COMPLAINT TO THE COMMISSION AGAINST THE KINGDOM OF SPAIN FOR INFRINGEMENT OF EUROPEAN LAW

We are writing on behalf of our clients, the Spanish Internet Users' Association (Asociación de Usuarios de Internet, "**AUI**"), the Internet Users Association (Asociación de Internautas, "**AI**"), the Internet Society Spain ("**ISOC-ES**"), the Technical Computing Association (Asociación de Técnicos de Informática, "**ATI**") and the Spanish Association of Periodical Publication Publishers (Asociación Española de Editoriales de Publicaciones Periódicas, "**AEEPP**", jointly referred (together, the "**Complainants**"), in order to submit a complaint against Spain for a breach of EU law (the "**Complaint**").

AUI is a non-profit association established in July 1995 under Spanish law and registered at the General Associations Registry of the Interior Ministry under number 160.095, on 5th July 1995; its tax identification number (Número de Identificación Fiscal, "CIF") is G-81235996, and its registered office No.5 at Montearagón Street, Door F, 4D, 28033 Madrid, Spain; it is represented by Mr. Miguel Pérez Subías, with ID number 17147802-Z, as president.

As previewed in its articles of association, AUI is a non-profit organization which aims:

- To protect and defend the interests and rights of Internet users and users of New Technologies.

- To promote the correct use of the Internet and New Technologies and their application at home, in the workplace and in Public Administration; for use in the personal sphere as well as for professional activities.

Since its establishment in 1995, AUI has been one of the most active and relevant agencies in Spain for the defence of users' rights in relation to the use of new technologies. Among its most relevant actions are the launch of the neutral interconnection facility ESPANIX, Mundo Internet and Expo Internet congresses, the creation of World Internet Day, the campaign against Canon Digital which led to its abolition following the direct support of more than 1,500,000 citizens and the launch of the Spanish Forum for Internet Governance (IGFSPAIN). AUI is a member, with a seat and vote, of several different multi-sectoral bodies within the Ministry of Industry, such as the Telecommunication Advisory and Information Society Council (Consejo Asesor de Telecomunicaciones y Sociedad de la Información, "CATSI") and the National Forum on Digital Trust (Foro Nacional de Confianza Digital, "FNCD"). Since 2004, AUI has been an active member of ICANN and is actively involved in global, European (EURODIG) and Spanish (IGFSPAIN) governance forums.

AI is a Spanish non-profit association which was founded in 1998 and registered at the National Associations Registry, under number 164.343; its tax identification number (CIF) is G82182494 and its registered office is at Telémaco Street nº 12, 19 – 28027 Madrid; it is represented by Mr. Víctor Domingo Prieto, as president.

AI's operational activity extends across Spain, where it carries out international cooperation activities in relation to its goals. AI's main aim is to defend, inform and educate users and consumers of phone and telematics communications and other electronic networks, promoting accessible, affordable and universal services to them. Moreover, it ensures that public authorities comply with the duties contained in Article 51 of the Spanish Constitution with regard to issues that could affect the above-mentioned aims as well as civil rights and freedoms, especially with regard to privacy issues surrounding the control of communications.

ISOC-ES is a non-profit association registered at the National Associations Registry is under number 166.065; its tax identification number (CIF) is G-15737588 and its registered office is at Avda. de Vigo, Campus Sur, 15705 Santiago de Compostela; it is represented by Mr. Andrés Vea Baro, with ID number 52216152-B, as president.

ISOC-ES is a global organization aimed at ensuring that the Internet remains an open and transparent tool so that we can take advantage of it. It is the Spanish Chapter (Capítulo Español) of the Internet Society and is registered as a non-profit association with the following social objectives:

- To participate in Internet Society (ISOC) activities and collaborate with its other chapters.
- To encourage the development of the Information Society in Spain, including education, innovation and research in relation to the Internet, in both technological and socioeconomic spaces.
- To understand, disseminate and take part in the preparation of proposals, recommendations or regulations which affect the development of the Internet, both locally and internationally.

ATI is an association registered at the National Associations Registry, Group 1, Section 1 under number 31.434; its tax identification number (CIF) is G-08676967, and its registered office is at Ávila Street, 50, 3rd floor, venue 9, 08005 Barcelona; it is represented by Mr. Rafael Fernández Calvo, with ID number 50138434-K, as Member of the Board of Directors.

ATI is a non-profit association founded in 1967, which is open to everyone, at any professional level or in any industry sector, who is professionally active in the Information and Communications Technology sector (TIC). It is made up of an open community connected to major international entities such as CEPIS (Council for European Professional Informatics Societies), IFIP (International Federation for Information Processing), CLEI (Centro Latinoamericano de Estudios en Informática – Latin American Center for the Study of Computing) and ECWT (European Centre for Women and Technology), among others.

AEEPP is a non-profit association founded in 2000, its tax identification number (CIF) is G-28511897 and its registered office is at Diego de León Street, 50 Madrid; it is represented by Mr. Arsenio Escolar Ramos, with ID number 13077189-X, as president.

AEEPP represents around 100 publishing companies and groups in Spain which publish more than 900 titles, covering all topics and sectors (general information, specialized and professional), types of publications (daily, weekly, fortnightly, monthly, annually) and in all formats and channels (print, digital, free and subscription), with joint runs that exceed 500 million copies per year and with an estimated audience of 125 million readers a month for print media, and over two million unique visitors a day for online media. AEEPP employs 2,400 professionals, the majority of whom are journalists.

In this Complaint, the Complainants request the Commission to commence appropriate proceedings as a consequence of the infringement of EU Law by the Kingdom of Spain, through a major change, on 4 November 2014, of its Royal Legislative Decree 1/1996, of 12 April, approving the Restated Text of the Law on Intellectual Property, Regulating, Clarifying, and Harmonizing Applicable Legal Rules ("**Spanish Intellectual Property Law**").

In particular, the reported infringement is the result of Law 21/2014, of 4 November ("**Law 21/2014**"), which amended the Spanish Intellectual Property Law and Law 1/2000, of 7 January, on Civil Procedure, which seeks to grant publishers a so-called "ancillary" (extra) copyright (the "**Spanish Legislative Measure**"). As a result, online news aggregators (such as Yahoo! News, Google News and Menéame, among others) are obliged to pay a "fair compensation" for the use of non-significant fragments of the publisher's content (known as "*snippets*"), irrespective of whether this content is freely available on the one hand or requires a subscription login to access it[1]. Moreover, publishers cannot waive their right to compensation. A distinctive feature of the Spanish

[1] Online news aggregators provide links to the original content of the news, which has previously been published by the provider of the content (publishers), and they accompany these links, for informational purposes, with quotes that include portions of text (fragments) apart from the incumbent, which can be accompanied by an image in certain circumstances.

reform is that publishers can only obtain compensation through a collecting society, which will negotiate and collect the compensation on behalf of its member-publishers.

