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DISCUSSION PAPER

Rewarding quality journalism or distorting the Digital Single Market? The case for and against neighbouring rights for press publishers

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Executive summary

Last September, the European Commission introduced 'neighbouring rights' for press publishers at EU level as part of its proposal for a new Copyright Directive¹. These new rights are similar to the ancillary copyright for press publishers already introduced in Germany and Spain.

Neighbouring rights give publishers additional protection, entitling them to receive remuneration in the form of royalties from online services (such as search engines and news aggregators) that, for example, display snippets of news in search results.

New neighbouring rights at EU level may provide additional revenue for publishers, but raise many concerns. What would the implications be for other economic actors, such as creators, small publishers, online services and users? What is the added value of the new rights over existing copyright frameworks? How can the balance best be struck between the various stakeholders' interests? How to ensure that copyright exceptions are invoked given the significant disparities between member states' provisions?

While copyright is an important tool to encourage investment in the creative industries, strong evidence of a market failure is required to justify the introduction of a new right or related right provision. An ill-designed copyright reform would fail to deliver important objectives such as an efficient value chain and a functioning Single Market. It could also have a negative impact on society as a whole by limiting access to information, undermining media plurality and hampering innovation.

That is why, in developing copyright legislation, proposed instruments should be carefully assessed in light of accurate market data and existing evidence.

National experiences with similar neighbouring rights – the ancillary copyright laws in Germany and Spain – have not been satisfactory. There appear to be two reasons for this. First, they created massive legal uncertainties. Second, they did not bring clear economic benefits, but rather resulted in reduced competition and media pluralism as well as smaller consumer surpluses (See section I.2.B).

The German and Spanish experiences demonstrated that the negative consequences of new neighbouring rights go beyond purely economic considerations.

Limiting the right to index content by introducing neighbouring rights, and the associated administrative burden and costs, harms users and negatively impacts media pluralism and freedom of expression (i.e. access to information).

The intense debate around the ancillary copyright provisions in Germany and Spain has nevertheless increased public awareness of the challenges facing press publishers in the digital environment, drawing attention to the growing importance of alternative revenue streams.

A potentially beneficial option to reward quality journalism could be to investigate the possible use of economic rather than legal instruments, such as, for example, reduced taxes (e.g. VAT) for the publishing sector. If publishers' business models are moving away from advertising towards reader-funded content, this might be a more effective way to encourage quality journalism and media pluralism.

In conclusion, neighbouring rights for press publishers do not appear capable of delivering the desired economic or societal benefits (as shown in Part I of this report). On the contrary, they might have the reverse effect, reducing the benefits for all the stakeholders involved. They also raise significant legal issues (as highlighted in Part II).

Introduction

European legislators have taken on the ambitious task of adapting EU law to an increasingly digitalised world. As part of the European Commission's strategy for the Digital Single Market, it is currently modernising EU copyright legislation.

The "general principles" of its first legislative proposal, aimed at improving the cross-border portability of online content, have already been endorsed by the European Council.² Further measures proposed in the autumn of 2016 include initiatives to widen access to content online (i.e. to reduce geo-blocking in Europe); to broaden copyright exceptions (for example, for the purpose of teaching and research, or to boost access for people with disabilities); and to create "a fairer marketplace".³

In this context, as part of the overarching copyright initiative, the Commission brought forward the idea of a European neighbouring right for press publishers. For several years, press publishers have been asking national and European authorities to introduce neighbouring rights, arguing that some online services are extracting value from news content without sharing it with publishers. Supporters of neighbouring rights maintain that online service providers should be required to enter into licensing agreements with or pay a flat fee to press publishers to index, share and/or aggregate press publications.

Several stakeholders voiced their opposition to this idea (e.g. an open letter from 83 MEPs to Commission President Jean-Claude Juncker⁴ and another from publishers to Vice-President Andrus Ansip, Commissioner Gunther Oettinger, First Vice-President Frans Timmermans and Commissioner Vera Jourová in December 2015⁵). Despite these concerns, a neighbouring right for press publishers was introduced in the proposal for a new Copyright Directive⁶ (hereafter the "draft directive") following a public consultation.⁷

The draft directive is currently being reviewed by the European Parliament and Council. In the Parliament's Legal Affairs Committee, rapporteur MEP Comodini Cachia opposes the creation of a new right for publishers, proposing instead to give press publishers more powers to enforce their copyright claims.⁸

A neighbouring right (also known as "ancillary copyright") is a "copyright fee to be paid by online news aggregators (such as Google News) to publishers for linking their content within their aggregation services".⁹ It uses private law¹⁰ to reallocate profits between private players and is designed to enable press publishers to charge online aggregators for displaying short texts that are often freely available elsewhere online (for example, a clickable link in a list of news search results). Ancillary copyrights for press publishers have already been introduced in Germany and Spain.

