

The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law

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Abstract

The Spanish Government proposed the introduction in the Spanish Copyright Act of an ancillary right in favor of press publishers for the online aggregation of news. Because of its imprecise language and poor drafting technique, the proposed statutory license may apply to a broader range of online linking activities beyond news and may negatively affect the development of the public-licensed and open-access contents. In addition, it will likely have anticompetitive effects on the market of news aggregation and search engines, and deter the functioning of the EU internal market.

The proposal amounts to an attempt to subsidize an industry at the expense of another and it does so by distorting copyright law rules and infringing EU law and international obligations. On the one hand, the ancillary right proposed is contrary to EU law: it contradicts the CJEU ruling that linking to copyrighted contents freely available online does not amount to an act of communication to the public (Svensson) and the harmonization of this right under Art.3 Directive 2001/29/EC.

On the other, its approval would render Spain and the EU liable for non-compliance with their international obligations under the Berne Convention and the TRIPs Agreement. Even when assuming that linking involves an act of exploitation, online news aggregation is mandatorily exempted by the quotation exception in Art.10(1) BC, without any compensation. Furthermore, to the extent that aggregation and search engines play a key role in the provision of and access to information, the proposal fails to correctly balance the copyright interests with the fundamental right to information, thus disregarding Art.7 TRIPs as well as the principle of *proportionality* - consistently applied by the CJEU.

For all these reasons, its approval would render Spain and the EU liable for non-compliance with the BC and TRIPs obligations. In addition, if approved, it would be deactivated under the CJEU doctrine of *interpretation in conformity*, which sets aside any domestic provision which is contrary to international obligations and EU law.

Keywords

Copyright, quotations, limitations, news, aggregation, search engines, press-summaries, proportionality, fair balance, fundamental rights

EXECUTIVE SUMMARY

In February 2014, the Spanish Government proposed a bill to amend the Spanish Intellectual Property Law (TRLPI).¹ Among other amendments, the bill introduces an ancillary right in favor of press publishers for the aggregation of news and other copyrighted content available online by means of a statutory limitation that authorizes the aggregation of online contents subject to an unwaivable equitable compensation, managed by the corresponding Collective Management Organization [CMO]. Search engines are also authorized to link to this copyrighted content, this time without any remuneration.

The proposed statutory license has been severely criticized from all sides: by Spanish consumers' associations, aggregators, search engines and providers of internet services, in general, as well as by some press-publishers. The bill is now under parliamentary proceedings.

The scope of the proposal is vague and, because of its imprecise language, may affect a broader range of online linking activities beyond the purportedly targeted news aggregation and search engines. The statutory license proposed will likely apply beyond the Spanish territory and Spanish works and aggregators and have deterring effects on the functioning of the EU internal market. In addition, the unwaivable nature of the statutory compensation will negatively affect the development of the public-licensed commons and open-access endeavors. As warned by the Spanish Competition Authority, the remunerated statutory license proposed will likely have anticompetitive effects on the market of news aggregation and search engines. No evidence to support either an economic loss by press-publishers caused by the online activities or a market failure has been submitted to justify the Government's proposal.

The proposal amounts to an attempt to subsidize an industry at the expense of another and it does so by distorting copyright law rules and infringing EU law and international obligations.

The Spanish proposal is contrary to EU law and case law. The Court of Justice of the European Union [CJEU] recently ruled that linking to copyrighted contents *freely available* online does not amount to an act of communication to

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¹ *Texto Refundido de la Ley de Propiedad Intelectual*, approved by Royal Legislative Decree 1/1996 of April 12; Available at http://www.mcu.es/propiedadInt/docs/RDLLegislativo_1_1996.pdf [hereinafter TRLPI]

the public (Judgment of 13 Feb. 2014, C-466/12 *Svensson*),² thus invalidating the premise upon which the proposal is based. In addition, despite being portrayed as an “adaptation” of the quotation limitation, the proposal introduces a new ancillary right which contradicts the harmonized scope of the right of making available online (Art.3 Directive 2001/29/EC)³ and will have deterring effects on the EU internal market.

Even when assuming that the provision of a link involves an act (or several acts) of exploitation, online news aggregation is mandatorily exempted by the quotation exception in Art.10(1) Berne Convention [BC],⁴ without requiring any compensation. The fact that Art.5(3)(d) ISD, which has the same scope of its BC counterpart, failed to formally address the mandatory nature of the quotation limitation, does neither affect nor alter the obligation of Spain and the EU to enforce the scope of uses exempted under Art.10(1) BC. The Spanish proposal is, accordingly, contrary to the BC obligations and –by means of its incorporation– contrary to the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs].⁵

Furthermore, aggregation and search engines play a key role in the development and enhancement of the fundamental right to freedom of information granted in Art.10 European Convention on Human Rights of 1950⁶ [ECHR] and Art.11 of the Charter of Fundamental Rights of the EU of 2000⁷ [EU Charter]. The Spanish proposal does not correctly balance the copyright interests with the fundamental right to information, thus disregarding Art.7 TRIPs which obliges States to enforce IP law in a manner “*conducive to social and economic welfare and to a balance of rights and obligations*”. Similarly, the proposal disregards the principle of *proportionality* which has been

² CJEU, 13 Feb. 2014, *Svensson et al v. Retriever Sverige AB* (C-466/12); Available at <http://curia.europa.eu/juris/document/document.jsf?docid=147847&doclang=EN>

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society; Available at http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm [hereinafter ISD]

⁴ The Berne Convention for the Protection of Literary and Artistic Works of Sept.9, 1886; Available at <http://www.wipo.int/treaties/en/ip/berne/> [hereinafter BC]

⁵ The Agreement on Trade-Related Aspects of Intellectual Property Rights of Apr.15, 1994; Available at <http://www.wto.org> [hereinafter TRIPs]

⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ratified by Spain in 1979); Available at <http://www.echr.coe.int/> [hereinafter ECHR]

⁷ The Charter of Fundamental Rights of the EU (2010/C 83/02); Available at http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm [hereinafter EU Charter]

consistently applied by the CJEU to balance copyright with other fundamental rights and public interests.

For all these reasons, the remunerated statutory license proposed for news aggregation and search engines should be deleted from the bill currently examined in Parliament. Otherwise, Spain and the EU will be liable for non-compliance with their international obligations under the BC and TRIPs. Nevertheless, even if the proposal were to be approved, it would be deactivated under the CJEU doctrine of *interpretation in conformity*, which sets aside any domestic provision which is contrary to international obligations and EU law.

I. THE SCOPE OF THE STATUTORY LICENSE PROPOSED

Last February 2014, the Spanish Government approved a bill to amend the law of intellectual property.⁸ It is a comprehensive reform bill that addresses very different topics, including the transposition of two EU Directives on the term of phonograms (2011/77/EU) and orphan works (2012/28/EU), the revision of the regime of collective management organizations (guided by the principles of transparency, efficiency and accountability, despite not implementing Directive 2014/26/EU), as well as the introduction (or amendment) of several limitations –among them, the one that is the subject of this study.

As mandated by legal process, the bill was circulated and informed by several advisory institutions before its approval by the government.⁹ However, none of them had the opportunity to look into the specific provision dealing with aggregators and search engines since it was only introduced at the last minute, in the bill approved by the government on February 14th. For this

⁸ The bill is available at

http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-1.PDF#page=1. Parliamentary works are available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas/ProydeLey?_piref73_1335538_73_1335535_1335535.next_page=/wc/servidorCGI&CMD=VERLIST&BASE=IW10&PIECE=IWA0&FMT=INITXD1S.fmt&FORM1=INITXLBA.fmt&DOCS=25-25&QUERY=121.cini.+no+%40fcie+no+concluido.fase

⁹ The bill has been informed by several Government Ministries, as well as by the *Consejo General del Poder Judicial*, the *Consejo Fiscal*, the *Agencia Española de Protección de Datos*, the *Comisión Nacional de los Mercados y de la Competencia*, the *Consejo de Consumidores y Usuarios*, and the *Consejo de Estado*.

reason, the *Comisión Nacional de los Mercados y de la Competencia* [CNMC] issued a report on May 16th to specifically address this last minute proposal.¹⁰

The bill is currently under parliamentary evaluation and several amendments have already been proposed by (non-government) parliamentary groups.¹¹ Some directly seek to remove this specific provision from the bill (on behalf of the fundamental right to access information and compliance with EU law); While others proposed substantive amendments.¹² At the time of closing this report, the proposal remains untouched as approved by the Congress. It will now be examined by the Senate before its final adoption. One can only speculate about an expected approval date, but it might be adopted in the fall or early winter.

The proposed limitation is included in Art.32.2 TRLPI under the title “*Quotations, reviews and illustration for teaching and scientific research purposes.*”

Art.32. Quotations, reviews and illustration for teaching and scientific research purposes.

2. The making available to the public by providers of digital services of contents aggregation of non-significant fragments of contents, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment, will not require any authorization, without prejudice of the right of the publisher or, as applicable, of other rights owners to receive an equitable compensation. This right will be unwaivable and will be effective through the collective management organizations of intellectual property rights. In any case, the making available to the public of photographic works or ordinary photographs on periodical publications or on periodically updated websites will be subject to authorization.

*Without prejudice to what has been established in the previous paragraph, the making available to the public by the providers of services which facilitate search instruments of isolated words included in the contents referred to in the previous paragraph will not be subject to neither authorization nor equitable compensation provided that such making available to the public is done without its own commercial purpose and is strictly circumscribed to what is indispensable to offer the search results in reply of the search queries previously formulated by a user to the search engine and provided that the making available to the public includes a link to the page of origin of the contents.*¹³

¹⁰ *Comisión Nacional de los Mercados y de la Competencia* [hereinafter CNMC], PRO/CNMC/0002/14, of 16 May 2014: http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf

¹¹ Amendments available at: http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-2.PDF#page=1

¹² Amendments were proposed to make it an uncompensated statutory license, to formally restrict it only to news and include the reproduction right; A merely formal amendment was proposed to move it (as it is) under a separate Art.32bis.

¹³ See Annex for Spanish version.

According to the official explanation given by the government, this provision aims at “adapting the quotation limitation to the field of Internet contents aggregators and search engines, granting a right to publishing companies and authors of news to be economically compensated for the exploitation of their contents.”¹⁴

Regardless of being presented as an “adaptation” of the quotation limitation, the proposal clearly amounts to an independent ancillary right granted by means of a new statutory license for the aggregation of online contents. Before analyzing its scope (2,3,4) and implications (5,6,7), it is advisable to explain the context of the quotation limitation in Spanish law where the proposed statutory license is to be inserted (1).

2. The Spanish quotation limitation

The quotation limitation in Art.32.1 TRLPI already encompasses three different layers of exempted *quotations*: quotations, in the traditional sense (a), “press summaries or press reviews” (b) and the so-called *press-clipping*, consisting in the digital reproduction of “press articles” for commercial purposes (c). The proposal regarding news aggregation and search engines would be introduced, respectively, as the fourth and fifth layers of quotations under a new Art.32.2 TRLPI.

The Spanish law does not give any definition of these concepts, and in some cases it is hard to find a coherent explanation among them.

a) Quotations

The existing quotation limitation in Art.32.1 TRLPI was designed in the very first version of the current IP law and has remained untouched ever since:

Art. 32. Quotation ...(1) It shall be lawful to include in one’s own work fragments of the works of others, whether of written, sound or audiovisual character, and also to include isolated works of three-dimensional, photographic, figurative or comparable art

¹⁴ See <http://www.lamoncloa.gob.es/consejodeministros/paginas/enlaces/140214-enlaceleypropiedadintelectual.aspx/> : “ El Proyecto de Ley adapta también el límite de cita o reseña al ámbito de los agregadores de contenidos o buscadores en Internet, reconociendo el derecho de las empresas editoras y autores de noticias a ser compensadas económicamente por la explotación de sus contenidos.”

*character, provided that the works concerned have already been disclosed and that they are included by way of quotation or for analysis, comment or critical assessment. Such use may only be made for teaching or research purposes, to the extent justified by the purpose of the inclusion, and indicating the source and the name of the author of the work.*¹⁵

We cannot examine here the scope of this quotation limitation, but it suffices to point out that it is more restrictive than the limitation in art.5(3)(d) ISD, since it requires that the quoted work be ‘included’ in a new work and it is restricted to ‘teaching or research purposes,’ which has forced courts to do a rather generous reading of these purposes in order to meet the purpose and natural scope of such an important limitation.

b) Press summaries and press reviews exempted as quotations

The quotation limitation in Art.32.1 TRLPI continues:

*Periodical compilations made in the form of press summaries or press reviews shall be treated as quotations.*¹⁶

‘Press summaries’ and ‘press reviews’ have been exempted as quotations since its original IP Law of 1987, and this exemption clearly derives from a similar provision that existed in Art.31 of the old (now derogated) Spanish Law on Intellectual Property of 10 January 1879.