By adopting the Spanish Legislative Measure, the Kingdom of Spain infringed a number of provisions of EU law. First, given that the Spanish Legislative Measure prevents the correct functioning of the internal market, it should have been notified by the Spanish Government before its adoption, as required by Directive 98/34[2]. Second, the Spanish Legislative Measure constitutes an unjustified restriction on the fundamental freedom to provide services, in breach of Article 56 of the Treaty on the Functioning of the European Union ("**TFEU**"), the general principle of proportionality and the Copyright Directive. Furthermore, the Spanish Legislative Measure has had a profoundly negative impact on competition among publishers, clearly damaging smaller publishers, who have seen how the Kingdom of Spain, through the new regulation, has raised barriers to entry and expansion, preventing or making it more difficult for them to benefit from online aggregators and thereby reach larger audiences. Ultimately, the Claimants highlight the importance for Spanish users to have access to as diverse a cultural and political news service as possible, with the aim of guaranteeing the right to information protected by Article 10 of the European Convention on Human Rights ("**ECHR**"). The Spanish Legislative Measure severely damages this right and goes against the EU objective of promoting access by internet users to pluralistic and culturally diverse online content, and hinders the development of a Digital Single Market with copyright regulation for the digital age.

In fact, as a result of the Spanish Legislative Measure, online news aggregators have decided to leave the Spanish market. This effect has been compounded by the legal uncertainty arising in relation to the way the measure will be implemented following its adoption. To date, the Spanish Government has not adopted the necessary measures for the new regulation pending the outcome of this Complaint (for example, it has not yet established the tariffs).

1. DESCRIPTION OF THE SPANISH LEGISLATIVE MEASURE

1.1 On 4 November 2014, the Kingdom of Spain adopted Law 21/2014 which introduced a number of changes to the Spanish Intellectual Property Law[3]. Law 21/2014 was published in the Spanish Official Gazette of 5 November 2014 and came into effect on 1 January 2015 (Law 21/2014 is attached as Annex 1).

1.2 Law 21/2014 introduced a new paragraph 2 to Article 32 of the Spanish Intellectual Property Law which reads as follows:

> ***Article 32. Quotations, reviews and illustration for teaching or scientific research purposes***
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> *The making available to the public by electronic service providers of non-significant fragments of aggregated content, reported in periodical publications or on periodically updated websites, which have as their purpose informing, creating a public opinion or entertaining, shall not require authorization, without prejudice to the right of the publisher or, where appropriate, of other rightholders to receive fair compensation. This right is non-waivable and will be made effective through collecting societies. In any case, the making available to the public by third parties of any image, photographic work or ordinary photograph reported in periodical publications or periodically updated websites will be subject to authorization.*
>
> *Notwithstanding the provisions of the preceding paragraph, the making available to the public by service providers that provide search engines of the facility to search for isolated words included in the contents mentioned in the preceding paragraph shall not be subject to authorization and fair compensation provided that such making available to the public*

[2] Directive 98/34 of the European Parliament and of the Council, laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services (OJ 1998 L 204/37).

[3] Approved by Royal Legislative Decree 1/1996 of 12 April and Law 1/2000 of 7 January on Civil Procedure.

is not for commercial purposes and is strictly limited to what is necessary to provide search results in response to queries previously made by a user to the search engine and where the making available to the public includes a link to the original website.

1.3 Article 32.2 of the amended Spanish Intellectual Property Law essentially creates a new "ancillary" copyright for publishers. Online news aggregators do not need a publisher's authorisation to use its content, but will always have to pay a "fair compensation", which is to be determined and collected in advance by collecting societies. Publishers are not entitled to waive their right to compensation and are legally required to charge the levy via one of the designated collecting societies.

1.4 The provision at stake has been introduced merely on economic grounds, with the aim of increasing Spanish news publishers' incomes in times of crisis for the sector, and the Kingdom of Spain has not at any point demanded that a compulsory fair compensation mechanism is necessary to protect the intellectual property rights of publishers whose content is used by online news aggregators.

1.5 This Complaint submits that Article 32.2 of the Spanish Legislative Measure is in breach of EU Law.

2. FAILURE TO NOTIFY THE SPANISH LEGISLATIVE MEASURE, IN BREACH OF DIRECTIVE 98/34

(a) Article 32.2 of the Spanish Intellectual Property Law

2.1 Spain failed to notify the Commission and other Member States, prior to its adoption on 5 November 2014, of Article 32.2 of the Spanish Intellectual Property Law, as amended by Law 21/2014. This infraction has been publicly noted by several authors, including the former president of the General Court of the European Union, Mr. Bo Vesterdorf,[4] and various groups of the European Parliament[5].

In 2014, AUI submitted, through the platform www.todoscontraelcanon.org, two statements to the Spanish Parliament and the Spanish Senate respectively calling for the removal of the fees introduced by this reform of the Spanish Intellectual Property Law:

http://www.todoscontraelcanon.org/docs/tcc_agregadores_congreso_diputados_sd.pdf

http://www.todoscontraelcanon.org/docs/tcc_agregadores_senado.pdf

In September 2014, AUI informed the EU about the possible infringements committed by the Spanish Government and, subsequently, in December 2014, submitted a statement to CATSI (Telecommunication Advisory and Information Society Council) calling on it to freeze the application of the new article until the EU had reached a decision. (See complete document submitted to CATSI in December 2014 at http://www.aui.es/pdfs/AUI_AI_CATSI_Diciembre.pdf.)

(b) General considerations of Directive 98/34

2.2 In order to avoid the adoption of national technical specifications that would create unjustified barriers to trade within the EU, Member States are required to notify the European Commission of any draft projects in the field of technical regulations prior to their adoption.

[4] Bo Vesterdorf, "The effect of failure to notify the Spanish and German ancillary copyright laws", 5 April 2015, Annex 2.

[5] Various parliamentary groups have opposed the introduction of the new paragraph 2 of Article 32, given the lack of notification. See Annex 3.

Directive 98/34 states, in its fifth recital, that it is essential that the Commission has the necessary information at its disposal before the adoption of technical regulations and that Member States are therefore required, under Article 10 of TEU, to notify the Commission of their projects in the field of technical regulations in order for the Commission to be able to fulfil its objectives.

It is settled case-law that "*Directive 98/34 is designed to protect, by means of preventive monitoring, the free movement of goods, which is one of the foundations of the Community and that this control serves a useful purpose in that technical regulations falling within the scope of that directive may constitute obstacles to trade in goods between Member States*"[6].

Furthermore, recital 13 of Directive 98/34 states that "*Whereas the Commission and the Member States must also be allowed sufficient time in which to propose amendments to a contemplated measure with the aim of eliminating or reducing the obstacles that can arise against free movement of goods*" and recital 16 points out that "*the Member State in question must* […] *defer implementation of the contemplated measure for a period sufficient to allow either a joint examination of the proposed amendments or the preparation of a proposal for a binding act of the Council or the adoption of a binding act of the Commission*".