Neighbouring rights are intended to protect the interests of certain groups of right holders, although the protection they grant is more limited than under copyright.¹¹ They do not reward the creation of the work, but rather either its performance (for example, by a musician) or the organisational/financial effort involved (for example, of a producer), which may also include participation in the creative process.¹² In the Commission's proposal, the new neighbouring rights would entitle press publishers to receive royalties for the online reproduction and/or communication to the public of their news publications. This potentially includes, for example, snippets of news being displayed by news aggregators.

The aim of this report is to assess the economic and societal consequences of neighbouring rights, as well as their legal frameworks, based on the experience of recent ancillary copyright laws in Germany and Spain.

The first part of this report is an economic analysis which: (1) takes stock of the objectives of the proposal; (2) assesses whether neighbouring rights have the potential to achieve those objectives; and (3) considers the potential economic consequences of the new right at EU level. The second part is a legal analysis which: (1) provides a review of existing national legislation; (2) explains the neighbouring rights' provision of the draft directive; and (3) demonstrates that such a right is both unnecessary and dangerous.

Background information for this report was gathered through a review of published academic literature and surveys, policy documents and court case decisions. Input for the economic analysis was also gathered through meetings in the framework of the European Policy Centre's Digital Media Task Force¹³, kindly supported by the Computer and Communications Industry Association (CCIA), which brought together a wide range of stakeholders to discuss these issues.

PART I: Economic analysis

Copyright legislation is an important tool for authors/creators to receive compensation for the reproduction of their work. By making access to a work contingent on remuneration, copyright provides incentives to create the work in the first place. It is, therefore, an essential tool to boost creativity, cultural diversity and innovation in the publishing and news sector.

Any change in the copyright regime could, however, affect the way the market functions, restricting the development of new business models and undermining competition. In light of this and in the context of the Single Market, strong evidence is required to justify such an intervention.

According to economic theory, introducing legislation that restricts the activities of firms – such as an obligation to pay – is only justified under certain circumstances, such as when there is an evident market failure.¹⁴ If that is not the case, introducing new rights risks causing economic harm to both businesses and consumers. It could prevent new players from entering the market, thus limiting competition and having a negative impact on price, quality and choice for consumers. Unnecessary or ineffective copyright legislation would also reduce the benefits to society as a whole by limiting access to information and slowing down innovation.

Copyright legislation should therefore strike the balance between access and incentives. In economic terms, this means that the benefits from the creation of content should be greater than the administrative costs and losses from limiting access to it.¹⁵ But before weighing up the advantages and disadvantages of introducing neighbouring rights at EU level, we need to understand the problem we are trying to solve by doing this.

1. What are we trying to achieve at EU level?

A. Value sharing

The motive for introducing a new right as part of the copyright reform in Europe is based on the idea of sharing value in the digital world (i.e. a "fairer marketplace") and improving copyright protection on the Internet.¹⁶ According to the European Commission, the value is created by content creators (such as authors or publishers), while intermediaries (such as search engines and news aggregators) benefit from it by generating advertising revenue.

Traditionally, press publishers receive most of the return on their investment in the form of revenues from advertising.¹⁷ With user preferences shifting more towards digital consumption, Internet traffic to specific sites/platforms determines a significant proportion of publishers' advertising revenues. For most publishers, the online business is growing while revenues from print publications are decreasing.¹⁸ Many publishers have successfully transitioned from analogue to digital, but some argue that they are still in a weak position and thus need additional legal protection.¹⁹

B. Financing quality journalism

Both publishers and authors need to be equally and fairly remunerated. With reduced revenues from advertising²⁰ and declining newspaper publishing revenue generally,^{21, 22} quality journalism needs to explore new options. These include new business models and/or new copyright protection to sustain their work in the digital era. The shift of advertising revenue from news creators to online services has created a new impetus for change.

C. Proper assignment of property rights

Markets work most effectively when creators, intermediaries and users are granted clear property rights. However, in many cases, these rights cannot be easily allocated, especially when it comes to intangible intellectual property.

Press publishers need clear rights that are recognised by the market to reap the benefits of creation and innovation, and to be able to compete in the digital environment. Emerging business models that create new forms of interaction with content need legal certainty over who owns what right and what is allowed. Currently, though, there is a lack of clarity over copyright obligations. Certain situations – for example, the shift of advertising revenue from creators to online services – could limit the possibilities for publishers to receive remuneration for their investments. The aim of copyright reform should therefore be a better assignment of property rights in the digital environment – but that does not necessarily mean assigning a new right.

