociated from the fair compensation set in the InfoSoc Directive. Indeed, the CJEU in the *VEWA* decision held that “It is true, in the context of Directive 92/100, that, when there is a derogation from the exclusive right of authors, the Community legislature used the word ‘remuneration’ instead of ‘compensation’ provided for in Directive 2001/29. However, that concept of ‘remuneration’ is also designed to establish recompense for authors, arising as it does in a comparable situation in which the fact that the works are being used in the context of public lending without the authorisation of the authors result in harm to the latter” (see *VEWA*, para. 29).
12. Despite the above, this distinction is neither addressed nor clarified in the proposed Article 12. The (re-)establishment of the possibility of Member States to stipulate the distribution of the amount collected for use of works made under an exception or limitation amongst authors and derivative rightholders (including publishers) who invest in the work's exploitation is

related to a clear understanding of the **notion of fair compensation**. The discrepancy in the term's usage is clearly proved by the abovementioned decision of the Court of Appeal of Brussels (see para. 2a).

b) Rightholder

13. The proposal does not touch upon the CJEU's understanding of the notions of "author" and "rightholder" in the *Reprobel* decision. This becomes relevant with respect to Article 5(2)(a) and (b) of the InfoSoc Directive, allowing certain reproductions of a work provided that rightholders receive fair compensation. According to the CJEU the term "rightholder" in Article 5(2)(a) and Article 5(2)(b) of the InfoSoc Directive is equivalent to the term "author" as the party which, pursuant to Article 2 InfoSoc Directive, disposes of the exclusive right to authorise or prohibit reproductions. Consequently, only the authors who have created the work are entitled to receive fair compensation. Third parties (such as publishers) that contractually acquire copyrights are not deemed to be rightholders in terms of Article 5.
14. At the same time the CJEU in the *Reprobel* decision seems to aim at balancing publishers' and authors' interests: according to the Court Article 5(2)(a) and (b) of the InfoSoc Directive do not preclude national legislation from allocating a part of the fair compensation (i.e. levies plus volume-based copying fees) to the publishers provided that "those publishers are under obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived" (see *Reprobel*, para. 49).

2. Legal foundation to claims to fair compensation

15. The *Reprobel* decision is debatable for a number of reasons, and in order to define the legal foundation for the claims to fair compensation it is useful to start with the issues raised by the CJEU in that decision.

16. **First**, it ignores the **use of the term “author”** in international copyright law. The Berne Convention in Article 9 also provides an exclusive right to “authors” to allow or prohibit reproductions, but no provision prevents Member States from attributing this right to a derivative rightholder who has invested in the exploitation of works. Also, Article 2 of the InfoSoc Directive cannot be read in the sense that only authors are entitled to prohibit reproductions. If the copyright is assigned to a publisher, for instance, it is doubtlessly this **(derivative) rightholder** who has the right to prohibit third parties from reproducing the work.
17. **Second**, the derivative rightholder who invests in the “production” and “commercialisation” of the work may obviously **suffer a direct (economic) harm** from statutory permissions to use a work, in particular uses according to Article 5(2)(a) and (b) of the InfoSoc Directive. The original rightholder, in contrast, may – but does not necessarily – suffer indirect economic harm due to losses incurred by the derivative rightholder (e.g. if the publisher compensates the authors based on its own revenues). This leads to the conclusion that quantifying the amount to be collected for use of works made under an exception or limitation based on the criterion of harm (as required by the CJEU in certain cases) makes sense for the derivative rightholders who bear the risk of making the investment needed for the work to yield revenues.
18. One might discuss whether an author could be entitled to remuneration for the use of a work for which he previously assigned or transferred his economic rights to a derivative rightholder. But it can be hardly justified why a party that actually incurs harm and that is the actual rightholder should not be compensated – for the benefit of a party (the author) that (possibly) does not suffer direct harm.
19. **Third**, there may nevertheless be reasons to argue why the author (as the original rightholder) should obtain **remuneration** in cases in which his work is used – irrespective of the economic circumstances of the case, and in particular

of whether he has transferred or assigned the copyright to a derivative rightholder investing in the work's exploitation. In fact, unless the parties have agreed on a particular distribution rule, the payment of the fair compensation settled in the InfoSoc Directive should logically be granted to the actual rightholder "in his capacity as holder of the reproduction right" (as confirmed by the CJEU in the *Luksan* decision; see para. 2 above). This means that the author, by assigning the reproduction right to the derivative rightholder in the first instance, ensures that the latter receives the related fair compensation. But the author does not necessarily give up his own entitlement to remuneration in case of use of his work made under an exception or limitation. And the legislature may even go one step further and prohibit a waiver or transfer of such remuneration.