Having in mind that both are ‘compilations’ and are done ‘periodically’, the distinction between these two concepts has been explained as follows: the former “summarizes” the news published in the referenced newspapers, and the later “reproduces” (in whole or in part) the news-articles as published in the referenced newspaper.¹⁷ These two concepts are difficult to integrate with the general concept of a quotation. A press-summary may (but does not need to) include quotations of the summarized news-articles; and a press-review (and a *press-clipping* service, see below) will often involve full reproduction of the news-articles, thus going beyond a quotation, in strict terms. Legal doctrine has been debating about these two concepts and, especially, whether the fact that

¹⁵ See Annex for Spanish version.

¹⁶ See Annex for Spanish version.

¹⁷ See Pérez de Ontiveros Vaquero C (2007) “Comentarios a los Artículos 32 y 33”, Comentarios a la Ley de Propiedad Intelectual (Bercovitz R., ed.), Ed. Tecnos, Madrid, 3ª ed., pp 548 – 610, p. 594.

they are ‘*treated as quotations*’ means that they must comply with the specific requirements set for quotations or instead they are directly permitted, regardless of them.¹⁸ In either case, some restriction may ultimately be imposed in compliance with the so called *Three-step-test* (ex Art.40bis TRLPI).¹⁹ This was precisely the reason that prompted the addition of the *press-clipping* provision.

c) Digital *press-clipping* for commercial purposes

In 2006, on the occasion of implementing the ISD,²⁰ a new paragraph was added to deal with the compilation of press-articles done by **digital commercial** services:

*Nevertheless, when the compilation of press articles consists basically in their mere reproduction, and such activity is done for commercial purposes, the author who has not expressly opposed to it will have a right to receive an equitable remuneration. When the author has expressly opposed it, such activity will not be covered by the present limitation.*²¹

Since 2006, the authors of newspaper articles *merely* reproduced²² by commercial press-services have a choice²³ to either receive an equitable compensation (for the *press-clipping* authorized under the new statutory limitation) or expressly oppose it; in this later case, they can either prohibit or license *press-clipping* services subject to any conditions voluntarily agreed.

Accordingly, digital *press-clipping* done for non-commercial purposes, as well as press summaries and reviews in analog formats, remain exempted as quotations and non-remunerated.

¹⁸ In favor of the former, see Rodríguez-Tapia (Dir.) (2007) Comentarios a la Ley de Propiedad Intelectual, Thomson Civitas, Cizur Menor, p.260; In favor of the later, see Marín López J J (2008), “Derecho de Autor, revistas de prensa y press clipping”, *RIDA* 215, pp.2-101, p.15.

¹⁹ See Audiencia Provincial Madrid (sec.28) July 6, 2007 [*Periodista Digital*], Westlaw.ES AC2007/1146.

²⁰ Act 23/2006 of July 7, implementing Directive 2001/29/EC, of May 22 on the Information Society.

²¹ See Annex for Spanish version.

²² That is, when no analysis, comment or criticism of the quoted work is done.

²³ Notice that the scope of this limitation will ultimately depend on the will of the author: whether he opposes it or not. Interestingly, the original draft presented by the government established a simple statutory license, subject to fair compensation; the choice to oppose press-clipping was added later, following strong lobbying from the newspaper publishers.

The *press-clipping* limitation was a failure from its birth. It was poorly drafted and left many questions open, such as:

- who has the choice, the author or the publisher?²⁴
- what is included as ‘*news reporting articles*’?
- what is a non-commercial purpose?²⁵
- how will the voluntary licensing be done and what is its scope (only making the *press-clipping* or also its distribution)?²⁶
- how is the fair compensation established, managed and collected, by CMOs or individually?²⁷
- can the compensation be waived and/or transferred?²⁸

In short, lobbying efforts were successful in preventing digital *press-clipping* to be exempted as a periodical compilation, but the solution adopted was far from successful or efficient in practice.

The bill now proposed leaves untouched all the provisions examined so far under Art.32.1 TRLPI and adds (as Art.32.2) two other forms of “quotations” done online by means of aggregation and search engines.

3. Scope of the Proposed Statutory License

The language of the proposed statutory license leaves many questions open as to its intended scope.

a) Which aggregators and search engines?

²⁴ Although the provision only refers to the author, newspaper publishers were doing the choice, by showing an opposition notice in their newspapers. Many journalists might have preferred not to oppose it and receive fair compensation for *press-clipping*.

²⁵ Only *press-clipping* services provided by subscription or also other services provided for free but with a clearly lucrative intent?

²⁶ In recent years, CEDRO has been licensing the subsequent in-house distribution of the press-compilations, either those done in-house (under the limitation) or those obtained through a press-clipping service (under a license).

²⁷ Since it is not mandated to compulsory collective management, each copyright owner may decide how to license the use and collect the compensation. This will require constant clearance and evidence of which authors have opposed and, if not, which association holds the mandate to do which licensing. On the long run, this regime is unsustainable.

²⁸ In principle, silence may be read in the sense that the compensation can be transferred and waived, but that result would be clearly contrary to the *spiritu lege* and its intended goal.

According to the government's explanation, the proposed statutory license is intended for *news aggregators and search engines*.²⁹ However, the proposal formally refers to the '*providers of digital services of contents aggregation*' and '*contents ... available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment*.'

Due to the broad and complex language used to define '*aggregation*' and '*contents*', the statutory license may affect not only the *strict* aggregation of news but also many other online activities, such as RSS readers (i.e., *Menéame*, *Netvibes*, *Flipboard* or *Feedly*), blogs, pages in social networks (i.e., *Facebook* or *Twitter*); in short, any activity based on linking to online available '*content*'.³⁰

On the other hand, the meaning of '*providers of digital services of contents aggregation*' is not evident in the proposal. The common meaning of "aggregation" leads to a wide concept of "uniting or putting together," "adding" and "annexing."³¹ Accordingly, the only way to restrict the scope of aggregation affected by the proposal is the reference to '*providers of digital services*.' It clearly includes any company whose only commercial activity is the provision of online aggregated results, but what about a media company (or newspaper) whose website in addition to providing its own-production, also offers links to *other* '*contents ... available in periodical publications or in periodically updated websites...*'?³² And what about the aggregation of contents done by professional bloggers or even by private individuals who link to '*contents...*' on their blogs, personal Facebook pages or Twitter accounts – would they also qualify as '*providers of digital services of contents aggregation*'?

In short, the proposed statutory license risks of being applicable to any website which introduces a link to any contents available online.

b) Which works?

²⁹ As explained by the government, see *supra*.

³⁰ Needless to say, virtually any online service that currently exists or may likely be developed in the future, relies on providing links to pre-existing contents available online.

³¹ According to *Diccionario de la lengua española (DRAE)*, <http://www.rae.es/>

³² See, for instance, the BBC website which provides links to both internal (BBC) and external (non-BBC) websites; <http://www.bbc.co.uk/help/web/links/>

Quite inexplicably, despite referring in general to linked ‘*contents*,’ the proposal expressly excludes photographic works and simple photographs, which will still be subject to authorization:

*In any case, the making available to the public of photographic works or simple photographs on periodical publications of periodically updated websites will be subject to authorization.*³³

It is difficult to ascertain whether this exclusion refers to the ‘*making available*’ done (assumably) by aggregators and search engines by linking to photographs posted on the news websites or, instead, it refers to the ‘*making available*’ of these pictures by posting them (reproducing, storing and uploading a copy of them) ‘*on periodical publications of periodically updated websites*’. The internal logic of the provision would favor the former option, but the language clearly states the later one.

In any case, if only photographs are excluded, it is reasonable to understand that audiovisual works/recordings as well as any other images (inks, paintings, cartoons, etc) are indeed subject to the statutory license. And if this is so, why are photographs getting a differential treatment?

On the other hand, the proposal seems to presume that the contents linked by aggregators and search engines has been lawfully posted online, but nothing is expressly said about its lawful or unlawful nature. This may have effects on, at least, two different issues:

- the amount of compensation that the aggregators and search engines will have to pay to the copyright owners and, specifically, what is the ‘*equitable compensation*’ expected to compensate for the damage caused (if any) by linking to lawful contents or also the damage resulting from linking to infringing contents?
- its interaction with the ISP safe-harbor for search engines and links; Let’s imagine a specific case: where the safe-harbor exempts the ISP’s liability for linking to infringing contents, whereas the proposed statutory license would be “authorizing” the ISP for providing the link itself. As a result, despite the posting remains infringing in origin (and regardless of whether the ISP’s liability may be exempted or not for that), its linking by aggregators and search engines would be authorized and compensated under the statutory license.³⁴ The proposed statutory license might, thus, quite

³³ See Annex for Spanish version.

³⁴ Furthermore, it remains to be seen how this authorization might affect the assessment of the safe harbor to exempt the ISP for indirect liability.

unexpectedly, function as a “laundering” device for linking to unlawfully posted contents.

c) Which exploitation rights?

The proposal only refers to the ‘*making available to the public ...of non-significant fragments of contents.*’ This language is either insufficient or defective. On the one hand, when linking to contents available online, what is being made available (if so) is not only a fragment (let alone a non-significant fragment) of it, but the whole contents linked.³⁵ On the other, if linking does involve any act of exploitation at all, it is clearly a reproduction, to the extent that a fragment of the linked contents is usually shown (reproduced) as the header/pointer to activate the link. In other words, if the proposal aimed at allowing the use of ‘*non-significant fragments of contents*’ by search engines and aggregators, it should have referred to the act of ‘*reproduction*,’ rather than to the ‘*making available to the public*’. Instead, if the proposal assumed that search engines and aggregators are ‘*making available*’ the contents linked by them ... then it should have avoid referring to the ‘*non-significant fragments*’ of that contents.

Quite surprisingly, the proposal does not include *reproduction* under the statutory license. Why? At least, three explanations could account for it. The reproduction of these ‘*non-significant fragments of contents*’ may be deemed implicitly authorized within the ‘*making available to the public*,’ following a teleological/functional interpretation of this proposal (according to its spirit and goal).³⁶ It may also be deemed a temporary copy exempted under Art.31.1 TRLPI (*ex* Art.5(1) ISD). And, perhaps the copies done by aggregation services and search engines are deemed exempted as quotations under Art.32.1 TRLPI (*ex* Art.5(3)(d) ISD and Art.10(1) BC). We will have the opportunity to revisit these possibilities in the next two chapters.

³⁵ Of course, one may also interpret that by just reproducing a “non-significant fragment of the contents” on the aggregation list, this also entails an act of making available to the public of that fragment. But even in this case, the language would not achieve the goal of this provision because it would precisely leave out links to news which precisely use a ‘*significant*’ fragment of its contents: the headline!

³⁶ According to Art.3.1 Spanish Civil Code: “*Norms shall be interpreted according to the proper meaning of their wording, in connection with the context, the historical and legislative background and the social reality of the time in which they are to be applied, and taking into account fundamentally their spirit and purpose.*”

For now, let us mention that in the *Megakini* case, the Spanish Supreme Court considered that the reproduction by search engines of fragments of contents of the linked websites could be exempted under the *temporary copying limitation* (Art. 31.1 TRLPI, *ex Art.* 5.1 ISD), because of its “insignificance and its purpose to inform the user”. The Supreme Court also reminded us that the requirement that the acts of temporary reproduction do not have an economic significance (*ex Art.* 5.1 ISD) must apply to the acts of reproduction *per se* (that is, reproduction of fragments), not to other activities that Google may entertain on its website, namely, advertising.³⁷ Based on this interpretation, the Spanish government may have found no need to include reproduction within the proposed statutory license. Or perhaps, of course, they simply forgot about the reproduction right when drafting the proposal.

d) ‘non-significant fragments of contents’

Perhaps the reference to ‘*non-significant fragment of contents*’ may be explained after the 2013 amendment to the German Copyright Act, Art.87f-g (*Leistungsschutzrecht für Presseverleger*).³⁸ Despite granting press publishers a one-year exclusive neighboring right to commercially exploit their content, it ended up formally allowing search engines and aggregators to use ‘*individual words and small text excerpts*’ of works online to provide short descriptions of contents they are linking to.

If this is what the Spanish Government was aiming at, both the means and the results achieved are very different. The German provision initially grants a neighboring right to press publishers and then exempts reproduction (of individual works and small text excerpts) done by links, aggregators and search engines; The Spanish proposal grants press publishers a statutory right to obtain an unwaivable equitable compensation, under copyright, for the making available of their contents by means of linking.

³⁷ See Tribunal Supremo (Civil ch.), Sent.172/2012, 3 April 2012 [*Pedragosa v. Google*]. For a comment, see R. Xalabarder, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, 3 (2012) *JIPITEC* 162; Available at <http://www.jipitec.eu/issues/jipitec-3-2-2012/3445/xalabarder.pdf>.