D. A functioning Single Market

There are currently 28 different copyright regimes in the EU, a situation which clearly runs counter to the principles underpinning the (digital) Single Market. To address some of the deficiencies outlined above (value sharing, financing quality journalism and proper assignment of property rights), different provisions have been introduced in member states such as Germany and Spain. This has created the risk of fragmentation of the Single Market. A functioning Single Market requires harmonisation, and copyright legislation plays a significant role in this.

Moreover, attention should be paid to the proportionality of any new measures. Policy-makers should recognise that excessively restrictive copyright regimes limit new business models, market entry and competition.

E. Media plurality

Finally, press publishing is more than a business. As demonstrated by recent political developments (such as the US presidential elections²³ and the BREXIT referendum vote²⁴), quality journalism and media plurality play an important role in sustaining democracy. Many thus argue that the sector must be supported as a tool to hold those in power to account, provide the information that citizens need, and make markets more efficient.²⁵ While copyright provisions might provide additional revenue for quality journalism, they can also result in limited access to the press. This would not only undermine media plurality, but also go against the public interest in accessing information.²⁶

2. Why neighbouring rights will not help achieve the EU's objectives

The harmonisation of EU copyright legislation has great potential to deliver benefits to creators, intermediaries and users. EU-level legislation could decrease legal uncertainty and reduce market fragmentation. The publishing sector itself is playing a key role in the digitalisation of the European economy and society and, as such, requires a modernised European copyright framework.

However, when introducing new provisions such as neighbouring rights, careful consideration needs to be given to what impact this would have on different actors, as well as on the overall competitiveness of the sector and competition within the industry.

To better understand the potential economic impact of European neighbouring rights for press publishers, we can examine the evidence from the two EU member states which have already adopted similar laws. The evidence from the introduction of neighbouring rights in these member states – (A) Germany and (B) Spain – is discussed below.

A. Germany

The German ancillary copyright law, as introduced in 2013, is an exclusive right which relates to displaying snippets – short quotes from copyrighted content, such as news articles – in search and news aggregation results. This exclusive right requires a contractual arrangement to be reached before any snippet is displayed.

Experience with the German ancillary copyright legislation suggests that it has no positive impact on value sharing;²⁷ and, according to the Internet industry Association ECO, it is also not working in practice.²⁸ The

potential beneficiaries of the additional copyright revenue have voluntarily granted free licences to the largest intermediaries, fearing a loss of traffic. A study by Bitkom²⁹, the German Federal Association for Information Technology, Telecommunications and New Media, shows that leading news aggregators no longer display snippets from publishers who claim payment of the licensing fee (e.g. Google) or hide entire search results for content which may fall under the ancillary copyright (e.g. Deutsche Telekom AG, 1&1). Many small providers have decided to limit or even shut down their services. Furthermore, the Bitkom study argues the law may have resulted in less diversity of expression and hindered the free flow of information.³⁰

Publishers argued that Google was abusing its dominant position by refusing to display content falling under the ancillary copyright legislation. However, following a legal challenge, the German courts rejected this claim.³¹

So the German ancillary copyright law is not only failing to achieve its purpose, but is also discouraging competition. Under the current rules, small players have no chance of getting the same exemptions as market leaders. The legal and administrative burden is also too much for small players on either side. Small publishers face the challenge of having to grant exclusive exemptions to each search engine/news aggregator, and small intermediaries need to gather explicit exemptions from all publishers. This results in barriers to access in both sectors.

B. Spain

The more recent Spanish ancillary copyright provision, introduced in 2014, adds a new dimension to the German one. It is a compulsory remuneration right (not just an exclusive right) from which derogations cannot be granted. It does not require contractual arrangements to be made in advance, only a *post factum* payment. The online news sector was only partially in favour of this new law³² and no market failure was identified before it was introduced.³³

The consequences of this compulsory obligation were immediate – Google closed its Google News site in Spain, which clearly resulted in a fall in publishers' revenues and citizens' choice and/or access to information.³⁴ According to the Electronic Frontier Foundation, the law not only threatens free speech on the Internet but also penalises innovators.³⁵

A study commissioned by the Spanish publishing industry³⁶ has shown that the law damages competition, with a particularly negative impact on small publishers. Internet traffic to publishers' sites decreased by 6% on average and 14% for small publishers in the months following the introduction of the new right. This demonstrates that news aggregators play a major role in making consumers aware of smaller, lesser-known outlets which are unlikely to be accessed directly otherwise.

