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The proposed publishers' right in press publications: an evidential mistake

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KEYNOTE by Commissioner Mariya Gabriel

PANEL DEBATES: • Neighbouring right for publishers
• Platform Liability • Copyright on data

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Neighbouring Right for Publishers

The proposed publishers' right in press publications: an evidential mistake

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Introduction¹

One of the most controversial features of the European Commission's proposal for a Directive on copyright in the Digital Single Market is the provision introducing a related (or 'ancillary') right for publishers of press publications (art. 11 CDSM proposal).² As it is currently proposed, this provision would grant publishers of press publications a set of broad exclusive rights of reproduction and communication to the public to authorise digital uses of their press publications until 20 years after first publication, subject to the same exceptions and limitations that apply to copyright works. Effectively, it would mean that, unless an exception or limitation applies, prior authorization would have to be obtained from publishers for any digital reproduction (direct or indirect, temporary or permanent, by any means and in any form) and any making available of their press publications, in whole or in part, including possibly the smallest snippets.³ This right is offered in addition to existing copyrights protecting the content (articles, photographs, illustrations, etc.) of newspapers, magazines, journals and other periodicals.

In the past year, fierce criticism has been raised against the proposed publishers' right, both by academics,⁴ independent publishers⁵ and other stakeholders, including creators in the news publishing industry.⁶ In this contribution, the key points of criticism will be analysed and discussed in the light of the EU's objective for 'better regulation'. After a short introduction into the background of the proposal, the paper will elaborate on four main objections against the proposed publishers' right. It will conclude that, in view of the evidence available, it is clear that the proposal is ill-suited to address the problems that press publishers are facing. Therefore, the proposed publishers' right should at best be removed from the legislative agenda or at worst be replaced by a presumption that publishers represent the authors' copyright in press publications and have the right to sue in their own name against digital infringement of that copyright, as was proposed in the draft report of the European Parliament's JURI committee of 10 March 2017.

1 The research for this paper was conducted in the framework of the research programme Veni with project number 451-14-033 ('The challenge of evidence-based intellectual property law reform: Legal pragmatism meets doctrinal legal reasoning'), which is partly financed by the Netherlands Organisation for Scientific Research (NWO).

2 European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14 September 2016, COM(2016) 593 final, art. 11.

3 See the Impact Assessment accompanying the proposal (SWD(2016) 301 final, Brussels, 14 September 2016), p. 157 (n. 485), referring specifically to the CJEU's *Infopaq I* judgment (Case C-5/08), in which it was held that capturing 11-word text fragments of newspaper articles constitutes a reproduction in part of these works under art. 2(a) Directive 2001/29 'if the elements thus reproduced are the expression of the intellectual creation of their author.'

4 See e.g. 'EU Copyright Reform Proposals Unfit for the Digital Age', Open Letter from European Research Centres to Members of the European Parliament and the European Council, 24 February 2017, available at: <http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf>, p. 3-5 and the references to independent studies and opinions contained therein.

5 See e.g. News Now, 'Common Position Statement on the proposed EU Directive on Copyright in the Single Market', 28 February 2017, available at: <<http://www.newsnow.co.uk/eu-link-tax/publishers-position-statement.html>>.

6 See e.g. Platform Makers, Response to the internet consultation on modernising EU copyright of the Ministries of Economic Affairs, of Education, Culture & Science and of Security & Justice in the Netherlands, 1 December 2016, available at: <https://www.internetconsultatie.nl/modernising_eu_auteursrecht_dsm/reactie/59245/bestand>, p. 3-5.

Background to the proposal

A central point that the Commission wishes to address by the introduction of the press publishers right is the future sustainability of the quality press, which according to the Impact Assessment is in jeopardy. As this ‘would be prejudicial for the media pluralism, good quality information and the role [press publishers] play in democratic societies’,⁷ the Commission believes that legislative intervention at EU level is needed.

In a nutshell, the problems that press publishers are facing stem from the fact that they have been struggling to cater to the two-sided market of readers and advertisers in the digital environment.⁸ In recent years, press publishers have seen a significant decline in print readership due to structural changes in consumer behaviours. In the past, it were traditional outlets such as newspapers, radio and TV channels that brought news to the people, but nowadays, most news is consumed on the internet, through different digital formats and online sources. Data provided by the press publishing sector show a steady decline in print circulation of daily newspapers in eight EU Member States, although the differences between countries are noticeable, varying from an 8% decline in Belgium, to an 18% decline in the UK and a 52% decline in Italy in the period 2010-2014.⁹

Concomitantly, press publishers have seen structural changes in advertising markets. Advertising takes place where audiences can best be reached. As a consequence, online advertising has grown at the cost of traditional off-line advertising. This has affected news publishers in particular, as advertisers tend to favour search engines, social media and other channels over news media.¹⁰ News publishers have also lost their position in the advertising market for jobs, housing, (used) cars and tourism, which on the internet is controlled predominantly by specialised platforms and online marketplaces.