³⁸ See German Copyright Act (1965, as last amended in 2013), Art.87f: “Press publishers (1) The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts. If the press product was produced within an enterprise, the owner of the enterprise shall be deemed to be the producer.” Available at http://www.gesetze-im-internet.de/englisch_urhg/index.html#gl_p0576

In short, there are far too many reasons to criticize the proposal both on formal as well as substantive grounds.

4. Aggregation: equitable compensation, unwaivable and subject to collective management

The statutory license proposed imposes on aggregation services the obligation to pay an ‘*equitable compensation*,’ which will be unwaivable and managed only by CMOs. No further indication is given as to how the remuneration will be set, collected and distributed.

a) Who is obliged to pay?

The proposal is very vague as to who is obliged to pay. In principle, it should be understood that this obligation vests in the ‘*providers of digital services of contents aggregation...*,’ but the proposal does not expressly refer to them as the debtors of the equitable compensation. Furthermore, as we mentioned, the scope of ‘*services of contents aggregation*’ is so wide that this may include professional aggregation services as well as bloggers and many different types of ‘*users who provide links to available online content*.’ The obligation to compensate might be placed not on the aggregators themselves, but upon any other intermediary (i.e., the provider of internet access). In fact, depending on how wide the scope of the ‘*digital services of contents aggregation*’ is, this may well be the only way for CMOs to effectively manage any licensing and compensation for it. If this is so, will any blogger (who produces ‘*contents, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment*’) be entitled to receive compensation for aggregation of his contents, and obliged to compensate for all third party contents he aggregates and links to? The proposal might, indeed, end up setting a system of cross-subsidized internet activity, where actors become debtors and creditors of some compensation.

b) Who is entitled to compensation?

Who is entitled to receive the compensation is not any clearer. The proposal refers to ‘*publishers or, as applicable, other rights owners*’ of the linked ‘*contents*.’ On the one hand, this will reopen the on-going battle between

journalists (authors) and publishers of newspapers which started regarding *press-clipping* services. But the scope of right owners may well go beyond news-related works to owners of more general contents ‘*available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment*’ who may also claim compensation for its aggregation.

c) Mandatory collective management

The compensation is subject to mandatory collective management. The CMOs entitled to manage it will depend on the answer to the previous question. In fact, the Spanish CMO for publishers and literary authors (including journalists) is CEDRO;³⁹ neither the *Asociación de Editores de Diarios Españoles* (AEDE)⁴⁰ which has welcomed the proposal, nor the *Asociación Española de Editores de Publicaciones Periódicas* (AEEPP)⁴¹ which formally complained about the collective management regime, qualify -at least, now- as CMOs.

Furthermore, the proposal may have important licensing effects beyond its originally intended scope. If the aggregation of online contents amounts to an act of exploitation under copyright, copyright owners of any aggregated contents which do not fall within the scope of the proposed statutory license will be entitled to authorize or prohibit its aggregation. For instance, since photographs (photographic works or simple photographs) are expressly excluded, the proposal would imply that the CMO for photographs (VEGAP) is entitled to grant the corresponding license for online aggregation –on a voluntary basis, rather than as a statutory licensed remuneration. Similarly, other aggregated contents, such as audiovisual and musical works or recordings, should be either subject to the statutory license or licensed on a voluntary basis. This would affect other CMOs, such as SGAE –on behalf of audiovisual and musical authors-, EGEDA –on behalf of audiovisual producers- and AGEDI –on behalf of phonogram producers.

d) Unwaivable

The ‘*unwaivable*’ nature of the compensation may be more easily explained than justified. It may be explained to the extent that the ancillary right is subject

³⁹ <http://www.cedro.org>

⁴⁰ <http://www.aede.es>

⁴¹ <http://www.aeep.com/>

to mandatory collective management; indeed, it would make no sense that a remuneration which can only (and exclusively) be managed by a CMO (or several) may, nevertheless, be waived by the authors. However, it is difficult to justify it (both its unwaivable nature and the mandatory collective management) when taking into account that the fair compensation is granted to ‘publishers or, as applicable, other rights owners;’ that is, it will most likely benefit businesses and companies, rather than the *authors* (natural persons) who have created the contents.⁴² For instance, a newspaper might be ready to enter an agreement with a news aggregator and share revenues (i.e., income from advertising), but even in this case the aggregator would be subject to payment for the ancillary right through the corresponding CMO.

Under Spanish law, “unwaivable” is usually distinguished from “inalienable”.⁴³ Yet, nothing is said in the proposed statutory license about the transferability of the equitable compensation that belongs to ‘publishers or, as applicable, other rights owners.’ How will ‘as applicable’ be read? Does it mean that the fair compensation will be granted as agreed by the parties, since it can be transferred from the authors to the publishers? Does it mean that publishers and authors will share it in two halves?

Perhaps the CJEU ruling in *Luksan*,⁴⁴ concluding that fair compensation or remuneration (meaning the same), can neither be waived nor transferred might help. Despite the Spanish proposal refers to the ‘publisher or, as applicable, other rights owners,’ if -according to *Luksan*- the fair compensation “arises in order to compensate for harm”⁴⁵ and this is what conveys its unwaivable character, it could be argued that the fair compensation belongs to any copyright owner who is suffering the harm resulting from aggregation. Once it is agreed who is entitled to it (perhaps, both authors and publishers? perhaps only publishers?), it cannot be waived ... or transferred; which means that it

⁴² In general terms, a non-waivable remuneration may be more easily justified when granted to authors or artists, but it is hard to explain for other copyright owners, such as publishers and producers, who usually retain all exclusive rights in the work (sometimes, both their own rights and those of authors’ by assignment) and are in a good position to negotiate their own licensing deals directly (rather than through a CMO).

⁴³ For instance, moral rights are ‘*unwaivable and inalienable*’ (Art.14 TRLPI) and so are most equitable remunerations and compensations set in favor of authors and artists.

⁴⁴ CJEU, 9 Feb.2012, *Luksan v. Van der Let* (C-277/10). It is true that in *Luksan* (#99) the question is “solely” answered from the point of view of the private copying exception and compensation (Art.5(2)(b) ISD) but it is difficult to stay away from the strong conclusions adopted by the CJEU.

⁴⁵ See *Luksan* #103: “the concept of ‘remuneration’ is also designed to establish recompense for authors, since it arises in order to compensate for harm to the latter (see, to this effect, Case C-271/10 *VEWA* [2011] ECR I-5815, para 29).”

will not be affected by neither the *cessio legis* of exploitation rights for works created under employment (Art.51 TRLPI: in favor of the employer) and for audiovisual works (Art.89 TRLPI: in favor of the producer), nor any other contract signed by the author and the publisher.

e) Equitable compensation

Compensation seems to imply that what needs to be compensated is only the damage caused, while *remuneration* (as used for *press-clipping*) could go well beyond the compensation for damages caused. The compensation must be *equitable*, which means that the price agreed should afford –at least- the sustainability of the aggregation and search engine services. However, the Government has produced no information regarding the parameters to calculate the compensation. In principle, the amount would be negotiated and agreed upon by the parties (CMOs and aggregators) and, if no agreement is reached, it will be set by the *Comisión de la Propiedad Intelectual* [hereinafter CPI].⁴⁶

5. Search instruments: non-remunerated license

The second paragraph of the proposal deals specifically with search instruments, which are authorized too but exempted from remuneration:

*Without prejudice to what has been established in the previous paragraph, the making available to the public by the providers of services which facilitate search instruments of isolated words included in the contents referred to in the previous paragraph will not be subject to neither authorization nor equitable compensation provided that such making available to the public is done without its own commercial purpose and is strictly circumscribed to what is indispensable to offer the search results in reply of the search queries previously formulated by a user to the search engine and provided that the making available to the public includes a link to the page of origin of the contents.*⁴⁷

Search instruments clearly include search engines. However, what is less apparent is whether this provision covers any kind of search engines or only those used by the aggregators subject to the statutory license in the first paragraph of the proposal. The bill refers to ‘*providers of services that facilitate search instruments of isolated words included in the contents referred*

⁴⁶ This is precisely the general rule that the proposed bill intends to introduce as a novelty in the Spanish law: failing an agreement among the parties, fees for statutory Licensing will be set by the CPI. Currently, CMOs have no obligation to negotiate fees (not even those under statutory licensing) and can set them unilaterally.

⁴⁷ See Annex for Spanish version.

to in the previous paragraph...' It thus seems to be aiming only at the search engines offered on the aggregation sites, rather than to any general search engines.

Even then, since the broad reference to *'contents, available in periodical publications or periodically updated websites and which has an informative purpose, of creation of public opinion or of entertainment'* may virtually cover any website and contents posted online, the specific reference to *'the previous paragraph'* will not significantly affect the scope of search engines affected by the second paragraph.

The making available to the public done by the search engine must comply with three conditions. It must be:

- *'done without its own commercial purpose'*
- *'strictly circumscribed to what is indispensable to offer the search results in reply of the search queries previously formulated by a user to the search engine'*
- *'and provided that ...(it) includes a link to the page of origin of the contents.'*

The second and third elements, rather than conditions, seem to explain what current search instruments do: showing what the results of the search and linking to the page of origin. Of course, the assessment of what is *'indispensable to offer the search results'* is an elusive and mostly subjective parameter (depending on the kind of work being searched, the purpose of the search, etc). In the case of press-articles, is the headline enough to offer the results or showing a few lines of the linked contents is also indispensable?

The condition that it is *'done without its own commercial purpose'* may also be difficult to assess. On the one hand, *'own'* commercial purpose may be understood as a commercial purpose different, independent, from the commercial purpose of the linked contents. If this were the case, the provision would not exempt any search instrument at all since they all are providing an activity which is different from the linked sites' activities (whatever these may be). On the other, *'commercial purpose'* may be read specifically in the sense that it involves some kind of commercial activity, as opposed to a general intent to obtain some kind of benefit. Accordingly, search instruments provided in exchange for a fee would not be covered by the exemption.⁴⁸ Once again, all

⁴⁸ In practice, any search instrument that is offered in exchange for a fee is included within a database and, in that case, access to the database would already set the conditions and the licensing terms of the contents.

three conditions are more likely to explain the term ‘*search instrument*’ rather than define the scope of the exemption, itself.

6. *Extraterritorial effects and private international law*

Nothing is specifically said in the proposal, but its effects in terms of private international law are apparent. Given the territoriality of copyright laws, and the *lex loci protectionis* rule provided for in Art.5(2) BC and Art.8 Rome-II Regulation,⁴⁹ the proposed statutory license and fair compensation would apply to any contents that is aggregated and linked available in Spain, regardless of where the original contents is posted and regardless of who is the company/person aggregating it.

In principle, it makes sense to assume that the proposal is meant for the benefit of Spanish news publishers and copyright owners. However, restricting its application to Spanish authors and press-publishers would not only be contrary to Art.18 Treaty on the Functioning of the European Union (TFEU),⁵⁰ which prohibits discrimination on the grounds of nationality, but also illogical from a copyright perspective. If aggregation and search instruments cause damages to copyright owners, to the extent that they need be “economically compensated for the exploitation of their contents,”⁵¹ then one must assume that damages are not only caused to Spanish copyright owners but to any copyright owner whose content is being aggregated and linked available in Spain.

Furthermore, under the general rules that set the scope of the Spanish TRLPI, the remuneration proposed would benefit not only Spanish and EU authors/copyright owners but any other, regardless of nationality.⁵² The government could have subject the remuneration of non-Spanish/EU authors to a reciprocity-condition,⁵³ but it did not. Accordingly, the proposed

⁴⁹ Regulation 864/2007/EC, of 11 July 2007, on the law applicable to non-contractual obligations.

⁵⁰ Available at http://europa.eu/eu-law/decision-making/treaties/index_en.htm

⁵¹ See <http://www.lamoncloa.gob.es/consejodeministros/paginas/enlaces/140214-enlaceleypropiedadintelectual.aspx/>

⁵² According to art.163 TRLPI, Spanish copyright law applies to five different groups of authors: Spanish nationals, EU nationals, authors who are Spanish residents, and authors whose works are published for the first time (or within 30 days) in Spain.

⁵³ As it is done in art.163(2) TRLPI regarding the unwaivable remunerations (box-office and alike) set for co-authors of audiovisual works, regardless of their nationality: in the case of a co-author who is a national of a State which does not afford an equivalent right to Spanish authors, the Government may rule that the sums paid by exhibitors to administration entities in that connection shall be used for purposes of cultural interest to be laid down by

remuneration would also benefit non-EU authors, despite their national laws do not afford an equivalent right to Spanish authors. Furthermore, lacking any of the above, the Spanish remuneration would also benefit –under *lex loci protectionis*– works of authors who enjoy protection in Spain according to an international treaty (for instance, the Berne Convention).⁵⁴

Accordingly, any news publishers and authors would be entitled to claim fair compensation but only for uses done by aggregation services and search engines available in Spain. This would be, of course, a matter to be taken into account when establishing the specific acts of linking and aggregation subject to the statutory license, the amount of fair compensation due, as well as the persons obliged to pay for it. And, as we have mentioned, the proposal is cryptic about all these issues. Let's elaborate on them.