The study also found that the most significant short-term impact for consumers is that it takes longer to search for news. Assuming the time spent searching for and reading information/news is the 'cost' that a consumer pays for freely available information online, the 'price' users pay for news increased when the right was introduced. The financial equivalent of the extra time spent by users searching for news amounts to approximately EUR 1.85 billion per year, according to the study. This amount is defined as a "loss of consumers' surplus".

The Spanish experience prompted one group in the national parliament to propose a repeal of the ancillary copyright law, claiming that its introduction had not delivered the expected outcomes. The group argues that only larger press publishers benefit from an additional right, as they can afford to sacrifice the traffic generated by news aggregators. Smaller competitors were hit hard by declining traffic or a complete halt to it, which made them unsustainable or prevented them from growing.³⁷

C. Conclusion

Despite the commendable impetus for harmonising and modernising copyright legislation at EU level, and the efforts to protect quality journalism, evidence shows the neighbouring rights provisions in Spain and Germany

have not brought clear economic benefits to any of the actors involved (creators, publishers, search engines, news aggregators or users). The new rights have also not supported quality journalism. On the contrary, the German and Spanish laws have contributed to reducing competition, consumer 'surpluses' and media plurality.

The debate around the Spanish and German legislation has raised awareness among users, legislators, intermediaries and creators of the challenges facing press publishers, and drawn attention to the growing importance of alternative revenue streams for traditional businesses. Recognition of the importance of a quality press and an understanding of the challenges to its funding within the culture of a "free Internet" might also make users more willing to embrace new ways of supporting quality journalism.³⁸

However, the provisions introduced in Germany and Spain demonstrate the hazards of regulating innovative new business models in a restrictive way which, in the end, does not address the challenges faced by press publishers.

3. Potential consequences of new neighbouring rights for press publishers at EU level

As in the case of Germany and Spain, and as demonstrated in the legal analysis later in this report, introducing neighbouring rights at EU level carries some risks. Experience also suggests that such rights risk undermining the competitive functioning of the market and media pluralism, as well as reducing freedom of expression (undermining access to information and freedom of the press).

Having to obtain and manage licenses to index certain news articles could limit the number of search results to what the search engine or news aggregator deems to be a manageable or 'necessary' level, based on its business model. This could threaten media pluralism and the freedom of expression that Europe has championed since the EU was created.

Moreover, such licensing agreements for displaying search results would not fit the business model of online news aggregators and search engines, potentially reducing incentives for investment and innovation in the sector and undermining its economic viability.

Regarding the possibility of market failure, the evidence suggests that online search engines and news aggregators are supporting a quality press rather than having a negative impact on it. According to a recent study by Deloitte³⁹, traffic referred from online services to newspaper publishers generated an estimated EUR 746 million across four markets (France, Germany, Spain and the UK) in 2014. The Internet is increasingly important for news distribution and content editing.⁴⁰ It has reduced operating costs for publishers, removed barriers to entry and encouraged new, more efficient digital business models.⁴¹ According to one survey⁴², press publishers' revenues are increasingly based on the overall consumption of news, with growing audiences for print and digital media combined. Paid digital circulation increased by 56% in 2014 and has risen by more than 1,420% over the last five years, according to PwC.

The symbiotic relationship between online services and press publishers' content online is recognised by the German Competition Authority⁴³, among others. A new regulatory measure that risks limiting competition between intermediaries could therefore undermine publishers rather than support them.

Furthermore, consumers appear increasingly willing to pay for premium content online.⁴⁴ PwC's global entertainment and media outlook for 2015-2019 found that online paywalls are now making up for newspapers' lost print circulation revenue globally, with total global newspaper circulation revenue set to record year-on-year increases – a pattern that began in 2013.⁴⁵ Undermining this process by limiting the free display of links to content risks slowing down or even reversing this trend.

Some publishers argue that the introduction of new neighbouring rights at EU level will provide a source of revenue for the industry. However, this has not happened in the member states that have already introduced such a right and it would be a risky experiment to act at EU level in the hope of getting different results with a similar legislative instrument. Moreover, given that the digital media market is very dynamic, any regulatory intervention would potentially have only a limited impact in the short term, and the long-term implications of

the proposed neighbouring rights have yet to be estimated. It is also worth noting that neighbouring rights are not targeted at supporting quality journalism, as any publication – including publications requiring no major investment or with no "quality" content – would benefit from them.

As an alternative, given that the issues which policy-makers are trying to address are of an economic nature, consideration could be given to introducing economic rather than legal instruments – such as, for example, reduced taxes (e.g. VAT) for the publishing sector. The benefits of such measures for the sector would go beyond the economic: a tax benefit for a public good (such as independent quality journalism) would work in unison with the principles of the Single Market while supporting key European values – cultural diversity and strengthened democracy, as well as media plurality.