2.3 The duty of Member States to notify the Commission of any draft technical regulation is laid down in Article 8 of Directive 98/34[7]: "*Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice*".

As indicated in the *Schwibbert* judgment, C-20/05, ECLI: EU: C: 2007: 652, "*According to settled case-law, the aim of the second part of the first subparagraph of Article 8(1) of Directive 98/34 is to enable the Commission to have as much information as possible on any draft technical regulation with respect to its content, scope and general context in order to enable it to exercise as effectively as possible the powers conferred on it by the Directive (see, in particular, CIA Security International, paragraph 50; Case C-279/94 Commission v Italy [1997] ECR I-4743, paragraph 40; and Case C-145/97 Commission v Belgium [1998] ECR I-2643, paragraph 12*" (paragraph 41).

2.4 The concept of "technical regulation" is defined broadly in Directive 98/34[8]. Paragraph 11 of Article 1 of Directive 98/34 defines a "technical regulation" as "*technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider*".

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[6] Cases *Lidl Italy*, C-303/04, ECLI: EU: C: 2005: 528, paragraph 22; *Intercommunale Intermosane and Fédération de l'industrie and du gaz*, C-361/10, ECLI: EU: C: 2011: 382, paragraph 10; *Fortuna* Cases C-213/11, C-214/11 and C-217/11, ECLI: EU: C : 2012: 495, paragraph 26; *Belgische Petroleum Unie and others*, C-26/11, ECLI: EU: C: 2013: 44, paragraph 49, and *Ivansson* Cases C-307/13, ECLI: EU: C: 2014: 2058, paragraph 41.

[7] Case *Lidl Italy*, C-303/04, ECLI: EU: C: 2005: 528, paragraph 18.

[8] The Court of Justice supports a broad understanding of the term "technical regulation" referred to in Article 1, paragraph 11 of Directive 98/34. Thus, the judgment *Intercommunale Intermosane and Fédération de l'industrie et du gaz*, C-361/10, ECLI: EU: C: 2011: 382 explains that, "*It should be recalled that, according to the case-law, it follows from Article 1(11) of Directive 98/34 that the definition of 'technical regulation' can be broken down into three categories: first, the 'technical specification' within the meaning of Article 1(3) of that directive; second, the 'other requirements', as defined in Article 1(4) of that directive; and, third, the prohibition of the manufacture, importation, marketing or use of a product referred to in Article 1(11) of the Directive*" (see Case C 267/03 *Lindberg* [2005] ECR I 3247, paragraph 54, and Case C 20/05 *Schwibbert* [2007] ECR I 9447, paragraph 34)".

National rules on the establishment of service providers, in particular, rules imposing authorisation schemes or licensing arrangements, clearly amount to technical regulations of mandatory notification.

Directive 98/34 must also apply to those rules which directly affect the provision of services for the "Information Society", as implied by Directive 98/48.

The preamble to the said Directive explains that services of the Information Society are "*services which are provided at a distance, electronically, and at the individual request of a recipient of services (Information Society services) are likely, in view of their diversity and their future growth, to necessitate and generate the largest number of new rules and regulations*", so that "*provision must accordingly be made for the notification of draft rules and regulations relating to such services*" (recitals 15 and 16). Thus, Directive 98/48 further confirms that "*specific rules on the taking-up and pursuit of service activities which are capable of being carried on in the manner described above should thus be communicated even where they are included in rules and regulations with a more general purpose*" (recital 17).

The 18 recital of Directive 98/48 is particularly relevant when identifying measures relating to services of the information society that fall within the scope of the application of Directive 98/34: "*Rules on the taking-up and pursuit of service activities' means rules laying down requirements concerning Information Society services, such as those relating to service providers, services and recipients of services and to economic activities capable of being provided electronically, at a distance and at the individual request of the recipient of the services*". This definition "*includes, for example, rules on the establishment of service providers, in particular, those on authorization schemes or licensing arrangements*".

Moreover, paragraph 2 of Article 1 of Directive 98/34 defines "service" as "*any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*". For the purposes of this definition:

- "*at a distance*" means that the service is provided without the parties being simultaneously present;

- "*by electronic means*" means that the service is provided through electronic equipment for processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by cable signals, radio, optical means or other electromagnetic means; and

- "*at the individual request of a recipient of services*" means that the service is provided through the transmission of data upon individual request.

For its part, paragraph 5 of Article 1 of Directive 98/34 defines the concept of "*rule on services*" as a "*requirement of a general nature relating to the taking-up and pursuit of service activities* […], *in particular provisions concerning the service provider, the services and the recipient of services* […]". For the purposes of this definition:

- *a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner*; and

- *a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner*.

2.5 On the other hand, it is important to consider that even if a technical regulation has been notified, if it is modified by the accountable Member State during its processing, it has the

duty to notify the updated version of the measure, as indicated by the EU Courts, through a broad and teleological interpretation of the Directive.

For instance, in the *Ivansson* Case, the Court concluded that "*the requirement that changes be significant applies to all of the situations referred to in the third subparagraph of Article 8(1) of Directive 98/34, including the shortening of the timetable for implementation of the technical regulation*" (paragraph 44). Therefore, the criterion of "significance" applies to any amendment to the scope of the technical regulation, any reduction of the implementation schedule and the inclusion of new specifications or requirements.

Equally, in *Commission/Germany* (C-317/92, ECLI: EU: C: 1994: 212), the Commission sued Germany for failure to notify it of a change to a previously notified measure on drug labelling obligations for sterilising medical instruments. The Court sided with the Commission concluding that "*The German regulation in question constitutes a new technical specification under Article 1 [of Council Directive 83/189/CEE, of 28 March 1983, laying down a procedure for the provision of information in the field of technical standards and regulations] since non-reusable sterile medical instruments may henceforth be marketed or used in Germany only if certain obligations are fulfilled the application of which was formerly confined to the labelling of medicinal products*". The Court added that "*the application, to given products, of a rule which previously only affected other products, constitutes, with regard to the former, a new regulation and must therefore be notified in accordance with the directive*".

Similarly, in the *Lindberg* Case (C-267/03, ECLI: EU: C: 2005: 246), the Court held that "*redefining in national legislation a service connected with the design of a product, in particular that of operating certain gaming machines, as the 1996 law did, can constitute a technical regulation which must be notified under Directive 83/189, if that new legislation does not merely reproduce or replace, without adding new or additional specifications, existing technical regulations duly notified to the European Commission as long as they have been adopted after the entry into force of Directive 83/189 in the Member State concerned*".

Finally, the duty to notify the Commission of any significant amendment to a previously notified technical regulation was also confirmed in the *Schwibbert* judgment. In this case, Italy failed to notify the Commission of the adoption of a law that extended the mandatory use of the "SIAE" (Società Italiana degli Autori ed Editori) label to other media containing content protected by copyright. The Court considered Italy to have breached the notification requirement of Article 8, paragraph 1, third subparagraph, of Directive 98/34. The Court explained that this provision requires Member States to notify the draft again if they "*make changes to the draft that have the effect of significantly altering its scope*" and that "*the inclusion of new media, such as CDs, within the scope of the obligation to affix the distinctive sign "SIAE" must be regarded as such a change*" (paragraph 42).