First, it would require specific agreements between international collecting societies managing press-authors and press-publishers rights, to ensure that any remuneration collected in Spain (probably by Spanish CMOs) is correctly distributed among all affected copyright-owners in other EU as well as non-EU countries.⁵⁵

Second, we will need to ascertain which aggregation activities, subject to equitable compensation, are deemed to take place in Spain. Will it be based on the (.es) country code top-level domain of the site linking or aggregating the contents? Will it be based on the audience targeted by the website offering the links or aggregation service? Will it be based on the origin of the copyrighted contents that is being linked or aggregated?

Third, we will need to establish the amount of equitable compensation to the aggregation *taking place* in Spain. Such an amount must be restricted by the same principle of territoriality as a matter of substantive law (*lex loci protectionis*), since only Spanish law grants this statutory right to fair compensation and it is only effective within Spanish territory.⁵⁶

regulation. A similar reciprocity-condition is imposed under art.163(1)4 for the protection (in general) of works of non-EU authors or works of non-Spanish residents first published in Spain.

⁵⁴ Art.163(3) TRLPI. The last remaining criterion, strict reciprocity, will unlikely apply.

⁵⁵ CMOs should ensure that the money collected be given to non-Spanish rightholders, and avoid any *de facto* restrictions for its distribution to foreign copyright owners.

⁵⁶ Accordingly, this should not be mistaken for a matter of competent jurisdiction and the scope of damages it can be awarded by each jurisdiction (for damages only caused within its territory or worldwide). See CJEU, 25 Oct.2011, *eDate Advertising GmbH v X and Olivier Martinez v MGN Ltd* (C-509/09 and C-161/10), where the CJEU concluded that a person who

7. Negative effects on the licensed “commons” and open-access contents

The proposal, and specially the unwaivable nature of the equitable compensation, may have unexpected results regarding the contents licensed through a public license, such as *Creative Commons* [hereinafter CC].⁵⁷

Quite often the contents aggregated will be licensed through some public license (such as CC) which authorizes its reproduction, distribution and making available online for free. Not all open licenses grant the same scope of rights/uses authorized: some allow for the transformation of the work, others do not: some allow for commercial uses of the work, others only cover non-commercial uses. Regardless of the commercial or non-commercial nature of the aggregation, if the remuneration is set by law as non-waivable (as in this case) it would not be affected by any CC license (of any kind). In fact, CC licenses expressly refrain from interfering with any remuneration scheme set in national laws as non-waivable.⁵⁸ In other words, the unwaivable equitable

had been infringed a personality right over the Internet may bring action before the courts of the Member State in which he has his “center of interests” and seek compensation for damage caused worldwide. According to the CJEU, Art.5(3) Brussels-I Regulation 44/2001/EC, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast, Regulation 1215/2012/EU) must be adapted online and the courts of the place where the victim has his “centre of interests” (which may, but need not be, his place of residence) is in the best position to assess the liable impact on his personality rights of the material placed online.

⁵⁷ For further criticism on how the proposal may affect the commons, see <http://advocacy.globalvoicesonline.org/2014/07/30/spain-on-a-downward-spiral-new-law-may-destroy-the-digital-commons/> and <http://www.communia-association.org/2014/08/06/did-spain-just-declare-war-on-the-commons/>.

⁵⁸ See CC/BY/4,0/International, Sec.2(b)(3): *To the extent possible, the Licensor waives any right to collect royalties from You for the exercise of the Licensed Rights, whether directly or through a collecting society under any voluntary or waivable statutory or compulsory licensing scheme. In all other cases the Licensor expressly reserves any right to collect such royalties.*

See, also, CC/BY/3,0/International, Sec.3(e): *For the avoidance of doubt:*

- **Non-waivable Compulsory License Schemes.** *In those jurisdictions in which the right to collect royalties through any statutory or compulsory licensing scheme cannot be waived, the Licensor reserves the exclusive right to collect such royalties for any exercise by You of the rights granted under this License;*
- **Waivable Compulsory License Schemes.** *In those jurisdictions in which the right to collect royalties through any statutory or compulsory licensing scheme can be waived, the Licensor waives the exclusive right to collect such royalties for any exercise by You of the rights granted under this License; and,*
- **Voluntary License Schemes.** *The Licensor waives the right to collect royalties, whether individually or, in the event that the Licensor is a member of a collecting society that*

compensation will also be due when aggregation is done of CC licensed contents.

The proposal may also affect the open-access efforts of the academic and scientific communities, such as by the European Union in its Recommendation C(2012) 4890 final⁵⁹ and in its recent research programs (FP7 and the current Horizon 2020),⁶⁰ as well by the Spanish government in Art.37 of Spanish Act 14/2011 of Science, Technology and Innovation which requires that the results from research projects “mostly financed” with public funds be published in digital open-access repositories, at least within 12 months from publication.

Open-access repositories may qualify as ‘*periodically updated websites which have an informative purpose, of creation of public opinion or of entertainment*’. Aggregating contents of any of these open-access sites would easily qualify under the proposed statutory license and be subject to equitable compensation. And this would be so despite the contents of these repositories had been expressly and voluntarily licensed by authors under a CC or other public license which clearly allowed linking and aggregation.

As we mentioned above, depending on how the scope of the statutory license is designed,⁶¹ an academic article published on the Social Science Research Network (SSRN) or the Public Library of Science (PLOS)⁶² that has been aggregated on a (.es) URL site would be subject to the collection of fair compensation in Spain, and the same would apply to the contents of any site published under a CC license that is being aggregated and accessed by Spanish (.es) sites and users.

In short, a broad reading of the scope of the proposed statutory license would contradict the open-access mandates adopted in Spain and the EU and will

administers voluntary licensing schemes, via that society, from any exercise by You of the rights granted under this License.

⁵⁹ See also the Commission’s Recommendation of July 17th 2012 17 July 2012, on access to and preservation of scientific information; Available at http://ec.europa.eu/research/science-society/document_library/pdf_06/recommendation-access-and-preservation-scientific-information_en.pdf

⁶⁰ See <http://ec.europa.eu/programmes/horizon2020/en/>

⁶¹ For instance, let us assume that the scope of the statutory license and the obligation to pay fair compensation is based on the (.es) country code top-level domain of the site doing the link or aggregation: any works aggregated from these sites would be subject to the statutory license and its copyright owner would be entitled to receive fair compensation.

⁶² In Spain, the website of *Fundación Española para la Ciencia y la Tecnología* (FECYT) compiles several open access repositories existing in Spain: <http://recolecta.fecyt.es/repositorios-recolectados>.

reduce the scope of public licensing and open-access platforms, in Spain; An important part of the “commons” being subject to a compensation scheme managed by CMOs.

8. No market-failure; The anti-competitive effects of the proposal

Since it was introduced in the very last minute, none of the requested reports had the opportunity to look into the ancillary right for press aggregators. This is why the *Comisión Nacional de los Mercados y de la Competencia* (CNMC) – which had already reported on the bill-⁶³ issued *motu proprio* a second report on May 16th 2014 to specifically address this provision.⁶⁴

The proposal assumes the need to resolve a market failure, but no evidence has been provided by the Government in that sense.

The Spanish Competition Authority found no evidence of market failure to justify the proposal.⁶⁵ According to the CNMC, the existence of a direct competition in the market between the original sites and the aggregators (that would justify the need for a remuneration scheme) has not been proven. In fact, the report makes express reference to the availability of standard robots.txt exclusion protocols that could be easily used by copyright owners to avoid aggregation (if they so wished) and the possibility of contractual agreements (including remuneration) on a voluntary basis, which are enough to reach efficiency in this market and clearly disavow the market failure argument.

In similar terms, a report prepared by *Coalición Prointernet* concludes there is no economic justification for the introduction of a levy on news aggregation: “It has not been shown that content aggregation causes a market failure in making periodical information available to the public, nor that there is an intrinsic limitation preventing publishers from receiving a market compensation for their

⁶³ *Comisión Nacional de los Mercados y de la Competencia* (CNMC), IPN 102/13, 4 Sept. 2013; Available at : <http://www.cnmc.es/es-es/cnmc/actividadcnmc/ipns.aspx?num=IPN%20102/13&ambito=Informes%20de%20Propuestas%20Normativas&b=IPN%20102/13&p=1&ambitos=Informes%20de%20Propuestas%20Normativas&estado=0§or=0&av=0>

⁶⁴ *Comisión Nacional de los Mercados y de la Competencia* PRO/CNMC/0002/14, 16 May 2014; Available at: http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf

⁶⁵ *Comisión Nacional de los Mercados y de la Competencia* PRO/CNMC/0002/14, 16 May 2014; Available at: http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf

productive activities. Nor does the aggregation activity restrict the socially desirable quantity of information.” The report also points out that “there is no unanimity among publishers about the negative impact caused by the aggregation services,” and shows evidence of “the multiplier effect of advanced aggregation services” (increasing visits to media websites by an estimate of 13%) as well as of the “learning effect” (increasing direct visits to smaller and local media by an estimate of 5%).⁶⁶

The CNMC also mentioned that the introduction of the proposed ancillary right would become an obstacle (or a deterrent) for new operators to access the market of news aggregation in worse conditions than those applied to established businesses. And, finally, even in the case that a remuneration was deemed necessary due to a failure in the market (which was not been proven in this case), the CNMC concluded that it should never be under compulsory collective management but rather on a voluntary basis (more in accordance with competition rules).

For all these reasons, the CNMC advised the Spanish Government to drop the ancillary right proposal or, at least, delete its non-waiveable nature and subjection to collective management. In similar terms, the report done by *Coalición Prointernet* also refers to the inexistence of a failure in the market to justify the statutory license proposed, to the anti-competitive effects that the proposal may have for the entry of new aggregators in the market and to the risk of relocating news aggregation activities in sectors of high value added to the detriment of the general interest of access to information.⁶⁷

The Spanish Government’s proposal lacks any economic and market-failure justifications. No evidence has been presented to prove a direct correlation between losses of the press-publishing industry and news aggregation services or to prove a market failure or any other reason that could justify it. Lacking any solid justification, the proposal is but a subsidy of an industry at the expense of another. Distorting copyright law to protect interests which are foreign to copyright and in a manner that has deterring effects on the EU internal market and negatively affects the freedom to information online is simply a very wrong policy.

⁶⁶ See *Coalición Prointernet – AFI*, “Economic argument on the amendment of the Intellectual Property Law (IPL) with regard to aggregation of information,” July 2014. The report also refers to the anti-competitive effects that the proposal may have for the entry of new aggregators in the market and to the risk of relocating news aggregation activities in sectors of high value added to the detriment of the general interest of access to information.

⁶⁷ See *Coalición Prointernet – AFI*, “Economic argument on the amendment of the Intellectual Property Law (IPL) with regard to aggregation of information,” July 2014.

In addition, the Spanish proposal is contrary to EU and international law as it will now be examined.

II. THE SPANISH PROPOSAL IS CONTRARY TO EU LAW

The Spanish proposal is contrary to EU law and case law for several reasons.

The Spanish proposal relies on the premise that linking to copyrighted contents involves an act of exploitation. This premise is contrary to the CJEU ruling that linking to copyrighted contents *freely available* online does not amount to an act of communication to the public (Judgment of 13 Feb. 2014, C-466/12 *Svensson*) (1).

On the other hand, the functioning of aggregators and search engines involves the reproduction of pre-existing contents (i.e., the headline, an extract or a thumbnail picture) usually as the pointer of the link. This act of partial and temporary reproduction may be implicitly cleared with the act of making available (i.e., as implicitly done in *Svensson*) or exempted under the temporary copying limitation in Art.31.1 TRLPI (*ex* Art.5.1 ISD) (2).

By granting a new ancillary right beyond the right of making available online granted in Art.3(1) ISD, the Spanish proposal is contrary to the harmonizing goal of the ISD and will have deterring effects for the functioning of the internal market (3).

In addition, the proposal is incoherent with the exemption of liability for the provision of links to infringing contents, under the ISP safe harbors (4)

1. CJEU ruling on “*Svensson*”: Linking to freely available contents is not an act of communication to the public

The CJEU ruling in *Svensson* is especially relevant because it specifically dealt with *linking to press-articles*, which is precisely the scope of works purportedly targeted by the statutory license proposed (a). Yet, the reasoning used by the court to reach its conclusion deserves some criticism (b).

a) Linking done by news aggregators is not an act of making available to the public

The request for a preliminary judgment was done in the proceedings brought by several reporters against the operator of a website which provided (to its clients) with lists of Internet links to press articles (created by claimants) published on freely accessible media websites. The court asked the CJEU whether the provision of a clickable link to a copyrighted work available on a website was an act of communication to the public within the meaning of Art.3(1) ISD. The CJEU concluded -through a rather complex reasoning- that Art.3(1) ISD must be interpreted as meaning that the provision on a website of clickable links to works *freely available* on another website does not constitute an act of communication to the public.