PART II: Legal analysis

In this section of the report, after (1) reviewing existing national legislation, and (2) describing the provisions on neighbouring rights in the draft directive⁴⁶, we will (3) demonstrate that such a right is both unnecessary and dangerous.⁴⁷

1. Inventory of national legislation on press publishers' rights

Different responses to the same question

Both the German law of 1 March 2013 and the Spanish law of 4 November 2014 established a new neighbouring right for news companies (press enterprises, online news publishers, and sometimes press agencies) when their content is indexed and/or aggregated. However, the two laws take very different approaches.⁴⁸

A. Germany: an individual right to authorise or prohibit (Act of 1 March 2013)

Generally speaking, neighbouring rights are managed on an individual basis (with authorisation given directly by the right owner to the user) or on a collective basis (with an authorisation given by a collecting society to the user). The German neighbouring right law ("*Leistungsschutzrecht für Presseverleger*") takes the former approach. Put simply, search engines or news aggregation services that make parts of press products (so-called "snippets") available to the public must obtain a license from each relevant press publisher to do so.

In this Act, "press products" are defined as the "*fixation of editorial and technical journalistic contributions within the framework of a collection published periodically under a title and on any type of medium, which should be considered as essentially editorial and which is not used primarily for self-promotion*" (UrhG, § 87f [2]). Following a heated debate, the final version allows search engines and aggregators to use short extracts (described as "*insignificant fragments*"⁴⁹) without the need for a license.

Before the law entered into force, some search engines implemented a system to establish whether publishers agreed to their news content being referenced. Google, for example, only referenced content from press publishers who signed a "*renunciation statement*". This prompted a complaint to the Competition Authority over alleged abuse of a dominant position.

The district court in Berlin⁵⁰ rejected this claim, stating that the system set up by the search engine created a 'win-win': it offers consumers the opportunity to benefit from indexed content and quick access to information, while press publishers benefit from traffic driven by online services.⁵¹ The press sector's collecting society, VG Media, nonetheless took Google to court seeking compensation for the exploitation of content. At a recent hearing, the district court implied that the entire German right could soon be declared null and void.⁵² The Arbitration Chamber of the Patent Office and Trademark Office (DPMA), which generally takes decisions regarding collecting societies' rates, delivered a preliminary ruling in October 2015 that Google News' snippets should be limited to seven words. Google has challenged this interpretation.

B. Spain: "fair compensation" managed collectively (Law of 4 November 2014)

The Spanish law, which entered into force on 1 January 2015⁵³, creates a levy on online services for the display of snippets of news content. This is not a neighbouring right, but rather creates a "fair compensation" mechanism for press publishers and limits the exceptions to copyright for quotations from news content.

Unlike the German law, this right is exercised collectively by a management company which negotiates the financial compensation due to publishers with online aggregators. The Spanish law is also more restrictive: the right applies regardless of the purpose for which the content is exploited (commercial or not), and publishers cannot grant aggregators a free license even if they want to. These restrictions have prompted several aggregators to shut down their services in Spain.⁵⁴

There are clear differences between the German law, which created a genuine neighbouring right, and the Spanish one, which limited exceptions to copyright by eliminating the right to quote from news content. It is not clear whether the Spanish law complies with the Berne Convention, the TRIPS agreements or with EU legislation, and in particular with Directive 2001/29. While the member states can introduce a "right to quote" as an exception to copyright in national law, they are not obliged to do so. Furthermore, the European Court of Justice (ECJ) has consistently ruled that if and when national governments decide to take up this option, they must do this fully and faithfully.

2. A review of the neighbouring right in the draft directive

In this section, after reviewing the arguments in favour or against the introduction of a neighbouring right for press publishers, we review the content of the draft directive.

A. The debate on the neighbouring right

Neighbouring rights are supported by some publishers, but opposed by many other groups such as start-ups⁵⁵, consumers⁵⁶ and civil society organisations.⁵⁷

Most online service providers consider that "there is no market failure that needs to be addressed since online services drive traffic to publishers' sites and increase the visibility of their brands, while publishers can control the use of their publications by relying on authors' rights transferred to them. Some feared that a new neighbouring right would risk imposing the negotiation of additional licences on them and lead to an increase in transaction costs related to the identification of the relevant right holders".⁵⁸

Beyond the obvious antagonism between press publishers and online service providers, other stakeholders in the press sector, such as journalists, are also suspicious of the move. Journalists and authors have expressed concerns that a neighbouring right for publishers "could have an impact on their own authors' right, weaken their bargaining position in relation to publishers and make it more difficult to exploit their rights independently from them".⁵⁹

Moreover, publishers themselves are divided on the issue⁶⁰. Small publications have voiced concerns that neighbouring rights would harm their business while reinforcing the dominant position of bigger publishing houses.