Only if the change has been introduced to address the European Commission's comments on the notified draft is the Member State not required to comply with the obligation of prior notification. For instance, in *Belgische Petroleum Unie* and others (C-26/11, ECLI: EU: C: 2013: 44), the Court explained that: "*Belgium* […] *restricted itself to amending the provisions of draft legislation in accordance with a request from the Commission to remove a barrier to trade, and so, by virtue of Article 10(1), final indent, of Directive 98/34, the obligation to notify the Commission under the first subparagraph of Article 8(1) of that directive does not apply to the draft Law on the blending obligation*" (paragraph 56). In the same case, the Court stated that Article 8 of Directive 98/34, read in conjunction with Article 10, subsection 1, final indent, must be interpreted as not requiring notification of draft national legislation requiring petroleum companies commercialising petrol or diesel fuels on the market to also commercialise certain percentages of biofuels on the market, in the same calendar year, where, after having been notified pursuant to the first subparagraph of Article 8, subsection 1, paragraph 1,

the draft was amended to take into account the Commission's observations on it, and the amended draft was then communicated to the Commission (paragraph 57).

2.6 The failure of a Member State (in this case the Kingdom of Spain) to respect the notification obligation resulting from Directive 98/34 can be sanctioned by the EU Courts in an infringement procedure initiated by the Commission. In this regard, it is important to note that the absence of a notification means that **the national measure, which should have been notified, cannot be enforced against individuals**[9]. The EU Court of Justice has indeed stressed that failure to observe the obligation to notify under Directive 98/34 "*constitutes a substantive procedural defect such as to render the technical regulations in question inapplicable and therefore unenforceable against individuals*"[10].

Thus, the Court confirmed in the *Lidl Italia* Case that "*the effectiveness of such control will be that much greater if that directive is interpreted as meaning that failure to observe the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and therefore unenforceable against individuals*" (paragraph 23). Similarly, the *Schwibbert* Case clarifies that a technical regulation which has not been notified remains unenforceable against individuals (paragraph 38). Therefore, individuals may allege that inapplicability before the national courts, which must refuse to apply a national technical regulation which has not been notified in accordance with Directive 98/34 (see, in particular, *CIA Security International*, paragraph 55, and *Sapod Audic*, paragraph 50).

Similarly, more recently, the Court held in *Ivansson* (C-307/13, ECLI: EU: C: 2014: 2058) that: "*a failure to observe the obligation to notify the Commission constitutes a procedural defect in the adoption of the technical regulations concerned, and renders those technical regulations inapplicable and therefore unenforceable against individuals (see, in particular, the judgment in CIA Security International, C 194/94, EU:C:1996:172, paragraph 54, and the judgment in Schwibbert, C 20/05, EU:C:2007:652, paragraph 44). Individuals may rely on that inapplicability before the national courts which must decline to apply a national technical regulation which has not been notified in accordance with Directive 98/34 (see, in particular, the judgment in Schwibbert, EU:C:2007:652, paragraph 44, and the case-law cited)*" (paragraph 48).

(c) Spain fails in its obligation to notify the Spanish Legislative Measure (Article 32.2) in breach of Directive 98/34

(i) The Spanish Legislative Measure is a "technical regulation"

2.7 Article 32.2 of the amended Spanish Intellectual Property Law (the Spanish Legislative Measure) affects a specific group of providers of information society services, in particular those providers of online news aggregation services. More specifically, Article 32.2 requires these providers to pay a fair compensation for the content through collecting societies. Both the compensation (which is non-waivable) and the use of collecting societies is mandatory.

2.8 Article 32.2 thus amounts to a measure regulating the provision of electronic services and content aggregation, as well as the entities providing those services. Moreover, the provision cited subjects the provision of aggregation services to a fair compensation mechanism. Therefore, the modified Article 32.2 of the Spanish Intellectual Property Law is a "technical regulation" within the meaning of Article 1, paragraph 11, of Directive 98/34.

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[9] See Commission Guide to the procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services, page 55. And the recent report from the German Government, Annex 4.

[10] Case C-433/05, *Lars Sandström* [2010] ECR I-2885, paragraph 43; Case C-303/04, *Lidl Italia* [2005] ECR I-7865, paragraph 23.

2.9 Support for the qualification of the Spanish Legislative Measure as a "technical regulation" can be found in recital 18 of Directive 98/48 (see above 2.4). In fact, Article 32.2 contains a rule relating to the "exercise" of the business of providing electronic service content aggregation, since it sets out a "*requirement[s] on Information Society services*": namely, the payment of a fair compensation. Moreover, the Spanish Legislative Measure is a technical regulation, even if it is part of a more general regulation.

2.10 **In fact, the European Commission has itself taken the view that the Spanish Legislative Measure constitutes a technical regulation covered by the notification requirement of Directive 98/34** as demonstrated in the Commission letter sent to the ProInternet Coalition in November 2014 and the Commissioner's response of December 2014[11].

2.11 Also the former president of the General Court, Mr. Bo Vesterdorf, concluded that "*there cannot be any reasonable doubt regarding the fact that the draft constituted a technical regulation draft*" since Article 32.3 "*requires information societies to pay a compensation for the fragments included in the aggregated content in Spain*".[12]

2.12 Finally, it must be pointed out that Austria has recently notified an initiative similar to the Spanish one under Directive 98/34, which underlines the fact that Spain should have notified the Spanish Legislative Measure before its adoption[13].

(ii) **The notified version of draft Law 21/2014 did not contain Article 32.2**

2.13 On 10 May 2013, the Kingdom of Spain notified the Commission under Directive 98/34 of draft Law 21/2014 (see Annex 5) proposing a reform of the Spanish Intellectual Property Law. The notified draft Law however did **not** contain Article 32.2. This provision was introduced at the last minute[14] and for the first time on 14 February 2014, i.e. after the end of the standstill period triggered by the Directive 98/34 notification procedure.

2.14 Spain failed to notify the Commission of Article 32.2 prior to the adoption of Law 21/2014, even though it represents a **significant change** to the previously notified draft Law and should therefore have triggered a new notification to the Commission under Article 8, first paragraph, third subparagraph, of Directive 98/34.

2.15 This conclusion has been backed, again, by Mr. Bo Vesterdorf: "*introducing an obligation to pay compensation clearly constitutes a significant and almost fundamental alteration to the scope of the original, previously submitted draft Law of the Spanish Intellectual Property Law reform, which contained no request to pay for compensation*"[15].

2.16 Indeed, Article 32.2 falls within the scope of Article 8, paragraph 1, third subparagraph, of Directive 98/34 as it introduces a new requirement affecting providers of online aggregation services. This requirement was not contained in the draft Law 21/2014 reforming the Spanish Intellectual Property Law, which was notified to the Commission on 10 May 2013.