Within the CJEU ruling, *freely available* must be understood as “without any restrictions,” but also as from a “lawful” source. The first requirement was set as *obiter dicta*, when the CJEU explained that an act of communication to the public would indeed exist where “a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted.”⁶⁸ The second requirement, that the linked contents must have been *lawfully available*, may be implied from the facts of this case, which only dealt with copyrighted content available online with the consent of their authors and owners.

After *Svensson*, linking to freely available news-related works (even when done by press-monitoring services, operating in exchange for a fee) is not an act of making available online. There is no reason to conclude differently when the linking is done by aggregators and search engines.

To the extent that news aggregators (or other aggregators) and search engines only link to freely (lawful and unrestricted) available contents –and on its original websites⁶⁹–, the statutory license proposed by the Spanish

⁶⁸ See *Svensson* #31: “This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders’ authorization”.

⁶⁹ The CJEU also stated that this conclusion is not altered by the fact that the linked contents is shown on the original website or it is shown in such a way as to give the impression that it is appearing on the same website (on which the link is found) (*Svensson* #29).

Government loses all justification (at least, as far as copyright is concerned). If linking to freely available online contents is not an act of exploitation (under Art.3(1) ISD) of the linked contents, there is no ground to justify the statutory limitation proposed, let alone subject it to remuneration.

It is true that when dealing with news, the value of the information over the protected expression, itself, makes the analysis more difficult, but it should not *per se* justify a different treatment under copyright and, ultimately, distort copyright law to protect interests which are alien to it.⁷⁰ The CJEU got this right in its *Svensson* ruling, which precisely dealt with the aggregation of news freely available online. News and headlines may be aggregated and used by search engines under the same conditions as other protected works and subject matter.

b) A criticism of *Svensson*

Despite the result reached in *Svensson* being correct, the reasoning used by the CJEU is complex and creates legal uncertainty that may have unexpected results for the functioning of the internet services.

The CJEU initially assumed, as obiter dicta, that the provision of a clickable link is an act of making available to the public⁷¹ and only afterwards, turned to the requirement of the new public, as “a public that was not taken into account by the copyright holders when they authorised the initial communication to the public.”⁷² Accordingly, it concluded that this requirement is not met when

⁷⁰ Instead, the Belgian case *Copiepresse* is a good example of how difficult it is to distinguish the exploitation of copyright from the value of facts and information. See *Copiepresse SCRL v. Google Inc.*, Tribunal de Première Instance de Bruxelles, 13 February 2007; confirmed by Cour d’Appel de Bruxelles (9^{ème} Ch.), 5 May 2011. For a comment of this case, see R. Xalabarder (2012), “Google News and Copyright,” *Google and the Law* (ed. A. López-Tarruella), Springer, The Hague, pp.113-167.

⁷¹ According to the CJEU, “for there to be an ‘act of communication’, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity ... the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’ ...” (*Svensson* #19-20); And the concept of public “refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons” (*Svensson* #21).

⁷² See *Svensson* #24. The concept of a “new public” was introduced in (C-306/05) *SGAE* [2006] and has been subsequently redefined in other rulings: (C-403/08 and C-429/08) *Football Association Premier League and Others* [2011]; (C-431/09 and C-432/09)

providing a link to freely available contents online and, therefore, it does not qualify as an act of making available.

In short, according to Svensson, linking to copyrighted contents available online will qualify as a new act of making available online or not, depending on the original act of making available (posting), specifically, the public targeted and its lawfulness or unlawfulness.

This complex reasoning has already been read (beyond the specific facts of the case) a contrario: that linking to unlawful contents is an act of making available to the public.⁷³ Of course, a careful reading of the Svensson ruling is far from suggesting so; rather, the existence or not of a new public will only be decided in each specific case.

Yet, on behalf of copyright logics, it would have been preferable that the CJEU had concluded either that linking to available contents posted online never involves a new act of making available (because it does not involve an upload and a new transmission of the work and because links are mere reference tools to help locate and access the original contents),⁷⁴ or that it always qualifies as such (which would, subsequently, illegalize the current functioning of the Internet).

Qualifying any link as an act of communication to the public and only later assessing whether the public targeted was “new,” based on the initial act of making available of that contents, is bound to generate legal uncertainty and deter the functioning of the Internet, which heavily relies on linking to available contents.

Furthermore, depending on how the *Svensson* ruling is read, it may render ineffective the safe harbor for search engines and links which exist in some EU countries (i.e., Spain) and has been formally accepted by the CJEU in *Louis Vuitton*.⁷⁵ It is precisely when the link directs to infringing contents that the

Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Airfield NV v Agicoa Belgium BVBA [2011]; (C-136/09) *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon* [2010]; (C-607/11) *ITV Broadcasting and others* [2013].

⁷³ See for instance: <http://www.interiuris.com/blog/?p=989> This reading *a contrario* is particularly appealing in Spain where –as we saw– courts have been steadily denying that linking to infringing contents amounts itself to a new infringement.

⁷⁴ As proposed by the European Copyright Society in its *Opinion on The Reference to the CJEU in Case C-466/12 Svensson*, 15 February 2013; Available at: http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf

⁷⁵ CJEU 23 March 2010 (C-236/08 to C-238/08) *Google France v Louis Vuitton*.

safe harbor operates;⁷⁶ However, if we read the *Svensson* ruling to only cover links to *lawfully* posted contents, the ISP would still be liable in this case for direct infringement –regardless of whether it had actual knowledge about the infringing nature of the original contents and regardless of how expeditiously it acted to remove or disable access to the infringing contents. It makes no sense to exempt search engines and the providers of links from liability for any infringement done by third party contents, yet force them to obtain a license for linking to it.

Furthermore, one should not underestimate the deterring effects that treating a same act of linking differently –under copyright- depending on the lawful or unlawful nature of the original linked contents might have for the functioning and development of the internet.⁷⁷

The complex ruling in *Svensson* may be the cue for a legislative intervention to overcome the dangers of the CJEU ruling and perhaps, also, harmonize the safe-harbor for search engines and links.

2. What about reproduction?

The functioning of aggregators and search engines involves the copying of pre-existing contents (i.e., the headline, an extract or a thumbnail picture) usually as the pointer of the link. If, according to *Svensson*, linking to freely available contents is not an act of making available online, then it follows that any temporary copies done in order to facilitate such lawful use, must be deemed exempted either (a) implicitly exempted with the act of making available (i.e., *Svensson*) or (b) under the temporary copying limitation in Art.5.1 ISD.

⁷⁶ For instance, in Spain (Art.17 LSSICE), the search engine or aggregator will not be deemed liable for an infringement committed at origin as long as they do not know about its infringing nature or, as soon as they do, act expeditiously to remove or disable the link.

⁷⁷ In order to avoid it, some Spanish scholars have proposed that the activities of an ISP whose conduct is not neutral or merely technical, automatic and passive (i.e., a website that provides lists of links to infringing P2P files) should not be evaluated as a “direct infringer” but rather examined *extra muros* (outside of Copyright) under the general doctrine of liability for any damages caused (*responsabilidad aquiliana*, Art.1902 Civil Code: “Any one who by act or by omission causes a damage to another, intervening fault or negligence, is obliged to repair the damage”) or as an act of unfair competition (under Act 3/1991, Jan.10th, of Unfair Competition). See F. Carbajo, “Sobre la responsabilidad indirecta de los agregadores de información por contribución a la infracción de derechos de propiedad industrial e intelectual en Internet,” *ADI* 32 (2011-2012) 51-78, p.62.

a) Copies implicitly allowed under *Svensson*?

Quite surprisingly⁷⁸ the *Svensson* ruling did not consider, at any time, the acts of reproduction done as part of the linking activity (let alone the making available of the fragments reproduced as part of the header of the link). It would make sense to read the CJEU ruling so as to also allow, implicitly, any copying and making available of fragments of the work done for purposes of providing the link, be it the title of the press article or a few words of the linked contents. On account of logics, an authorization to make an act of making available, communication or distribution (either by license or by a statutory limitation), should include also any reproductions necessary to carry them on; otherwise, the authorization is ineffective.

The fragmented approach of the exploitation rights in the ISD certainly disincentives this reading; the temporary copying exception in Art.5(1) ISD only covers reproduction and the limitations in Art.5 are segregated by exploitation rights in paragraphs 2 (reproduction only) and 3 (reproduction and communication to the public). However, basic hermeneutical rules existing in all national laws -such as the teleological interpretation and the most favorable interpretation for the validity of a contract- would certainly allow it.

b) Temporary copies under Art.5(1) ISD

Another explanation for the silence in *Svensson* regarding the act of reproduction is that the copies of fragments done as pointer of the links are already allowed under Art.5(1) ISD.

Art.5(1) ISD exempts the temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process, whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work, and which have no independent economic significance.

According to recital 33 ISD, this exemption is intended to cover reproductions on Internet routers and by proxy servers, as well as reproductions created by

⁷⁸ Since the questions presented by the national court only –and strictly- referred to the right of making available online/communication to the public, the CJEU probably did not go further into considering other rights involved in the same activity of linking. This may work as an explanation, but not as a justification.

users while browsing, including the copies stored in Random Access Memory (RAM) and local caches in their PC.⁷⁹

The reproduction of headlines or small fragments (as pointers) for linking purposes by search engines may be exempted as a temporary copy because the reproduction is automatically generated by the search engine (upon the terms requested by the user) and is automatically deleted upon closing the session.⁸⁰ These copies are an integral and essential part of a technological process to enable a transmission ...by an intermediary⁸¹ and comply with the requirements of the *Three-step-test*.⁸² And it should be taken into account that the CJEU has always concluded that any act which qualifies as a temporary copying under Art.5(1) ISD has also complied with the requirements of the *Three-step-test* in Art.5(5) ISD.⁸³ As we saw in the previous chapter, the Spanish Supreme Court favored the exemption of copies done by search engines as temporary copies (*ex Art. 5.1 ISD*).⁸⁴

But would the same still hold true beyond search engines? A news aggregation *site* (rather than news search engines) is not acting as a mere ‘*intermediary*’ (as required by Art.5(1) ISD) but rather as a *provider* of a different service itself, to the extent that it selects and classifies -be it manually

⁷⁹ A recent ruling by the CJEU has confirmed that RAM and local cache copies done in the user’s PC are exempted under Art.5(1) ISD and satisfy the conditions of the three-step-test in Art.5(5) ISD: “the copies on the user’s computer screen and the copies in the internet ‘cache’ of that computer’s hard disk, made by an end-user in the course of viewing a website, satisfy the conditions that those copies must be temporary, that they must be transient or incidental in nature and that they must constitute an integral and essential part of a technological process as well as the conditions laid down in Article 5(5) of that directive, and that they may therefore be made without the authorization of the copyright owner.” See CJEU, 5 June 2014, *Public Relations Consultants Association Ltd. v. Newspaper Licensing Agency Ltd.* (C-360/13).

⁸⁰ In the first *Infopaq* case [CJEU, 16 July 2009, *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08)], the CJEU concluded that in order to qualify as a “transient” copy, the “process must be automated so that it is deleted automatically, without human intervention, once its function of enabling the completion of such a process has come to an end” (see *Infopaq-I*, # 64). The requirement of “automatic deletion” was reversed in *Infopaq-II* [CJEU, 17 January 2010 (C-302/10)].

⁸¹ One may also question whether showing the extract in the results list is necessary or instead the headline would suffice to achieve the purpose of locating the contents sought.

⁸² A lot can be said against qualifying temporary copying as a limitation (Article 5(1) ISD) and subsequently restricting it to the *Three-step-test* in Art.5(5) ISD, rather than designing it as a negative definition to balance the wide concept of reproduction set in Art.2 ISD.

⁸³ See CJEU, *Infopaq-II* (C-302/10) and *PRCA* (C-360/13).

⁸⁴ See Tribunal Supremo (Civil ch.), Sent.172/2012, 3 April 2012 [*Pedragosa v. Google*]. For a comment, see R. Xalabarder, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?,” 3 (2012) *JIPITEC* 162; Available at <http://www.jipitec.eu/issues/jipitec-3-2-2012/3445/xalabarder.pdf>.

or automatically- the aggregated news shown under pre-set categories. Still, even in this case, Art.5(1) ISD could exempt these reproductions to the extent that they are done to enable a ‘*lawful use*’: the transmission of the contents which is freely (and lawfully) available online.

3. Granting an ancillary right for online aggregation is contrary to EU law harmonization and may be an obstacle for the internal market

In *Svensson*, the CJEU also concluded that the exclusive rights in the ISD are fully harmonized and that a Member State cannot give wider protection to copyright holders by including within the concept of communication to the public a wider range of activities than those harmonized under Art.3(1) ISD.

Despite being disguised as a limitation, the Spanish Government’s proposal amounts to the introduction of a *new* ancillary right for the making available online by linking, that would be in breach of Art.3(1) ISD and the harmonization goal attempted by EU law.