20. This reasoning underlies the approach established in Article 5 of **Directive 2006/115/EC** (Rental Directive) ensuring that authors (and performers) who have transferred or assigned their rental right to derivative rightholders exploiting their rights will "retain the right to obtain an equitable remuneration for the rental". This right to remuneration of authors in principle is directed against the actual derivative rightholder. If collective rights management is involved (see Article 5(3) of the Rental Directive), however, this leads to the result that the collecting management organisation (CMO) has to split the distribution between authors and exploiters. Such a distribution rule may apply regardless of the various legal ways in which the administration of rights may be carried out by the CMOs in the Member States.
21. These are issues that the proposed Article 12 should address – but it entirely fails to do so. The Commission misses the opportunity to shed light on the darkness created by the CJEU in a number of cases dealing with fair compensation. Beyond that, it maintains the undesirable fragmentation of the Internal Market that existed prior to the *Reprobel* decision.

III. Alternative regulatory approach

22. First the EU legislature should **clarify the notion of “rightholders”**. As mentioned above, the CJEU’s decision in the *Reprobel* case is not convincing. However, even though it is crystal clear that the EU legislature – not least in light of international copyright law – in the InfoSoc Directive referred not only to authors but to rightholders, including derivative rightholders, who take the risk and make the investment needed for the work to yield revenues, at this point this should be made clear by the European legislature.
23. In view of the inconsistent use of terminology within the *acquis* (see para. 4 above) the EU legislature should clarify the concepts of “fair compensation” and “(equitable) remuneration”. In the long run it would even be advisable to ensure harmonisation of the criteria used to quantify the amount to be collected in the context of exceptions and limitations. Such amount should include a share for both authors and derivative rightholders who take the risk and make the investment needed for the work to yield revenues.
24. Indeed, it is reasonable to **divide the amount collected** for use of works made under an exception or limitation between original and derivative rightholders, a **practice** that was **common** in a number of **Member States** prior to the *Luksan* and *Reprobel* decisions of the CJEU. In fact, whereas authors and derivative rightholders who invest in works’ exploitation should get a proportional share of the fair compensation for harm, authors should get remuneration (based on the value of use of a work) for the use of the works (irrespective of an actual harm or of whether they still are owners of the economic rights of the related copyright).
25. At the same time, the EU legislature in regulating this matter should consider that CMOs may play various roles in the different settings of Member States, especially where the exclusive rights are assigned to them.

26. Finally, it is worth noting that performers likewise should get a proportionate share of fair compensation if they suffer harm from the use of their performances made under an exception or limitation requiring that the rightholders be fairly compensated.

IV. Proposal

Article 12

(1) Where the author and performer has transferred or assigned, in whole or in part, his rights to a publisher or producer, or to whomever makes the work available to the public through customary channels of commerce, and where a use of that work made under an exception or limitation requires fair compensation, Member States shall ensure that each party concerned obtains a share of that compensation in proportion to the harm resulting from the use of the work.

(2) The author shall in any case obtain remuneration for the use of his work according to paragraph 1. This remuneration shall not be assignable to the publisher or producer, or to whomever made the work available to the public through customary channels of commerce.

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TABLE OF EQUIVALENCES

| New Numbering of Paragraph, Part F (Version 1.2) | Old Numbering of Paragraph, Part F (Version 1.0) | Old Numbering of Paragraph, Part F (Version 1.1) |
|---|---|---|
| 1 | 1 (amended in version 1.2) | 1 (amended in version 1.2) |
| 2 | 2 (amended in version 1.2) | 2 (amended in version 1.2) |
| 3 | | |
| 4 | | |
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| 9 | 3 (amended in version 1.2) | 3 (amended in version 1.2) |
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| 11 | 4 (amended in version 1.2) | 4 (amended in version 1.2) |
| 12 | 5 (amended in version 1.2) | 5 (amended in version 1.2) |
| 13 | 6 (amended in version 1.2) | 6 (amended in version 1.2) |
| 14 | 7 | 7 |
| 15 | 8 (amended in version 1.2) | 8 (amended in version 1.2) |
| 16 | 9 | 9 |
| 17 | 10 (amended in version 1.2) | 10 (amended in version 1.2) |
| 18 | | |
| 19 | 11 and 13 (amended in version 1.2) | 11 and 13 (amended in version 1.2) |
| 20 | 15 (amended in version 1.2) | 15 (amended in version 1.2) |
| 21 | | |
| 22 | 14 (amended in version 1.2) | 14 (amended in version 1.2) |
| 23 | | |
| 24 | 12 (amended in version 1.2) | 12 (amended in version 1.2) |
| 25 | | |
| 26 | | 16a (amended in version 1.2) |
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