2.17 Additional proof of the relevance of this change in Article 32.2 is the fact that, as the change was included in the text after the CNMC had launched its report regarding the original draft reform of the Spanish Intellectual Property Law, the authority considered it

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[11] See Annex 2 (footnote 12 of the Article written by Bo Vesterdorf).

[12] Bo Vesterdorf, "*The effect of failure to notify the Spanish and German ancillary copyright laws*", 5 April 2015.

[13] Austria notified an amendment made in the drafting of its intellectual property law, through which it added an ancillary copyright for publishers.

[14] See page 3 of the publication by Prof. Raquel Xalabarder in Annex 6.

[15] Bo Vesterdorf, "*The effect of failure to notify the Spanish and German ancillary copyright laws*", 5 April 2015, Annex 2.

necessary to draft an additional report on its own initiative, in order to analyse the possible impact this modification may have on free competition[16].

2.18 Therefore and in conclusion, by failing to notify the Commission prior to its adoption of paragraph 2 of Article 32 of the amended Spanish Intellectual Property Law, the Kingdom of Spain acted in breach of Article 8, paragraph 1, third subparagraph, of Directive 98/34.

3. ADVERSE EFFECTS OF THE SPANISH LEGISLATIVE MEASURE

3.1 Collecting societies have been given the task of determining the fair compensation that publishers must receive and they will therefore be responsible for negotiating, collecting and distributing the collected fees among their member-publishers.

3.2 The Spanish Intellectual Property Law (in its altered form) does not specify, however, how this system should work in practice (i.e. how should compensation be calculated, raised and distributed)[17]. It is therefore expected that the Spanish Government will approve the necessary implementing regulations. However, to date (that is to say, nearly a year after the adoption of the Spanish Legislative Measure), it has not done so. This situation creates further legal uncertainty for any online news aggregator wishing to enter or maintain its presence on the Spanish market.

3.3 Moreover, the Spanish Legislative Measure immediately caused online news aggregators to exit the Spanish market (e.g. Google News, NiagaRank or SystemAdmin)[18].

3.4 In fact, Ms. Julia Reda, Member of the European Parliament, and author of the European Parliament report on the implementation of the Copyright Directive, has already highlighted the distorting effects of the Spanish Legislative Measure: "*Spain's new copyright law requires the payment of a statutory licence fee for aggregating articles and other copyrighted works that are freely available online (including those released under free licences). This new inalienable remuneration right has made the operation of news aggregation services like Google News commercially unviable and has had devastating effects on the rights to freedom of expression and freedom of information, as it affects all kinds of activities that rely on the voluntary free sharing of information through open licences*"[19].

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[16] See CNMC report, 16 May 2014, page 5. Annex 7.

[17] Article 157.1.b) of the Spanish Intellectual Property Law:

Collecting societies shall be obliged: To lay down general tariffs to determine the remuneration payable for the use of their repertoire, which shall include rebates for the benefit of non-profit making cultural bodies. The amount of the tariffs shall be determined reasonably, with reference to the economic value of rights over the work or service protected in the activity of the user, and with the intention of reaching a proper balance between both parties. This implies taking into account at least the following criteria:

1. The level of effective use of the repertoire in the activity of the user as a whole.

2. The intensity and relevance of the use of the repertoire in the activity of the user as a whole.

3. The extent of the repertoire of the collecting society. To that effect, "repertoire" shall be understood as those works and services with rights managed by a collecting society.

4. The economic income obtained by the user arising from commercial exploitation of the repertoire.

5. The economic value of the service provided by the collecting society in order to effectuate the implementation of tariffs.

6. The tariffs established by the collecting society for other users for the same type of use.

7. The tariffs established by collecting societies homologated in other Member States of the European Union for the same type of use, as long as there exists a homogeneous basis for comparison.

[18] See Annex 8.

[19] https://juliareda.eu/copyright-evaluation-report-explained/#licences

3.5 Furthermore, the Spanish Legislative Measure has had a negative impact on competition in the online media markets, as stated in a recent report from the consultancy firm NERA[20]. This report confirms what is already a well-known fact: that aggregators lower barriers to entry to online media markets, therefore, their services are clearly pro-competitive, since they benefit all operators, especially smaller ones in terms of size or popularity, allowing them to reach a wider audience in an efficient and cheap (free) way. In particular, NERA report regarding the impact of the Spanish Legislative Measure (page 51, first paragraph), the NERA report states that the closing of Google News and other news aggregators has led to a loss of traffic of 2.9% over the first three months since the law came into effect, having had smaller publishers larger. The loss of traffic for the 28 biggest publishers has been of 2.5%, while the loss of traffic for the 28 least-read publishers in the same study sample has been, on average, of 10.2%.

4. THE SPANISH LEGISLATIVE MEASURE IS UNJUSTIFIED AND ENTAILS A SIGNIFICANT RESTRICTION ON THE RIGHT TO PROVIDE SERVICES

4.1 Any national rule imposing or introducing an obstacle to the provision of cross-border services is, in principle, prohibited by Article 56 of TFEU.

4.2 This also includes the provision of commercial services by online news aggregators who are affected by the Spanish Legislative Measure[21]. Article 56 of TFEU further confers rights not only on the service providers, but also on the recipient of those services, such as Spanish readers and internet users, whose interests are defended by the Complainants[22], or publishers, particularly those from smaller publishing houses.

(a) The Spanish Legislative Measure is a restriction of trade within the EU in breach of the freedom to provide services (Article 56 of TFEU)

4.3 Settled case-law from the European Courts of Justice implies that Article 56 of TFEU does not only require the elimination of any discrimination against service providers on the grounds of nationality, irrespective of whether they are established in a Member State other than that in which the services are to be provided. It also requires **the abolition of any restriction on trade between Member States**, even if it applies without distinction to national service providers and to those of other Member States, **which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services**[23].

4.4 This notion of hindrance therefore encompasses measures taken by a Member State which, although applicable without discriminating on grounds of nationality or residence, affect access to the market by undertakings from other Member States and thereby obstruct or hamper intra-Community trade[24].

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[20] NERA report "Impact on the New Article 32.2 of the Spanish Intellectual Property Act", 9 July 2015.

[21] Article 57 of TFEU. It is sufficient that the online aggregator is remunerated for the service in "one way or another"; the remuneration does not necessarily have to come from the services at stake, as it may result from advertising, (see Case C-291/13, *Papasavvas*; Case 352/85, *Bond van Adverteerders and Others*, para. 16 and recital 18 of Directive 2000/31). For instance, the European Court of Justice (ECJ) confirmed in *Papasavvas* (Case C-291/13, paras. 26-30) that the planned provision for "information society services", within the meaning of Article 2(a) of Directive 2000/31, covers the provision of online information services for which the service provider is remunerated, not directly by the recipient, but by income generated by advertisements posted on a website.

[22] C-80/13 *Strojírny Prostějov and ACO Industries Tábor*, recital 26.