B. Draft directive introducing a neighbouring right for press publishers

Article 11 is drafted as follows:

"1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other right holders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other right holders and, in particular, may not deprive them of their right to exploit their works and other subject-matters independently from the press publication in which they are incorporated.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication."

This article effectively grants a neighbouring right to the publishers of press publications, broadly defined in recital 33 as "journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining".⁶¹

Recital 33 adds that the protection should not extend to "acts of hyperlinking which do not constitute communication to the public". This precision echoes the jurisprudence in the case of Svensson⁶² and GS media⁶³: in short, the aggregation of content which consists only of publishing hyperlinks and does not

constitute communicating with the public escapes the new monopoly of press publishers. However, this is unlikely to apply to online services, as they usually also provide the title of the article and a short description ("snippet"), thus probably falling within the scope of Article 11.

This neighbouring right covers the right of reproduction and the right of communication to the public. Notably, the European Court of Justice (ECJ) ruled in May 2016⁶⁴ that the act of communication to the public must be treated in the same way for copyright and for ancillary rights, which means that the right of communication to the public (and its exceptions) should also apply in the same way to the neighbouring right for press publishers.

Article 11 also states that the neighbouring right must not prejudice the journalists' copyright, reflecting the concerns they have voiced – principles already established by EU and national legislation. Notably, Article L. 211-1 of the French Intellectual Property Code states that: "Neighbouring rights shall not prejudice authors' rights. Consequently, no provision in this Title shall be interpreted in such a way as to limit the exercise of copyright by its owners." This provision reproduces the first article of the Rome Convention, which is also included in numerous foreign laws.⁶⁵

Finally, Article 11 states that this right should last for at least 20 years, beginning at the end of the calendar year following publication of the press content. Article 18.2 of the draft proposal also states that the neighbouring right would also apply to press content published before the draft proposal enters into force.

This text has been widely criticised. Opponents point out that copyright exceptions (like quotation and parody) – which should also apply to this neighbouring right for publishers – are not harmonised at European level. It will therefore not be easy for anyone (including online service providers, which may argue that snippets of content are covered by the quotation exception) to invoke these exceptions, in light of the significant differences in member states' provisions. Critics also argue that the neighbouring right – and its retroactive application – lasts too long, and should instead, at the very least, have been based on the notion of relevant news. Beyond these specific points, more general criticisms can be made.

3. Critical review of the draft directive

As underlined above, press publishers claim that they need a neighbouring right to be able to better control the distribution and use of their content by online services. They claim that copyright does not allow them to do so effectively. But is this argument valid? Existing copyright legislation already gives press publishers bargaining power, and it is important to be aware of the disruption caused by this new neighbouring right.

A. Press publishers already have bargaining power – through copyright

This neighbouring right is not needed because copyright already gives press publishers the bargaining power they are asking for.

Scope of the protection

The ECJ ruled, in a 2011 case involving Google and Copie presse, that some titles and first lines of articles could be original and thus protected by copyright.⁶⁶ Two years earlier, the Court ruled that "it cannot be excluded that certain isolated sentences, or even some groups of sentences concerned, are able to convey to the reader the originality of a publication such as a newspaper article, by communicating an element that is in itself an expression of the intellectual creation of the author of this article".⁶⁷ Therefore, a publisher would not need a new neighbouring right to protect a short extract of text in the event that this short extract did indeed constitute a personal intellectual creation by meeting all the requirements to be protected by copyright – including the "originality" criterion.

Ownership

For publishers, invoking copyright which has been transferred to them is not as simple as invoking a neighbouring right to which they are entitled *ab initio*. However, in reality, the difference is not that important:

firstly, because with respect to third parties, the press publisher is presumed to hold the authors' rights to the articles, photographs, drawings etc. he invokes; secondly, because some legislation can give ownership of copyright directly to press publishers. For example, under French law, since the "Hadopi" Act of 2009, the employment contract between a journalist and his employer constitutes an automatic assignment of all rights to the journalists' work for an initial period of publication in all editions (paper and digital) of a press title, so it would not be difficult for the press publisher to establish ownership of the right to act on the basis of copyright.