Regardless of the eventual specificities of its implementation (see *supra*), the compensation would have a negative impact on the functioning of the EU internal market, becoming an obstacle for the provision of cross-border services of aggregation. Any service of online aggregation provided within the EU market would be *de facto* subject to such payment, if accessible in Spain (*lex loci protectionis*); unless, of course, non-Spanish operators decide to geo-block their services in Spain, which would be contrary to EU principles of the internal market and to the fundamental rights of access to information and freedom of speech. Simply put, unthinkable.

4. The Spanish proposal is incoherent with the ISP safe harbor exempting liability for the provision of search engines and links

The Directive 2000/31/EC on e-commerce⁸⁵ did not expressly establish any safe harbor for the ‘*providers of hyperlinks and location tool services*.’⁸⁶

⁸⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [hereinafter e-commerce Directive]; Available at http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm.

However, they are being exempted in practice in several countries, either through case law⁸⁷ or by means of a specific safe harbor, such as the Spanish Art.17 LSSICE,⁸⁸ which exempts liability of the providers of links and search instruments under the same conditions set for the “hosting” safe harbor (Art. 16 LSSICE, *ex* Art. 14 e-commerce Directive). In fact, the CJEU itself has condoned the exemption of search engines (and other web 2.0 services) from liability under the same conditions set for the hosting safe harbor in Art.14 e-commerce Directive,⁸⁹ provided that the service is an “information society service”⁹⁰ and that the activity of the ISP is “neutral... of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of, nor control over, the information which is transmitted or stored.”⁹¹

The EU safe harbors exempt the ISP for any indirect liability that might result from any infringing content in the original linked website. They rely on the assumption that the ISP is not, itself, doing any direct acts of exploitation. The Spanish proposal seems to be running in the opposite direction. It makes no sense to exempt the ISP from *indirect* liability resulting from an infringement committed by its user at origin, and assign it liability for *direct* copyright

⁸⁶ According to Art.21 e-commerce Directive, this possibility would be considered when examining the need for an adaptation of the Directive. Apparently, so far, it has not been deemed necessary.

⁸⁷ For instance, the German Federal Supreme Court accepted that the conditions in the hosting safe-harbor could exempt liability of the search engine for linking to third party infringing contents; See *Vorschaubilder*, BGH I ZR 69/08, 29 April 2010. Also in France, the Google search engine has benefitted from the safe-harbors principles; See *Société des Auteurs des arts visuels et de l’Image Fixe (SAIF) v. Google France and Google Inc.*, Tribunal de Grande Instance de Paris, 20 May 2008, available at <http://www.juriscom.net/jpt/visu.php?ID=1067>; confirmed by Cour d’Appel de Paris, 26 January 2011, available at <http://www.juriscom.net/documents/caparis20110126.pdf>

⁸⁸ Act 34/2002, of July 11, on Services in the Information Society and e-commerce, which implemented e-commerce Directive 2000/31/EC [hereinafter LSSICE]; as amended by Act 32/2003 of Nov.3, on Telecommunications and by Act 57/2007 of Dec.28, on Measures to Improve the Information Society; Available at <http://www.minetur.gob.es/telecomunicaciones/lssi/normativa/Paginas/normativa.aspx>

⁸⁹ CJEU, 23 March 2010, *Google France v Louis Vuitton Malletier SA* (C-236/08 to C-238/08)

⁹⁰ As defined in Article 1(2) e-commerce Directive: “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”

⁹¹ See CJEU, 23 March 2010, *Google France v Louis Vuitton Malletier SA* (C-236/08 to C-238/08), and CJEU, 12 July 2011, *L’Oreal v. eBay UK* (C-324/09). Furthermore, the CJEU made clear that the fact that the service was subject to payment cannot deprive the ISP of the safe harbors in the e-commerce Directive, *eBay* #116.

infringement. The argument is even stronger when links are done to lawful (freely available online) contents.

If links and aggregators must be authorized (either by law or by the owner), the ISP safe harbors for search instruments and links (including Art.17 LSSICE) are devoid of any meaning because, regardless of any copyright infringement at origin, the ISP providing the link or the search engine will be committing a direct infringement itself if not authorized.

III. THE SPANISH PROPOSAL IS CONTRARY TO INTERNATIONAL OBLIGATIONS IN ART.10(1) BERNE CONVENTION AND ART.7 TRIPS

Even when assuming that the provision of a link constitutes an act (or several acts) of exploitation, the Spanish government's proposal is contrary to the international obligations undertaken by Spain under the Berne Convention and the TRIPs Agreement. Art.10(1) BC mandatorily exempts online news aggregation without requiring any remuneration; and despite Art.5(3)(d) ISD failed to expressly incorporate its mandatory nature within the EU *acquis*, Spain and all EU members are obliged to enforce it with the scope mandated by it (1).

The Spanish proposal is contrary to Art.7 TRIPs which obliges Contracting Parties to enforce IP law in a manner '*conducive to social and economic welfare and to a balance of rights and obligations*'. In particular, aggregation and search engines play a key role in the development and enhancement of the fundamental right to freedom of information granted in Art.10 ECHR and Art.11 EU Charter. Yet, the Spanish proposal does not correctly balance the copyright interests with the fundamental right to information, thus disregarding Art.7 TRIPS as well as the principle of "proportionality" consistently applied by the CJEU to balance copyright with other fundamental rights (2).

1. Art.10(1) BC: online news aggregation exempted as a quotation

Any acts of exploitation involved in the linking done by news aggregators and search engines are allowed as quotations under Art.10(1) BC (a), to the

extent that they are compatible with *fair practice* (b); Being a mandatory limitation, Spain is bound to enforce it (c).

a) According to Art.10(1) BC:

It shall be permissible to make quotations from a work which has already been lawfully available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

All conditions in this limitation support its application to exempt uses done by news aggregators and search instruments.

Art.10(1) BC is not restricted to any specific purposes (it was agreed that a list of specific purposes could never hope to be exhaustive) and it is clearly meant to cover quotations done for “scientific, critical, *informatory* or educational purposes,”⁹² such as done by aggregators and search engines.

Quotations may be done of all kind of works, provided they have been ‘*lawfully made available to the public*’;⁹³ Anything, including –as expressly stated– ‘*newspaper articles and periodicals*,’ that has been posted online may be quoted by anybody, also by aggregators and search engines.

Art.10(1) BC covers any acts of exploitation, not only reproduction, but also distribution, communication to the public (as well as translations),⁹⁴ granted after the WIPO Copyright Treaty of 1996 [WCT]⁹⁵ to all kind of works.

⁹² See S.Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, § 13.41, p.786 [emphasis added]

⁹³ See S.Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7 WIPO, April 5th 2003, p.12: This is wider than the concept of a “published work” ... and it includes the making available of works by any means, not simply through the making available of copies of the work. (it) also covers the situation where this has occurred under a compulsory license...”

Available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf

⁹⁴ See S.Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, § 13.83-87

⁹⁵ WIPO Copyright Treaty of Dec.20, 1996; Available at <http://www.wipo.int/treaties/en/ip/wct/> [hereinafter WCT]. See also WIPO Performances and Phonograms Treaty of Dec.20, 1996; Available at <http://www.wipo.int/treaties/en/ip/wppt/> [hereinafter WPPT].

The term ‘*quotations*’ itself already suggests some restriction, but the length of the quotation is a matter to be determined *in casu* and provided it is done to the ‘*extent justified by the purpose*,’ this means that lengthy quotations and even the quotation of a whole work may be justified in specific cases.⁹⁶ The copying of the headline or of a fragment is justified to the extent that it helps the user *identify* the contents linked and, assuming that linking is deemed an act of making available online, to *directly access* the original site. Identification and direct access to the linked contents justify the extent of the use done by aggregators and search engines under the quotation limitation.

The standard practice of links done by aggregators and search engines easily clears the requirement to mention the source and attribution of authorship, under Art.10(3) BC.

And last, but not least, Art.10(1) BC expressly exempts ‘*quotations from newspaper articles and periodicals in the form of press summaries*.’ At first sight, this inclusion makes little sense since –as pointed by Prof. Ricketson– the making of a *summary* is not the same of the making of a *quotation*.⁹⁷ However, the French text of this provision (which prevails in case of the discrepancy between the French and English texts)⁹⁸ refers to ‘*revue de presse*’ which –also according to Prof. Ricketson– means:

“a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or

⁹⁶ See S.Ricketson, J.C.Ginsburg (2006), *International Copyright and Neighboring Rights – The Berne Convention and Beyond*, Oxford University Press, Oxford, § 13.42 p.788.

⁹⁷ See Ricketson, J.C.Ginsburg (2006), *International Copyright and Neighboring Rights – The Berne Convention and Beyond*, Oxford University Press, Oxford, §13.41.

Art.7 of the original BC Act (1886) granted news a very distinctive treatment: newspaper and magazine articles published in any Berne Union country could be reproduced, in the original language or in translation, unless the authors or editors had expressly prohibited so. In subsequent Acts (Berlin, Rome and Brussels), this provision was included in Art.9(3) as a restriction to the reproduction right, until it was moved and extensively amended to Art.2(8) at the Stockholm Conference (1967).

⁹⁸ This rule was established under the Brussels Act (1948). See Ricketson, J.C.Ginsburg (2006), *International Copyright and Neighboring Rights – The Berne Convention and Beyond*, Oxford University Press, Oxford, §5.12.

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express opinions about, the same issue. In consequence, the genre of ‘*revue de presse*’ necessarily includes quotations...”⁹⁹

Is there any better way to explain what online news aggregators and search engines do? No further evidence is needed to conclude that the use done by aggregators and search engines amounts to a ‘*revue de presse*’ that can be exempted as a quotation, provided that all other conditions in Art.10(1) BC are met.

In summary, the quotation limitation in Art.10(1) BC allows search engines and aggregators to reproduce fragments of the linked contents (the title, a picture or a few words) as the pointer to enable the link, as well as to make them available (assuming that linking involves such an act), provided that it is done to the extent necessary to identify and access that contents, and in a manner that is ‘*compatible with fair practice*.’

b) Compatible with *fair practice*

Online news aggregation and search engines will be allowed as quotations under Art.10(1) BC, to the extent that they are *compatible with fair practice*.

According to the Stockholm program, this reference was meant to imply that “the use in question can only be accepted after an objective appreciation.”¹⁰⁰ Accordingly, its assessment requires taking into account not only the copyright interests involved in the exempted use but also any other interests, including general public benefits, in terms of culture and society, market efficiency, etc.

On the one hand, it is true that Internet and digital technologies have shaken the traditional formats of *news production and distribution*. Some major newspapers have been enduring a negative trend in revenue and aggregation sites with larger audiences are identified as the cause of this decline, by taking further advertising share from newspapers. However, not all newspapers are in

⁹⁹ See Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, §13.41.

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¹⁰⁰ See S.Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, §13.41.

decline; Some have adjusted better than others to the requirements and opportunities of the online market and many press-publishers have entered agreements with major aggregators and search engines to share revenues from advertising. In addition, it is undeniable that –to some extent- news aggregators and search engines do increase traffic to the newspaper websites they index;¹⁰¹ The fact that newspaper publishers are not using exclusion protocols to prevent indexation of their contents by aggregators and search engines seems to weight in that sense.

The assessment of *fair practice* must also take into account the *market perspective*. As expressed by Netanel, “if copyright law can prevent that highly efficient regime of new media distribution [aggregation], it will do so at the cost of distorting the market and impeding expressive diversity.”¹⁰² According to him, holding search engines and aggregators liable for displaying short fragments of online contents “could well cripple the very tool that makes the web so valuable: the ability to quickly find information of interest and import from among the billions of pages available.”¹⁰³ Furthermore, according to the same author, if linking is subject to copyright –rather than exempted as a quotation- a few agents may monopolize the provision of aggregation services and search engines by securing exclusive licenses from content producers. This exclusivity, which was justified in analogue markets for the investment required in its distribution, is no longer true in the digital markets where distribution costs are virtually non-existent. The interest of the public as well as of the producers of news is better served if the activity of linking and aggregation remains outside of copyright law in the realm of market competition.

And last, but not least, compatibility with *fair practice* must necessarily take into account other public interests involved with aggregation and search engines services, such as the fundamental freedom to provide and access to information granted in Art.11 EU Charter and Art.10 ECHR. The need for intellectual property law to contribute to social and economic welfare and the need to

¹⁰¹ *Coalición Prointernet – AFI*, “Economic argument on the amendment of the Intellectual Property Law (IPL) with regard to aggregation of information,” July 2014. According to this report, there is no unanimity among publishers about the negative impact caused by the aggregation services (in fact, aggregation increases visits to newspaper sites at 13%, in addition to a “learning effect” of around 5%) and nothing prevents them –if they wish so- from receiving market compensation.