[23] See e.g. C-577/10, *Commission v Belgium*, paragraph 38, and C-91/13, *Essent Energie Productie*, recital 44.

[24] See Case C-518/06, *Commission v Italy*, recital 64. Also Articles 14 to 16 of the Services Directive 2006/123 require Member States, such as Spain, to ensure that the provision of services is subject only to non-discriminatory, proportionate and justified measures.

4.5 For instance, the ECJ ruled that national laws requiring government authorisation for betting and gaming activities, as well as national rules prohibiting online gaming, constitute a restriction on the freedom to provide services[25]. Equally, although Member States are free to determine their own national policy on betting and gaming (and even enjoy a wide measure of discretion, given the specificity of the sector), any restrictive measure must satisfy the conditions of proportionality[26].

4.6 As such, the Spanish Legislative Measure is capable of restricting the cross-border provision of services at the following two levels:

(i) Online news aggregators

4.7 The Spanish Legislative Measure imposes an obligation on aggregators to pay a "fair compensation" for all publisher content made available to viewers in Spain. This obligation makes it significantly more costly and therefore much less attractive for aggregators from other Member States, in particular those that are smaller and less-established in the market, to launch or maintain the provision of a news aggregation service in Spain.

4.8 It is therefore evident that **the Spanish Legislative Measure creates a significant regulatory barrier to entry to the market, and makes it substantially more difficult for aggregators established in other Member States to compete effectively in Spain with those aggregators already established in our country**, such as Menéame, which is somewhat protected. As mentioned above, this effect is aggravated by the legal uncertainty arising around the implementation of the measure.

4.9 In its May 2014 report, the Spanish National Markets and Competition Authority ("**CNMC**") identified this restriction[27]:

"[…] *the measure would cause discriminatory detriment to the entry of new operators into this market. The new compensation would construct a barrier to access that current, incumbent aggregators that are already consolidated have not had to face.*"

"*The said impact would, in all certainty, entail detriment for consumers in the form of lower competitive tension, a lesser variety of offerers and of technological innovations.*"

"*The existence of a "fair compensation" would discourage access to the market for new electronic aggregation service providers, even more so the higher the value of the same may be.*"

4.10 More recently, the Spanish Legislative Measure has been described by the European Parliament as rendering the operation of online news aggregation services in Spain "*commercially unviable*"[28] (see paragraph 3.4 above). In fact, clear evidence of the European Parliament's correct analysis is the decision of Google News, which in late 2014 decided to cease its news aggregation service in Spain precisely because it no longer considered it to be commercially viable for the future. As a result, the Spanish news aggregation landscape has become less competitive and, consequently, it has become less attractive for other aggregators seeking to enter the market.

(ii) Publishers/news services

4.11 Aggregators contribute to publisher content being given greater exposure, which translates into a larger number of readers being re-directed to the full press articles, ultimately generating more profits from advertising for publishers.

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[25] See Case C-360/04, *Sorricchio*, recital 42, and Case C-156/13, *Digibet Ltd*, recital 21.

[26] Case C-360/04, *Sorricchio*, recital 48.

[27] See CNMC report – 16 May 2014 – Annex 7 (emphasis added).

[28] See relevant press reports in Annex 9.

4.12 As previously noted, aggregator services are generally more beneficial to smaller news providers than larger ones (as such services help them access more visitors than they would otherwise be able to access through their own means). Readers that are redirected from online aggregators are typically referred to as "*one hit wonders*". A report drawn up by Coalición ProInternet[29] shows evidence of "*the multiplying effect of the aggregation services*" (increasing the number of hits on press websites by 13%), as well as the "*learning effect*" (increasing the number of hits on smaller and local publishers' websites by around 5%).

4.13 Without these aggregator services, smaller publishers cannot compete effectively with major online news outlets (indeed, small businesses that supply content to online news aggregators are virtually guaranteed an audience). It comes as no surprise, then, that smaller publishers have strongly criticized the Spanish Legislative Measure by clearly stating the importance of these online news aggregators to their business[30].

4.14 However, the mandatory and non-waivable remuneration system prevents publishers from individually and independently deciding how best to commercialise their content vis-à-vis aggregators, **reducing their ability to differentiate and compete effectively**[31]. In fact, smaller publishers who benefit the most from the exposure generated by the aggregators might not be able to compete effectively if the aggregators discontinue their services completely or partially as a consequence of the obligatory and non-waivable fees to be imposed. In this regard, by preventing smaller publishers from reaching a wider audience through aggregators, the system is sure to exert less competitive pressure on the largest and most powerful publishers, thus harming Internet users also (given that they will have access to less-diversified content in smaller quantity)[32].

(b) **Absence of justification for the restriction on the freedom to provide services**

4.15 A restriction may be justified in certain circumstances, for general interest reasons under the Treaty, such as the protection of intellectual property/copyright, provided that the restriction is proportionate. A purely economic argument (e.g. increase in revenue for publishers in Spain) is not a legitimate justification[33].

4.16 The Spanish Government has not, however, advanced any such justification (it is for the Member State concerned to demonstrate the existence of a justification). Even if it had invoked the need to protect publishers' copyright (*quod non*), the Spanish Legislative Measure should in any event be regarded as disproportionate and therefore unjustified.

(i) ***Spain has not invoked any reason of general interest to justify the restriction:***

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[29] Coalición ProInternet – AFI, "Economic argument regarding the proposed amendment of the Spanish Intellectual Property Law with regard to the aggregation of informative contents", July 2014, see Annex 10.

[30] See Annex 11 regarding the AEEPP press reports. AEEPP acts in the interest of the majority of smaller publishers in Spain.

[31] In the following cases, the Court followed a similar analysis of Article 56: Case C-518/06, *Commission v Italy*: it held that the Italian rule requiring all insurance companies operating in the field of third-party liability motor insurance to contract with all vehicle owners constitutes a substantial interference in the freedom to contract of economic operators and thus a restriction on trade. See also Case C-565/08, *Commission v Italy*, where the Italian rules requiring lawyers to comply with maximum tariffs for the calculation of their fees in the absence of an agreement between lawyer and client mean,: "a restriction exists, in particular, if those lawyers are deprived of the opportunity of gaining access to the market of the host Member State under conditions of normal and effective competition" (recitals 51-52). It is for the Commission to demonstrate that the national rules have this object or effect (paragraphs 51-52).

[32] NERA report, page 51, paragraph 1, states that: the closing of Google News and other aggregators has led to a loss of traffic of 2.9% during the first three months, resulting in a greater impact on smaller publishers. The 28 biggest publishers suffered a loss of traffic of 2.5% while the 28 smaller publishers suffered a loss of traffic of 10.2%.

[33] See Case C-319/02, *Manninen*, recital 49.

4.17 As stated by Prof. Xalabarder, the Spanish Legislative Measure is simply "*a subsidy made to one industry at the expense of another*"[34]. On the contrary, the benefits derived from the news aggregator services have been recognized, for example, by the CNMC in its 2014 report.