As a result of these developments, news publishers have witnessed a persistent decline in turnover over the past years, both in terms of sales and advertising revenues, which is expected to continue in the near future.¹¹ This has already caused news publishers to close down or reduce editorial staff,¹² thus leading to a decline of quality of the free and pluralist press. If, due to their poor financial situation, press publishers can make less resources available to conduct quality journalism, they may indeed lose ‘gatekeeping’ power. This threatens the traditional function of the press as a ‘public watchdog’¹³ and may put citizens’ access to information at risk. Ultimately, such state of affairs could be detrimental to public debate and the proper functioning of a democratic society.¹⁴

To ensure the sustainability of a free and pluralist quality press, news publishers have called for a new ‘ancillary right’ that enables them to (a) take legal action against online infringements of their publications, and (b) license their publications to online service providers, such as social media, news aggregators and search engines, which currently provide unauthorized access to press publications made freely available online by news publishers. This has resulted in the proposed press publishers’ right, which is aimed at protecting the investments of publishers in producing press publications.¹⁵

7 Impact Assessment, *op. cit.*, p. 161.

8 M.M.M. van Eechoud, ‘A publisher’s intellectual property right: Implications for freedom of expression, authors and open content policies’, study conducted on commission from OpenForum Europe, January 2017, par. 2.3.

9 Impact Assessment, *op. cit.*, Annex 13A.

10 Van Eechoud 2017, *op. cit.*, p. 14.

11 Impact Assessment, *op. cit.*, Annex 13A.

12 *Id.*, p. 156 (reporting on outcomes of the 2016 public consultation on the role of publishers in the copyright value chain).

13 The European Court of Human Rights has consistently emphasized the role of the press as “public watchdog”. See D. Voorhoof et al & T. McGonagle (ed. sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights* (IRIS themes, vol. III), Strasbourg: European Audiovisual Observatory 2016.

14 Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 31.

15 Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 32.

Key objections against the proposal

Objection 1: A publishers' right is unnecessary as press publications are already protected

It is somewhat awkward that the Commission is proposing a new related right in press publications, the content of which normally already benefits from copyright protection. Most press articles, photographs, illustrations, etc. are protected by copyright, which is usually transferred to press publishers before publication. Accordingly, press publishers often enjoy copyright protection in their press publications due to a transfer of rights by journalists, photographers, illustrators, etc.¹⁶ Press publishers nevertheless complain that licensing and enforcement in the digital environment is complex and inefficient, as they are not recognised as rightholders in their own right.¹⁷ But this raises the question: Why would existing copyright not be a good enough instrument to protect the interests of press publishers? And why would they be helped by the introduction of an additional layer of rights, which essentially grants a similar type of protection?

The Commission maintains that the introduction of a self-standing intellectual property right in press publications is needed to tackle the legal uncertainty that press publishers face when licensing and enforcing rights in the online environment.¹⁸ But that argument cannot convince. Although it may be easier for press publishers to negotiate licenses if they have their own right, they can already license on the basis of the copyright that is contractually obtained from journalists and other content creators. To the extent that press publishers face difficulties to prove that they own the copyright in press articles (i.e. to establish the chain of title of all rights in their publications), the legal uncertainty they face is unmistakably the result of a lack of adequate rights administration and not of a market failure. This could simply be cured through improved rights administration and does not warrant the introduction of a new press publishers' right.

Objection 2: The proposed right does not fix the problems of the press

Although sometimes met with scepticism, the problems that news publishers are facing with the transition from print to digital are real and should be taken seriously.¹⁹ They might warrant legislative action, but the idea that introducing a press publishers' right would help to cure the existing problems of print media in the digital environment is mistaken. Clearly, neither the behaviour of news consumers nor the advertising market will change as a result of the introduction of a press publishers' right. Accordingly, the proposal by no means addresses the key underlying drivers of the problem.