Finally, the argument that the burden of proof⁶⁸ makes it more difficult to exercise copyright must be put into perspective. Press publishers are, indeed, afraid of being forced to demonstrate (in the absence of mechanisms like the HADOPI or equivalent to the collective work⁶⁹) ownership of each item of summarised press content. However, a right holder who brings an action for copyright infringement has to demonstrate the originality of every work for which (s)he claims protection⁷⁰ anyway, and this proof is not impossible to gather today thanks to the existence of rights management software.

B. The neighbouring right may cause disturbances

Two key complications, among many others, may arise: one linked to the relationship between copyright and the neighbouring right for press publishers; and another related to freedom of information.

1. A difficult interplay between copyright and the neighbouring right

The impact of a new neighbouring right for press publishers on the rights of journalists should be questioned. Take the following example: in many countries, the copyright owned by a journalist on his/her article is not transferred by default to his/her publisher. But this transfer would take place under the new neighbouring right. How should both rights be reconciled? Should we consider that the journalist is no longer entitled to act to defend his/her rights? And what about freelance journalists? The draft directive provides no answer to this, and nor do national laws. In short, this neighbouring right creates, for example, a risk that employees or freelance authors will lose their right to compensation. Is it really worth it?

Furthermore, it is not easy to distinguish in the draft proposal between what is covered by copyright and what is covered by the neighbouring right. If we take the example of a commercial phonogram, it is easy to identify the producer's right (on the fixation of the sequence of sounds), the author's right (on the musical composition) and the performer's right (on the performance). But what about here? How can we distinguish between the author's right (i.e. the journalist's right) and/or the right (s)he transfers to the press publisher) from the neighbouring right part?

Concern about the difficulty this raises is shared by the European Copyright Society: "The neighbouring right of phonogram producers focuses on the 'first fixation' of sounds (i.e. the initial recording), which in the past occurred at the initiative and under the responsibility of the phonogram producer. It will be difficult to identify the appropriate connecting factor for a neighbouring right for publishers. The 'first fixation' of a published work will in many (if not most) cases be made by the author of the work, not its publisher".⁷¹

As seen earlier, press content can benefit from copyright protection. It can hardly benefit simultaneously from a neighbouring right without creating confusion about which new fixation (or action), if any, is protected. And if this draft proposal does not protect any specific fixation (or action), what will online services (and, more generally, users of news content) pay for?

Finally, the main difference appears to lie in the absence of an obligation, in the field of neighbouring rights, to characterise an original form, but it is not certain that this justifies the use of this less protective form of Intellectual Property Right.

2. Threats to freedom of information

The neighbouring right risks limiting freedom of information, which is protected by Article 10 of the European Convention of Human Rights. The draft directive wrongly claims that the new right would protect information

pluralism. Recital 31 states that: "A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of press publications are facing problems in licensing the online use of their publications and recouping their investments. In the absence of recognition of publishers of press publications as right holders, licensing and enforcement in the digital environment is often complex and inefficient."

This statement implies that the economic value of press content is captured by online services to the detriment of press publications – and, ultimately, of a "free and pluralist press". However, this assertion has been challenged on many occasions, including by the Regional Court of Berlin in February 2016, as seen above (I.A).

Another way to look at this issue would be through the prism of economic 'parasitism'. Are news aggregators guilty of such an act? A decision of the Paris Court of Appeal of November 2012⁷² identified as 'economic parasitism' a television website selling advertising in association with news content that had been obtained unfairly. However, this is not necessarily what happens with online services. The Google News webpage, for example, does not currently carry any advertising link associated with news content, so the parasitism argument does not hold in this case.

It is often argued that users get enough information from a snippet and thus do not click on the link to read more. This is far from certain: it could be that these services simply respond to user demand and do not actually replace the articles in question.⁷³ One could also argue that they guide the user to press publishers' websites, improving their ranking and driving additional revenue.

In conclusion, the neighbouring right for press publishers threatens the future of online services, who would be forced to request prior authorisation from right holders or, failing that, to refrain from reproducing hyperlinks and/or snippets. This would clearly have negative consequences for the pluralism of information. Neighbouring rights for press publishers might also pose some operational and legal difficulties without delivering the claimed economic or social benefits; on the contrary, they might even reduce the economic benefits for all stakeholders involved.

The views expressed in this Discussion Paper are the sole responsibility of the authors.

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Annex

Definitions

Market failure is an inefficient allocation of resources (labour, capital, goods) in the free market. Market failures – such as inequality, monopoly power, lack of proper assignment of property rights, negative externalities, missing or incomplete markets⁷⁴ – are hindering the economic objective of a functioning market and are explained below.