4.18 In this context, the Complainants consider **the Spanish Legislative Measure is not only incapable of protecting publishers' copyrights but is also in breach of the Copyright Directive** (2001/29)[35].

4.19 The European Parliament has effectively underlined the legality of the Spanish Legislative Measure in its recent resolution of 9 July 2015, in which it condemns the creation of ancillary protection of copyright by Member States[36]:

> "*Notes that in some Member States statutory licences aimed at compensatory schemes have been introduced; stresses the need to ensure that acts which are permissible under an exception should remain so; recalls that compensation for the exercise of exceptions and limitations should only be considered in cases where acts deemed to fall under an exception cause harm to the rightholder; further calls on the European Observatory on Infringements of Intellectual Property Rights to carry out a full scientific evaluation of these Member State measures and their effect on each affected stakeholder*" (point 57, emphasis added).

4.20 This resolution is clearly in line, as could not be otherwise, with what the ECJ held in its *Svensson* judgment, stating that "*Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision*"[37].

4.21 Therefore, **under EU Law, Member States have no legitimation to create additional copyrights which are not previewed in the Copyright Directive**.

4.22 However, this is precisely what the Kingdom of Spain has done. Article 32.2 of the Spanish Intellectual Property Law extends copyright protection to practices that, under the Copyright Directive itself, are not included within its scope. Indeed, the Spanish Legislative Measure grants publishers the right to obtain a non-waivable fair compensation, as copyright, for making non-significant fragments of content available through online links[38].

4.23 For its part, Article 3.1 of the Copyright Directive makes it clear that copyright protection requires the protected article to be publicly available: "*Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them*".

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[34] Publication of Prof. Raquel Xalabarder, "The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance with International and EU Law", 30 September, 2014.

[35] Directive 2001/29/CE of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[36] European Parliament Report (Point 56) , of 9 July, 2015 regarding the application of Directive 2001/29/CE of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0273+0+DOC+PDF+V0//EN

[37] See Case C-466/12, *Svensson*.

[38] See the publication of Prof. Raquel Xalabarder, "The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance with International and EU Law", 30 September 2014, in Annex 6.

4.24 Nevertheless, in the previously cited *Svensson* Case, it is evident that the act of linking to content protected by copyright made freely accessible online does not amount to an act of public communication[39]. Therefore, given that online aggregators only copy and make non-significant fragments of content available through links, this activity should not amount to an "act of disposition" that, according to the meaning of Article 3.1 of the Copyright Directive, would require copyright protection[40].

4.25 Second, even though the link in question involves copying existing content (titles and non-significant fragments of text) subject to copyright, it should benefit from the exceptions to provide a "quote or overview" set out in Article 32.1 of Copyright Law, or from the exception contained in Article 5(1) of the Copyright Directive.

4.26 Indeed, Article 32.1 already previews a general quotation right as an exception to copyright. The mere non-significant "fragments" of text are, by definition, nothing more than limited quotes of content which were previously available online and which aggregators provide links to, thereby effectively attributing authorship and not reproducing the content in question. Consequently, online aggregators' activities should benefit from the exception in Article 32.1 of Spanish Intellectual Property Law.

4.27 Article 32.2 excludes online news aggregators from the exception in Article 32.1; however, an exception is not required if the copyright to which the exception is intended to apply does not exist to begin with (i.e. there is no "*copyright protection*").

4.28 By excluding aggregators, the Spanish legislator treats news aggregation services differently, in practice, depending exclusively on whether their activity is online or offline. Nonetheless, there is no justification for establishing this differentiation, which, in addition, is contrary to a recent call from the European Parliament "*the necessity to guarantee technological neutrality and for future compatibility of exceptions and limitations, when taking into account the effects of media convergence, which serving the public interest through creating incentives which finance and distribute networks and to make those works available to the public through new and innovative ways*"[41].

4.29 Finally, Article 5(1) of the Copyright Directive [equivalent to the Spanish disposition], establishes that temporary acts of reproduction "*which are transient or incidental* [and] *an integral and essential part of a technological process and 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 or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2*". The reproduction of fragments and titles by online aggregators through links can be considered as a provisional copy in the sense of Article 5(1).[42]

(ii) ***The measure is disproportionate***

4.30 For the following reasons, the Spanish Legislative Measure is unnecessary and disproportionate, as indisputably stated by the CNMC in its 2014 Report:

"*In summary, without showing the existence of a fault in the market, competition between companies and contractual intent between parties would be capable of producing efficient results in this market, due to which it would prove to be unnecessary and disproportionate to arbitrate any other economic compensation systems, which may be*

[39] *Svensson*.

[40] See Prof. Xalabarder's report, pages 23 and 24, Annex 6.

[41] Point 44 of the European Parliament Resolution, of 9 July 2015 regarding the application of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society.

[42] See Prof. Xalabarder's report, pages 23 and 24, Annex 6.

more costly and which may distort competition, and which may in no case be more efficient."[43]

4.31 First, content providers or publishers are capable of ensuring that they themselves receive an adequate compensation for the use by aggregators of their copyright-protected content (they can even stop aggregators from using their content, see below). This compensation can take the form of a fee, but can also take the form of increased advertising revenue as a result of online advertising through increased exposure/traffic.

4.32 In this regard, the CNMC concluded that: "*[…] an aprioristic and generalized rule would be counter-productive, as the interests of news editors themselves may be diverse, not only in relation to other editors, but also with them being likely to evolve over time in one same company, taking into account the novelty of their web page, their reputation, the knowledge of users, their commercial policy, etc.*". And that, "*traffic obtained thanks to aggregation generates, or may generate, other income different from subscription, mainly from advertising*"[44].

4.33 Second, even if public intervention is deemed necessary to ensure adequate protection of publishers' copyright, this objective can clearly be achieved through equally efficient but less burdensome measures (which, however, do not seem to have been explored by the Spanish Government):

(i) Publishers have several straightforward tools at their disposal to ensure that their content is not used by online news aggregators (e.g. the use of the robots.txt feature to avoid crawling by aggregators, paywalls/log-in to access the full content on the newspaper's own website, etc.)[45].

(ii) A voluntary compensation scheme would offer equal sufficient copyright protection, whilst also giving publishers the option to independently and freely waive the right to compensation in the form of a levy, allowing them to establish strategies to differentiate themselves and compete more successfully. This would ensure a greater respect for the publishers' right to private property and their entrepreneurial freedom than the one achieved through the imposition on publishers of the obligation to charge a levy and to collectively decide how much it should amount to.

In fact, the author of a copyrighted work should enjoy the right to decide how to circulate their work and do so: "*according to his best interests, which involve not only the level of remuneration provided in the Member State in question but other factors such as, for example, the opportunities for distributing his work and the marketing facilities which are further enhanced by the free movement of goods within the* [EU]"[46].

Finally, the CNMC has firmly positioned itself against the non-waivable character of the compensation and stated that: "*fair compensation should never be contemplated with a non-renounceable character*"[47].