Moreover, while the Commission assumes that the proposed press publishers' right will have a positive effect on media pluralism,²⁰ the relationship between the two is unclear. In general, it is difficult to establish a causal effect between intellectual property rights and incentives to invest in content creation,²¹ let alone to demonstrate that a publishers' right will aid media pluralism. Even if it would yield additional income for publishers, it cannot be automatically assumed that the money will be invested in journalistic efforts. Hence, there is no evidence that the introduction of a press publishers' right will result in better news coverage or the creation of more diverse media content.

The proposal may even have adverse effects on media pluralism, as it is uncertain how online service providers will respond to the introduction of a press publishers' right. If they will refuse to engage in licensing negotiations with publishers and stop providing access to newspaper contents, as Google News and other news aggregators initially did in Germany and Spain where

16 Europe Economics, L. Guibault & O. Salamanca, *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works*, Brussels: European Commission DG Connect 2016, available at: <http://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf>, p. 73-83.

17 Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, recital 31.

18 Impact Assessment, *op. cit.*, p. 160.

19 R. Danbury, 'Is an EU publishers' right a good idea?', Final report on the AHRC project: Evaluating potential legal responses to threats to the production of news in a digital era, University of Cambridge, 15 June 2016, available at: <https://www.civil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.civil.law.cam.ac.uk/documents/copyright_and_news/danbury_publishers_right_report.pdf>, p. 11.

20 Impact Assessment, *op. cit.*, p. 161.

21 See e.g. N. Elkin-Koren & E.M. Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis*, London & New York: Routledge 2013.

similar, though narrower, rights in press publications have been introduced,²² this may have negative effects on the accessibility of news online and will certainly lead to a fall in referral traffic to newspaper websites. This may be harmful for small press publishers, in particular. A 2017 study shows that, after the introduction of the obligation to pay compensation for online use of news articles in Spain, the traffic to Spanish newspaper websites fell by a 5.3% decline in visits on average, with a decline of 4.9% for large newspapers, 6.3% for medium-sized newspapers, and 12.6% for small newspapers.²³ As a result, press publishers attract significantly less advertising revenue, which in Spain is estimated to be around 9-18 million annually in the short term.²⁴

The EU legislator should not take such effects lightly, but examine them seriously before even considering to introduce a press publishers' right. This is particularly important in light of new business models in online news publishing, which are still in development, as the Commission also acknowledges.²⁵ Caution is warranted, as it is uncertain how the introduction of a press publishers' right will affect traditional as well as future business models, including the B2B licensing market for online news publications.

Objection 3: The proposed right is possibly bad for authors of press publications

An additional concern is that the proposed press publishers' right might have a negative impact on journalists, photographers, illustrators and other creators, whose works are included in news articles. Although the proposal clearly states that the press publishers' right 'shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication',²⁶ it cannot be excluded that it will nevertheless affect them.

This is especially the case for journalists, photographers, illustrators and other creators who work as freelancers. To establish a name and reputation, which is crucial for their work and business, freelancers need maximum exposure of their work online. A press publishers' right might hinder that. As Van Eechoud explains: 'If the operation of the proposed publisher's right were to lead to a decline in referrals, shares, snippet-linking or the ability to blog about a journalist's works, this would directly harm the journalist's visibility, and thus opportunity to sell future work.'²⁷

Also, the proposal may worsen the bargaining position of journalists and other content creators. There is no guarantee that, after the press publishers' right is introduced, more money will become available to compensate for the online use of press articles. If the pie would grow, the surplus will presumably be taken by press publishers in the exercise of their related right. If the pie remains the same, there is a reasonable chance that press publishers on the basis of their related right will demand a larger share of it, in which case journalists, photographers and other creators would need to take a loss.

22 §87f-h German Copyright Act grants press publishers a one-year exclusive right to prohibit the use of 'snippets' (not being individual words or the smallest of text excerpts) by search engines and news content aggregators; Art. 32(2) Spanish Intellectual Property Act contains an obligation for content aggregators to pay compensation to news publishers for the use of 'snippets' of press publications.

23 NERA Economic Consulting, *Impact on Competition and on Free Market of the Google Tax or AEDE fee*, Report for the Spanish Association of Publishers of Periodical Publications (AEEPP), 2017, available at: <http://www.aeepp.com/pdf/Informe_NERA_para_AEPP_%28INGLES%29.pdf>, p. 59.

24 *Id.*, p. 62.