¹⁰² See Netanel N W (2008) “New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age,” p. 126; Available at <http://ssrn.com/abstract=1183167>

¹⁰³ See Netanel N W (2008) “New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age,” p. 129; Available at <http://ssrn.com/abstract=1183167>

maintain a balance between the rights of authors and the larger public interests, including access to information, has been recognized by TRIPs and the WCT, and is a paramount factor to be considered when examining the *fairness* of quotations done by aggregators and search engines. We will further elaborate on this factor under Art.7 TRIPs and the *proportionality* principle (see below).

For all these reasons, the non-remunerated exemption of news aggregation and search engines as quotations under Art.10(1) BC is, in the manner that is commonly conducted, compatible with *fair practice*. The same conclusion would result under the *Three-step-test*,¹⁰⁴ since it is comparable to the standard rule of being ‘*compatible with fair practice*’.¹⁰⁵ Furthermore, being a mandatory limitation, compliance with the *Three-step-test* could never result in a restriction of the scope exempted under Art.10(1) BC or in a derogation of its mandatory nature. Like the reference to ‘*fair practice*,’ the *Three-step-test* is a tool meant to ensure a correct balance between the private and public interests involved in each case.¹⁰⁶

Another provision in the BC may be relevant to help understand and reinforce why news aggregation is mandatorily exempted under Art.10(1) BC. Art.2(8) BC excludes the protection of the BC ‘*to news of the day or to miscellaneous facts having the character of mere items of press information*’.

Despite its language might be read as a public-policy exclusion of news works from the protection of Berne, its historical background shows that Art.2(8) BC is meant to state that while facts and data, *mere* information (that is

¹⁰⁴ Within a strictly BC perspective, Art.10(1) BC remains unaffected by the original *Three-step-test* in Art.9(2) BC. Under the WCT, compliance with the *Three-step-test* seems to be imposed by Art.10(2) WCT ‘*when applying the Berne Convention*.’ Nevertheless, it was expressly agreed that “Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” For purposes of this report, under TRIPs, Art.10(1) BC appears to be free from compliance with the *Three-step-test* because it only incorporates the BC provisions (including Art.10(1) BC), not the WCT, and the *Three-Step-Test* in Art.13 TRIPs does not refer to ‘*when applying the BC*’ but it is aimed –like Art.9(2) BC– at the new limitations enacted and applied by Contracting States.

¹⁰⁵ See S.Ricketson, J.C.Ginsburg (2006), *International Copyright and Neighboring Rights – The Berne Convention and Beyond*, Oxford University Press, Oxford, §§13.110 and 13.41. See also J. Reinbothe, S. von Lewinski (2002), *The WIPO Treaties 1996*, Butterworths, p.131: “All the limitations and exceptions allowed under the Berne Convention should, if applied correctly and in the spirit of that Convention, pass the three-step-test and meet its conditions.”

¹⁰⁶ See *Declaration: A Balanced Interpretation of the Three-Step-Test in Copyright Law*; Available at: http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm.

‘news of the day,’ ‘miscellaneous facts’ and ‘mere items of press information’) *per se* are not protected by copyright, news-related products may indeed be protected under the BC as long as they constitute literary or artistic works.¹⁰⁷ The Guide to the Berne Convention (1986) explains the same.¹⁰⁸

Art.2(8) BC reminds us that facts and data –no matter how precious and valuable- do not belong in copyright.¹⁰⁹ This distinction explains the historical reluctance to protect news under copyright (unlike with other works, it is the information rather than the expression that usually holds most of the value) and, when so protected, the need to allow the making of press summaries and press reviews under copyright law.

The need to distinguish and strike a *fair balance* between these two interests (information and copyright) is what justifies the mandatory nature of the quotation limitation in Art.10(1) BC (and in national statutes, such as art.32.1 TRLPI), as well as its non-remunerated character.

What is at stake now is the survival of this balance also in the digital environment.

The statutory license proposed by the Spanish government upsets this balance of interests and disregards the basic distinction between facts and expression, between exploiting the work and conveying information. The Spanish proposal uses copyright law to protect interests that could be –if needed- protected elsewhere and upsets the fair balance mandated by Art.10(1) BC between copyright and information.

The crucial role of search engines and aggregators in the provision of access to information leads us to the *fundamental right/freedom to convey and receive information*, granted in Art.11 EU Charter and Art. 10 ECHR, as well as in

¹⁰⁷ See Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, §8.106.

Art.7 of the original BC Act (1886) granted news a very distinctive treatment: newspaper and magazine articles published in any Berne Union country could be reproduced, in the original language or in translation, unless the authors or editors had expressly prohibited so. In subsequent Acts (Berlin, Rome and Brussels), this provision was included in Art.9(3) as a restriction to the reproduction right, until it was moved and extensively amended to Art.2(8) at the Stockholm Conference (1967).

¹⁰⁸ Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) (WIPO/PUB/615) of 15 May 1986;

Available at http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf

¹⁰⁹ See S.Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, §8.106.

Art.20(1)(d) Spanish Constitution. We will further consider this aspect under Art.7 TRIPs and the *proportionality* principle (see below).

c) Art.10(1) BC is a mandatory provision, which must be enforced by Spain and the EU.

Perhaps the most interesting feature of Art.10(1) BC is its **mandatory nature**: quotations, with the scope exempted under it, must be allowed by all Berne Member States, and regardless of the scope of the quotation limitation existing in national law.¹¹⁰

Assuming that aggregation and search engines involve unauthorized acts of exploitation, these acts are mandatorily exempted by Art.10(1) BC and the TRIPs Agreement. As acknowledged by Prof. Ricketson, Art.10(1) BC is “the one Berne exception that comes closest to embodying a ‘user right’ to make quotations.”¹¹¹

Precisely because it is an imperative restriction to the authors’ rights, Member States cannot reduce its extent in favor of Union authors and works. As Prof. Ricketson explains:

“it will be contrary to the Convention for national legislation to provide protection in a case where this has been specifically prohibited. In the same way that there is a principle of minimum of protection that operates under article 19 in favor of Union authors, so (it can be argued) there is a corresponding principle of maximum protection to be implied in those few cases where the Convention limits or excludes protection”¹¹²

¹¹⁰ As with all other BC provisions, its effectiveness is restricted to works claiming protection under the Convention (ex Art.5.1 BC: in countries of the Union other than the country of origin). Any national quotation exception that is more restrictive than Art.10(1) BC would only be applicable to purely domestic scenarios of copyright protection. Instead, any domestic quotation exception broader in scope than what is exempted under Art.10(1) BC, should still apply to foreign works and authors, as a result from the BC principle of national treatment (Art.5(1) BC).

¹¹¹ See S.Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, §13.41.

¹¹² See S.Ricketson, J.C.Ginsburg (2006), International Copyright and Neighboring Rights – The Berne Convention and Beyond, Oxford University Press, Oxford, §§6.110-111.

Ficsor prefers another explanation: the compulsory nature of Art.10(1) BC is not so much an exception to the principle of minimum of protection granted under the BC but rather “it follows from a basic human freedom –the freedom of speech and criticism- that is justified and necessary to allow free quotations in appropriate cases.”¹¹³

Under either interpretation, be it as an internal restriction of the minimum of protection granted by the BC or as an external obligation (*via* human rights protection), Berne Member States are obliged –when granting protection to foreign Union nationals and their works under the BC- to allow quotations, also online, at least with the scope permitted in Art.10(1) BC.

Art.5(3)(d) ISD enacted the quotation limitation using basically the same language of Art.10(1) BC, but it failed to state its mandatory nature. This, however, does not alter the fact that the mandate to exempt quotations is binding amongst BC and TRIPs Member States,¹¹⁴ and this includes Spain and the EU.

To the extent that it will have effects beyond national works, the Spanish Government’s proposal will be infringing Art.10(1) BC and the obligations undertaken by Spain under the TRIPs Agreement (which incorporates the BC). Furthermore, being a WTO member, the EU would be jointly responsible for the breach of its international obligations under the TRIPs Agreement.

2. Art.7 TRIPs and the “proportionality” principle

As mandated by international instruments, the protection and enforcement of intellectual property rights must be done in a manner that is consistent with the protection of other fundamental rights, such as the freedom to information. The Spanish proposal does not do so.

¹¹³ See M.Ficsor (2002), The Law of Copyright and The Internet, The 1996 WIPO Treaties, their Interpretation and Implementation, Oxford University Press, §5.12.

¹¹⁴ It is true that EU Member States must eliminate any conventional obligations among them that are incompatible with the EU ones, but the gap between Art.5(3)(d) ISD and Art.10(1) BC is not a question of incompatibility: the ISD *allows* member states to provide for a quotation exception (the EU ISD is not obliging member states to disregard the quotation exception –thus conflicting with Art.10(1) BC), while the BC *obliges* member states to provide for it, at least as far as non-national authors/works.

News aggregation and search engines play a key role in the development and enhancement of the fundamental right to freedom of information granted in Art.11 EU Charter and Art.10 ECHR of 1950 (ratified by Spain in 1979):

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The same fundamental right to ‘freely communicate or receive truthful information by any means’ is included in Art.20(1)(d) of the Spanish Constitution.¹¹⁵

The fundamental right of information is paramount to assess the copyright implications of the links done by aggregators and search engines and its compatibility with fair practice (see above) and to balance the interests of the copyright owners with other interests and public benefits.

According to Art.7 TRIPs, “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Similarly, the 1996 WCT and WPPT expressly recognize in its preamble “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”

Also at EU level, the need to strike a balance between copyright and other fundamental rights and public interests has been recognized and applied by the CJEU under what is known as the *proportionality* principle.

In a few recent cases, the CJEU has already had the opportunity to apply the principle of proportionality to conclude that intellectual property (Art.17.1 EU

¹¹⁵ If approved, the proposed limitation in Art.32.2 TRLPI may be challenged on unconstitutional grounds in front of the Constitutional Court. According to Art.10.2 CE, the fundamental rights and freedoms granted by the Spanish Constitution will be interpreted in conformity with the Universal Declaration on Human Rights and the international Treaties and Agreements on human rights that have been ratified by Spain (also the case law from the international courts on Human Rights is incorporated into Spanish law and is binding for Spanish legislators and courts).

Charter) is not an absolute right and that it must be balanced with other fundamental rights, such as the freedom of expression and information (Art.11 EU Charter). In the *Promusicae* case,¹¹⁶ the CJEU stated that:

“... when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law *in a manner consistent* with those directives but also *make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights* or with the other general principles of Community law, such as the principle of proportionality.” (emphasis added)

Another interesting case is *Sky Österreich*,¹¹⁷ where the CJEU concluded that the freedom to access information should cast a limitation upon the exclusive exercise of copyright. In this case, the CJEU validated a EU provision that forced copyright owners to provide access to their contents in favor of other broadcasters, in exchange for a fee that could not exceed marginal costs, because “the disadvantages resulting from that provision are not disproportionate in the light of the aims which it pursues and are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case.”¹¹⁸

According to the CJEU, the freedom to conduct a business is not absolute¹¹⁹ and a holder of exclusive broadcasting rights relating to *events of high interest to the public* cannot rely *only* on the protection afforded by Art.17(1) of the Charter.¹²⁰ The CJEU expressly stated that a compensation that exceeded the marginal costs could –depending on how it was determined– “deter or even

¹¹⁶ See CJEU, 29 January 2008 (C-275/06). Other more recent cases that have applied the principle of proportionality: CJEU, 16 Feb.2012, *SABAM v. Netlog* (C-360/10). CJEU, 24 Nov.2011, *Scarlet extended v. SABAM* (C-70/10).

¹¹⁷ See CJEU, 22 Jan. 2013, *Sky Österreich GmbH v. Österreichischer Rundfunk* (C-283/11).

The request for a preliminary ruling was made in the proceedings between Sky and ORF, concerning the economic conditions under which the latter was entitled to gain access to the Sky satellite signal to make short news reports; Specifically, what was at stake was the validity of Art.15(6) Directive 2010/13/EU which required that “where compensation is provided for (the making of such short extracts), it shall not exceed the additional costs directly incurred in providing access.” According to ORF, Sky intended to charge a remuneration fee greater than the additional costs, which were non-existent. The *Bundeskommunikationssenat*, the Government agency which referred the question to the CJEU, found that Art.15(6) (which prevented authorities in Member States from establishing a higher compensation) was an interference with the right of property and, hence, was inconsistent with the principle of proportionality. The CJEU concluded that it was not.

¹¹⁸ *Sky Österreich*, #66.

¹¹⁹ *Sky Österreich*, #45.