(iii) The mandatory use of the collecting society to set, collect and distribute fees is more restrictive than necessary. In this regard, the CNMC considers that:

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[43] See CNMC report, 16 May 2014, page 7, in Annex 7.

[44] See CNMC report, 16 May 2014, page 7, in Annex 7: "*there are simple, free, technical solutions that would prevent those external circumstances from arising, should the editor so desire, with reservation for the title-holder of the intellectual property of the possibility of the aggregation taking place or not*".

[45] See CNMC report, 16 May 2014, page 7, in Annex 7.

[46] See Cases 55 and 57/80, *Musik-Vertrieb/GEMA*, recitals 11-12.

[47] See page 8 of CNMC report of 16 May 2014 in Annex 7.

"*a regulatory model more favourable for competition is possible, in which the entities may face increased competitive pressure, in such a manner that the barriers for entry by new operators may be removed, which would increase incentives for entities to render services in an efficient manner and would reduce the possibilities of them exercising their market authority in the area of tariffs. In this regard, other entities could exist, such as press associations or editor associations, which could compete with the entities contemplated in the Draft Act for the management of the rights of editors and other holders of rights and the payment of the fair compensation*"[48].

4.34 Third, the mandatory "fair compensation" introduced by the Spanish Legislative Measure is contrary to the Copyright Directive.

4.35 In its *Padawan* Judgment (Case C-467/08) the ECJ clarified that "fair compensation" within the meaning of Article 5.2(b) of the Copyright Directive – which is an autonomous concept of European Union law – "*must necessarily be calculated on the basis of the criterion of the harm caused to authors or protected works by the introduction of the private copying exception*" (point 42 – emphasis added).

4.36 It should be added that, pursuant to recital 35 of the Copyright Directive, "*In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due*". The Copyright Directive then goes on to add that "*In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise*".

4.37 Thus the mandatory nature of the fair compensation provided for in Article 32.2 of the Spanish Intellectual Property Law is contrary to the principles underlying the Copyright Directive, as confirmed by the EU case-law:

- There is no evidence whatsoever (and the Kingdom of Spain did not assess this before adopting the Spanish Legislative Measure) that publishers suffer losses as a consequence of online aggregation services. On the contrary, publishers benefit from the traffic generated by news aggregators. In addition, if they were to suffer damage they always have the possibility to *opt out* of the service[49].

- Thus, beneficiaries of the alleged "fair compensation" are already compensated for any possible loss they may incur. This compensation takes the form of increased traffic on their respective websites and the resulting increase in revenues from advertising.

4.38 Finally, Article 32.2 of the Spanish Intellectual Property Law constitutes an unjustified restriction of Spanish citizens' freedom of expression and of information.

On the other hand, citizens see their right to information as being restricted because aggregators facilitate access to certain information that, without them, would go unnoticed by the majority of citizens.

Government's objectives should be to promote and preserve freedom of expression and to guarantee people's access to reliable and varied information, quality analysis and independent opinions, in order to create pluralistic public debates necessary for a democratic society.

Article 20 of the Spanish Constitution provides for the right to "freely communicate or receive reliable truthful information through any means", which must be in line with the property right, but not override it.

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[48] See pages 9-10 of the CNMC report of 16 May 2014 in Annex 7.

[49] See CNMC report, 16 May 2014, and ProInternet Coalition Report in Annexes 7 and 10.

The figure of the "non-waivable right" resulting from quoting texts on the internet would affect every publisher, without exception, and would leave no room to voluntarily renounce this right. This will endanger Creative Commons licences, which are widespread and which nowadays provide legal cover to copyrights of a significant part of Network content. We find ourselves facing a "copyright" imposition over "copyleft" supporters, which violates collective rights and interests instead of guaranteeing them and encourages collection of a tax which falls into the hands of a few. Far from being a threat, online news aggregators and other tools which link and quote original media, such as search engines, social media networks or blogs, facilitate access to information by citizens and generate wide traffic towards mass media. Moreover, this law strongly threatens journalism, as the right to quote is the essence of this profession. Criminalising these links would create legal insecurity questioning the fundamentals and the use of the internet. Guaranteeing rights, and respecting them, benefits everybody: internet users, publishers, aggregators, etc.

4.39 In *Promusicae* (Case C-275/06), the ECJ recalled that "*the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, 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*".

4.40 In the present case, the Spanish Legislative Measure conflicts with the fundamental rights of freedom of expression and of information access which are guaranteed by Article 11 of the Charter Of Fundamental Rights of the European Union ("CFREU")[50] and by Article 10 of ECHR[51]. In fact, as an example, representatives of the European Parliament have expressed their concern regarding the impact this measure has on communities with minority languages (such as Galicia), which are highly dependent on the online content that non-profit news aggregators publish, which could disappear because of the Spanish Legislative Measure (like www.chuza.org)[52].

4.41 In its third recital, the Copyright Directive stresses that "*the proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest*" (emphasis added).

4.42 An unlawful extension of Copyright beyond the limits of the Copyright Directive and an unnecessarily strict compensation mechanism imply an unjustified restriction of the fundamental freedoms of expression and of information, as has been expressly confirmed, for instance, by Ms. Julia Reda: "*This new inalienable remuneration right has made the operation of news aggregation services like Google News commercially unviable and has devastating effects on the rights to freedom of expression and freedom of information, as it affects all kinds of activities that rely on the voluntary free sharing of information through open licences*" (emphasis added).

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[50] Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are equivalent to those guaranteed by the ECHR. The limitations which may be imposed on it may, therefore, not exceed what is provided for in Article 10(2) of the Convention, without prejudice to any restrictions which the competition law of the Union may impose on Member States' ability to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR.

[51] Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are considered to be the same, as both are guaranteed under the Charter. Constraints imposed on this right should not exceed those imposed in Article 10.2 ECHR-without prejudice to any other restriction imposed by the Union on Member States when introducing the licence agreements mentioned in Article 10.1 ECHR.

[52] See Questions from the European Parliament of 12 February and 3 March 2015 in Annex 12.

4.43 For instance, in *Sky Österreich* (Case C-283/11), the ECJ held that "*a regulation providing for compensation to holders of exclusive broadcasting rights exceeding the costs directly incurred in providing access to the signal, and calculated on the basis of additional criteria such as, in particular, the price paid to acquire such rights and/or the scale of the vent at issue could, inter alia, depending on the method used to determine the amount of compensation to be paid and the financial capacities of the broadcasters wishing to gain access to the signal, deter or even 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*" (emphasis added).

5. THE ACTION REQUESTED FROM THE COMMISSION

5.1 As outlined above, the Complainants respectfully request the Commission to commence proceedings against the Kingdom of Spain under Article 258 of the Treaty on the Functioning of the European Union for failure to fulfil its obligations under the Treaty as justified in the present Complaint.

Yours Sincerely

For the Complainants

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President	President
Internet Users Association	Internet Users Association
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AUI	AI
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ISOC-ES

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