25 Impact Assessment, *op. cit.*, p. 157.

26 Proposal for a Directive on copyright in the Digital Single Market, *op. cit.*, art. 11(2) and recital 35.

27 Van Eechoud 2017, *op. cit.*, p. 5.

Objection 4: The proposal is overly broad

Apart from the questionable assumptions that underlie the proposal, there are further ambiguities, in particular regarding its beneficiaries and scope. Even if the proposal would aid press publishers, it goes way further than what is required to protect the quality press. The definition of ‘press publication’ (art. 2(4) CDSM proposal) is so broad that it covers virtually all content published periodically under a heading of news. The beneficiaries of the proposed right are thus not only the quality press, but all periodical media, including newsletters, blogs, glossies, social media, etc. It goes without saying that not all these media play an equally important role in democratic societies and they certainly are not in a similar situation of crisis as the quality press.

In respect of its scope, it is unclear why the proposal affects all online users of news, including consumers and other legitimate users, if the real intention is to target the use of press articles by social media, news aggregators and search engines. Furthermore, do press publishers really need broad exclusive rights, if they merely seek ‘to participate in the advertising revenues generated by their content on third parties’ websites’?²⁸ And why is a 20-years term of protection proposed, if the commercial life span of most press articles is no longer than a day, a week or a month at most? These are all questions to which the Commission’s proposal does not provide adequate answers.

The proposal further leaves unanswered what exactly will be protected: would the right protect press publications, *including* the content they comprise, or merely the fixation of press publications as identifiable media items? In the latter case the right seems useless, as online service providers seldom reuse or provide access to media items as a whole, but rather offer snippets to their content. If the right would also protect the *content* of a press publication, however, then this might extend the scope of protection beyond that of copyright protection. Brief and simple news items that contain little expression apart from facts, such as ‘news of the day’ or ‘miscellaneous facts having the character of mere items of press information’ are outside the scope of copyright,²⁹ but would arguably be protected under the proposed press publishers’ right.³⁰ Not only would this be contrary to the Berne Convention, but it would also impair the free flow of information.

Conclusion

The proposal for a related right for publishers of press publications is flawed. Although the problems that print media are facing in the online environment are real, there is no evidence that a press publishers’ right will meaningfully contribute to addressing these problems. Also, there is genuinely no need for a new right in press publications, as news publishers often already benefit from copyright protection contractually obtained from journalists and other content creators. In response to the draft impact assessment that accompanies the proposal, the European Commission’s Regulatory Scrutiny Board also observed that ‘[t]he report should more convincingly demonstrate that the creation of a new standalone right for news publishers would effectively contribute to reinforcing their role in the digital world and that action at EU level is needed.’³¹ In my view, it still makes no case for why the introduction of a press publishers’ right is needed.

Various European Parliament’s committees that are looking into the matter also seem to recognize that the evidence is against the proposal. The CULT Committee’s draft report of 6 February 2017 advised to significantly limit the proposal and the draft report of the IMCO Committee of 20 February 2017 even suggested to abandon the press publishers’ right altogether. The suggestion to replace the right with a presumption that publishers represent the authors’ copyright in press publications and have the right to sue in their own name against digital infringement

28 Impact Assessment, *op. cit.*, p. 157.

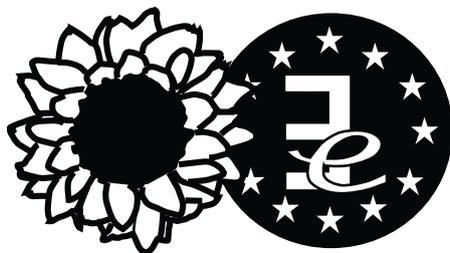
29 See specifically art. 2(8) Berne Convention: ‘The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.’

30 The proposal contains neither a threshold for protection, such as the originality criterion in copyright, nor a carve-out to exclude ‘news of the day’ or ‘miscellaneous facts’ from the scope of protection.

31 European Commission, Regulatory Scrutiny Board, Opinion on DG CONNECT’s draft impact assessment report on the modernisation of EU copyright rules (version of 1 July 2016), Ref. Ares(2016)3846527, 22 July 2016, available at: <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2016/sec_2016_0407_en.pdf>, p. 3.

of that copyright, as was made in the draft report of the JURI Committee of 10 March 2017, is probably easier to reach political agreement on. But in the absence of final votes on their positions, all is still out in the open.

Accordingly, the European Parliament has an important task ahead to make right what is wrong. Admittedly, this task is not easy. Still, the EU legislator should be very cautious to create a new right without having a clear picture of all its intended and unintended consequences. Lawmaking is not a process of trial-and-error. It actually has bearing on the subjects targeted by the legislation. As the potential impacts of the proposal on the position of journalists, on media pluralism, on future business models and on the B2B licensing market are not yet assessed, thoughtfulness and caution are warranted.



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