¹²⁰ *Sky Österreich*, #40.

prevent certain broadcasters from requesting access for the purpose of making short news reports and thus considerably restrict the access of the general public to the information.”¹²¹ In short, “the EU legislature was required to *strike a balance* between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the media, on the other.”¹²²

It is easy to draw a double parallelism between the CJEU ruling in *Sky Österreich* and the online aggregation of news as treated in the Spanish proposal. On the one hand, the Spanish proposal disregards the fair balance stroke in Art.10(1) BC between ‘*the various rights and fundamental freedoms at issue*’ and only focuses on the interests of right holders; By establishing a compensation for the online aggregation of news, it completely forgets about the important role they play in locating and providing access to more and more diverse information available online. On the other, if justified and necessary to strike a fair balance, any compensation should not exceed marginal costs, since a higher compensation could “deter or even prevent” some aggregators from accessing the market “and thus considerably restrict the access of the general public to the information.” And, as in the *Sky Österreich* case, marginal costs in this case would also be zero; once newspapers have made the contents freely available to the public, they incur in no extra costs so that aggregators and search engines can index and link to it.

To the extent that it has negative effects on the provision of access to information online, the Spanish proposal is contrary to the fundamental right to information granted in the Spanish Constitution, the EU Charter and the ECHR. Furthermore, it disregards Art.7 TRIPS and the CJEU principle of “proportionality” that require to enforce copyright in a manner that is balanced with other fundamental rights and public interests.

3. The Aftermath

When considering Art.10(1) BC and Art.7 TRIPs together, it is undeniable that the exemption of news aggregation and search engines as press-reviews and quotations is not only *compatible with fair practice*, but also *conducive to social and economic welfare* to the extent that it enhances free speech and access to information in the digital economy.

¹²¹ *Sky Österreich*, #55.

¹²² *Sky Österreich*, #59.

If –against the EU, BC and TRIPs norms- the Spanish government still believes that linking to freely available contents done by news aggregators and search engines involves any acts of exploitation that need be authorised by copyright law, it should do so *for free*, in compliance with Art.10(1) BC and Art.7 TRIPs, to avoid restricting public access to the information and curtailing the exercise of the fundamental freedom to information.

If the statutory license is passed as introduced by the government, Spain and the EU will be liable for infringement of the BC and TRIPs.

IV. DOMESTIC LAW MUST BE INTERPRETED IN CONFORMITY WITH EU NORMS AND INTERNATIONAL OBLIGATIONS

Interestingly, EU norms already provide for mechanisms to deactivate any domestic law provision which is contrary to EU and international obligations.

The principle of *interpretation in conformity* holds Member States obliged to “...interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to (in the Directive),”¹²³ as well we “in the light of the applicable rules of international law, and in particular those set forth in the Berne Convention”.¹²⁴

In fact, recital 44 ISD¹²⁵ directly calls for it:

When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations.

These international obligations include –as we have seen- the mandatory quotation in Art.10(1) BC, but also the mandate set in Art.7 TRIPs to enforce IP

¹²³ See, among others, CJUE, 29 Jan. 2008, *Promusicae* (C-275/06).

¹²⁴ See CJUE, 7 Dec.2005, *SGAE* (C-306/05) ##35,40,41 and CJUE, 4 Oct.2011, *Football Association Premier League and Others* (C-403/08 and C-429/08) #189.

¹²⁵ Even the *Three-step-test* in Art.5(5) ISD could be a privileged instrument to allow compliance with international obligations. See M. Senftleben, “Internet Search Results – A permissible Quotation?,” 235 *RIDA* 3 (Jan. 2013), p.43: “...the three-step-test in Article 5(5) ISD is primarily intended to ensure compliance with relevant international obligations, namely the international three-step-tests. Considering this close link with its international counterparts, however, Article 5(5) ISD cannot be exclusively understood as a restrictive control mechanism.”

law in a manner conducive to social and economic welfare and to a balance of rights and obligations, as well as, specifically, the protection of the fundamental right to information (Art.10 ECHR and Art.11 EU Charter).

The principle of *interpretation in conformity* will directly set aside any narrower domestic limitations¹²⁶ (such as –if passed– the Spanish proposal currently examined), in favor of the harmonized Art.3 ISD (which leaves no room for the ancillary right proposed) and/or in favor of the scope of quotations exempted under Art.5(3)(d) ISD,¹²⁷ thus complying with Art.10(1) BC. The CJEU has already done so in several cases.

In *Painer*,¹²⁸ the CJEU had the opportunity to specifically apply this principle to the quotation exception and interpret the more restrictive French quotation limitation in the light of the provisions in Art.5(3)(d) ISD and Art.10(1) BC. Accordingly, the CJEU refused as irrelevant¹²⁹ the domestic requirement that the work is quoted as part of a new literary work,¹³⁰ because neither Art.10(1) BC nor Art.5(3)(d) ISD require so and because the specific use in that case was not contrary to the *Three-step-test* (ex Art.5(5) ISD).¹³¹

¹²⁶ Several national limitations are set in more restrictive terms than Art.5(3)(d) ISD, which makes it difficult for aggregation and search engines to be exempted as quotations. For an overview of the quotation limitations existing in national laws, see R. Xalabarder, *Study on Copyright Limitations and Exceptions for Educational Activities in north America, Europe, Caucasus, Central Asia and Israel*, (SCCR/19/8), November 5, 2009; Available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.pdf

See also R. Xalabarder (2012), “Google News and Copyright”, *Google and the Law* (ed. A. López-Tarruella), Springer, The Hague, pp.113-167.

¹²⁷ Art.5(3)(d) ISD closely follows the language and scope of Art.10(1) and, accordingly, the same analysis and conclusions reached above as to its scope are applicable here. The acts of exploitation (reproduction and making available online) done (if so) by online news aggregation and search engines activities will be exempted as quotations, provided that they are done ‘*in accordance with fair practice, and to the extent required by the specific purpose.*’ Notice, that since the purposes of ‘*criticism or review*’ are listed as mere examples (“such as”), quotations may be done for informatory purposes, as well as for other purposes.

¹²⁸ See CJEU, 1 Dec.2011, *Eva-Maria Painer v. Standard Verlags GmbH et al* (C-145/10), #126.

¹²⁹ “...the issue of whether the quotation is made as part of a work protected by copyright or, on the other hand, as part of a subject-matter not protected by copyright, is irrelevant” (*Painer*, #136).

¹³⁰ Interestingly, the Advocate General had expressly concluded in the opposite sense, favoring a more restrictive (traditional?) reading of the quotation limitation requiring a “description, commentary or analysis” of the quoted work. See Opinion of Advocate General Trstenjak, 12 April 2011, *Eva-Maria Painer v. Standard Verlags GmbH et al* (C-145/10), #210.

¹³¹ “Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that Directive, must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.” (*Painer*, #137).

Notice that the CJEU did refer to the principle of *strict interpretation* of limitations, which has been traditionally applied as the only hermeneutical rule to interpret limitations to copyright (“the provisions of a directive which derogate from a general principle established by that Directive must be interpreted strictly”),¹³² but preferred the principle of *interpretation in conformity* over it:

“the fact remains that the interpretation of those conditions must also enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed.”¹³³

The CJEU also used the principle of *proportionality* to support the need to safeguard “as stated in recital 31 (ISD), a ‘fair balance’ ...between, on the one hand, the rights and interests of authors, and, on the other, the rights of users of protected subject-matter.”¹³⁴

Similarly, in the recent case *Deckmyn*,¹³⁵ the CJEU again preferred to assess the scope of the parody limitation in Art.5(3)(k) ISD under the teleological/functional criterion (to enable the effectiveness of the limitation) and the proportionality principle (seeking to achieve a fair balance), setting aside the principle of strict interpretation as the only hermeneutical criteria for the application of limitations.

Furthermore, in both rulings (*Painer*¹³⁶ and *Deckmyn*)¹³⁷ the CJEU seems to be favoring an interpretation of the limitations in Art.5 ISD as “autonomous concepts of EU law,” which prevail over any dissenting interpretation and provisions existing in EU national laws. This conclusion may be a rather far-reaching harmonization, which goes clearly beyond what was envisioned by the ISD legislator (the list of limitations in Art.5 ISD were expressly set as an exhaustive but optional one), but it is certainly aligned with the principle of *interpretation in conformity* and is extremely useful to ensure compliance with

¹³² See, for instance, *Infopaq*, #56-57.

¹³³ *Painer*, #133. See also *Premier League* (C-429/08), #162 and 163.

¹³⁴ *Painer*, #132. “Article 5(3)(d) of Directive 2001/29 is intended to strike a *fair balance* between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors. That fair balance is struck, in this case, by favouring the exercise of the users’ right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated.” (*Painer*, #134-135).

¹³⁵ See CJEU, 3 Sept. 2014, *Deckmyn v. Vandersteen* (C-201/13)

¹³⁶ See CJEU, 1 Dec. 2011, *Eva-Maria Painer v. Standard Verlags GmbH et al* (C-145/10), #126.

¹³⁷ See CJEU, 3 Sept. 2014, *Deckmyn v. Vandersteen* (C-201/13)

the international obligation in Art.10(1) BC through the quotation limitation in Art.5(3)(d) ISD.

The combination of both principles will efficiently overcome any quotations limitations in domestic law which do not conform with the scope mandatorily exempted under Art.10(1) BC –and Art.5(3)(d) ISD–, such as the Spanish Government’s proposal, if finally enacted.

V. CONCLUSIONS

In addition to serious flaws regarding its scope and implementation, the Spanish proposal is contrary to EU and international norms.

Since it is based on the premise that linking to online contents involves an act of making available to the public, the proposal is contrary to the CJEU ruling in *Svensson*. And to the extent that it amounts to a new ancillary right, the proposal is contrary to the harmonized right of making available to the public in Art.3 ISD.

Even when assuming that the provision of a link does constitute an act of exploitation, the proposal is contrary to Art.5(3)(d) ISD and to the scope of quotations mandatorily exempted under Art.10(1) BC and –by incorporation– under the TRIPs Agreement. Furthermore, the proposal disregards the fundamental right and freedom to information (Art.11 EU Charter, Art.10 ECHR) and contradicts the international mandate under Art.7 TRIPs to strike a fair balance among fundamental rights, in this case, access to information and copyright.

For all these reasons, the remunerated statutory license proposed for news aggregation and search engines should be deleted from the bill currently examined in Parliament. Otherwise, Spain and the EU will be liable for non-compliance with their international obligations under the BC and TRIPs. Nevertheless, even if the proposal were to be approved, it would be deactivated under the CJEU doctrine of *interpretation in conformity*, which sets aside any domestic provision which is contrary to international obligations and EU law.

Annex

Texto Refundido de la Ley de Propiedad Intelectual, approved by Royal Legislative Decree 1/1996 of April 12, regularizing, clarifying, and harmonizing the applicable statutory provisions.

Bill 121/000081: Proyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

Artículo 32. Cita e ilustración de la enseñanza.

Artículo 32. Citas y reseñas e ilustración con fines educativos o de investigación científica.¹³⁸

1. Es lícita la inclusión en una obra propia de fragmentos de otras ajenas de naturaleza escrita, sonora o audiovisual, así como la de obras aisladas de carácter plástico o fotográfico figurativo, siempre que se trate de obras ya divulgadas y su inclusión se realice a título de cita o para su análisis, comentario o juicio crítico. Tal utilización sólo podrá realizarse con fines docentes o de investigación, en la medida justificada por el fin de esa incorporación e indicando la fuente y el nombre del autor de la obra utilizada.

Las recopilaciones periódicas efectuadas en forma de reseñas o revista de prensa tendrán la consideración de citas. No obstante, cuando se realicen recopilaciones de artículos periodísticos que consistan básicamente en su mera reproducción y dicha actividad se realice con fines comerciales, el autor que no se haya opuesto expresamente tendrá derecho a percibir una remuneración equitativa. En caso de oposición expresa del autor, dicha actividad no se entenderá amparada por este límite.

“2. La puesta a disposición del público por parte de prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos, divulgados en publicaciones periódicas o en sitios Web de actualización periódica y que tengan una finalidad informativa, de creación de opinión pública o de entretenimiento, no requerirá autorización, sin perjuicio del derecho del editor o, en su caso, de otros titulares de derechos a percibir una compensación equitativa. Este derecho será irrenunciable y se hará efectivo a través de las entidades de gestión de los derechos de propiedad intelectual. En cualquier caso, la puesta a disposición del público por terceros de cualquier imagen, obra fotográfica o mera fotografía divulgada en publicaciones periódicas o en sitios Web de actualización periódica estará sujeta a autorización.

Sin perjuicio de lo establecido en el párrafo anterior, la puesta a disposición del público por parte de prestadores de servicios que faciliten instrumentos de búsqueda de palabras aisladas incluidas en los contenidos referidos en el párrafo anterior no estará sujeta a autorización ni compensación equitativa siempre que tal puesta a disposición del público se produzca sin finalidad comercial propia y se realice estrictamente circunscrita a lo imprescindible para ofrecer resultados de búsqueda en respuesta a consultas previamente formuladas por un usuario al buscador y siempre que la puesta a disposición del público incluya un enlace a la página de origen de los contenidos.”

¹³⁸ The proposed bill includes 3 other paragraphs regarding teaching and research purposes, which explain the longer title proposed for Art.32 TRLPI.