- Inequality (income gap) concerns a situation where market transactions reward creators, intermediaries, and users, but these rewards are concentrated in the hands of a few.
- Abuse of monopoly power concerns, for example, a situation where the access to the market for competitors is limited.
- Lack of proper assignment of property rights (including copyright) is observed when the (intellectual) property cannot easily be allocated to certain resources, limiting the ability of markets to form.
- Negative externalities are observed when one person/organisation/group's actions harm another⁷⁵, e.g. unfair competition.
- Missing or incomplete markets for public good, such as infrastructure, access to information or quality journalism, are also a market failure.

Consumer surplus is a common economic concept, defined as the difference between what a consumer is willing to pay for a commodity (e.g. information or news) and the price (s)he actually pays. For example, whenever the price of online news decreases, assuming that the willingness of the consumer to pay does not change, the consumer surplus grows. On the other hand, if the price of the news increases, the consumer surplus declines, hence there is consumer surplus loss.

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- 46 It must be noted that the draft directive also intends to break the *Reprobel* jurisprudence (Indeed, in this decision of 12 November 2015, CJEU, 12 Nov. 2015, n° C-572/13, Hewlett-Packard Belgium SPRL c/ Reprobel SCRL, the Court ruled that fair compensation related to the private copy exception could not benefit publishers and should be reserved for rights-holders: namely for the reproduction right to author, and for the private copy exception to both authors and holders of neighboring rights) by granting every press publishers a neighbouring right. This point, which will not be discussed within the framework of our analysis, has been deeply criticised in the French report by Franceschini: L. Franceschini CSPLA July, 2016.
- 47 As an aside – what about the feasibility of neighbouring rights at national and European level? International conventions, particularly the 1961 Rome Convention, do not preclude the creation of neighbouring rights. The Rome Convention only requires its signatories to create four related neighbouring rights for the benefit of artists, sound recordings, video recordings and audiovisual communication companies, but it does not prohibit the creation of such a right for other groups; it just sets a minimum that can be exceeded. Nevertheless, signatories must ensure that this right does not disproportionately affect trade within the Union, an interpretation which was confirmed by a European Court of Justice (ECJ) judgement in a Premier League case on the protection of sporting rights in October 2011 (ECJ October 4 2011 RTD eur. 2011 n°4 chron. Treppoz), notably n°102: "In these circumstances it is possible for a Member State to protect sporting events under the protection of intellectual property, by implementing specific national regulations or granting protection, subject to compliance with the right of Union, to these meetings by agreements concluded between the persons entitled to display to the public the audiovisual content of these meetings and people who wish to distribute this content to the public of their choice". Obviously, creation by some member states of neighboring rights on the aggregation of informational contents should respect the EU law, notably the principles of free movement, to the point that one wonders if this is not a field of competence reserved for the Union. For a deeper analysis of this question see the article of E. Rosati "*Neighboring rights for publishers: are national and (possible) EU initiatives lawful?*" International Review of Intellectual Property and Competition Law.
- 48 In a third case, France, there is no legislation yet, although the subject is still under discussion. A publishers' association had drafted a bill which provided, like the Spanish legislation, for the creation of a collecting society responsible for collecting fair compensation from online press content operators (aggregators), but in the end, this bill was not even presented to parliament. Instead, the association concluded an agreement with Google under the auspices of a mediator appointed by the French President on 1 February 2013. Under this agreement, the publishers abandoned their call for legislation in exchange for the creation by Google of a fund of 60 million euro over three years to finance digital media publishers' projects. However, the idea of introducing a neighbouring right for press publishers has not been abandoned, with the High Council of Artistic Literary Property (CSPLA) mandated to produce a report on the desirability of doing this. This report, called the "L. Franceschini Report", was published in July 2016. The report favours the creation of a neighbouring right (strangely qualified as a *sui generis* right) limited to digital use. This right would grant a right of reproduction and communication to the public (to be defined) to press publishers (and only them) and would last for 5 to 15 years. Alongside these discussions, a law on the freedom of creation adopted on 7 July 2016 sets up a mandatory system of rights management to allow for the remuneration of artists and photographers whose works are reproduced by automated image-referencing services and by a similar device for news agencies'

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- 49 A German parliamentarian adopted the example of the result of a football game. "Will we seek permission from press publishers to index content that announces the victory of Bayern Munich against Schalke 04?" In September 2015, the Arbitration Board of the German Patent and Trade Mark Office ruled that the law was applicable to any referencing exceeding 7 words, while underlining that the amount required by the publishers to the online service providers (11%) was too high.
- 50 LG Berlin 19 February 2016, 92 05/14 kart.
- 51 We can read in the decision of 19 February 2016: "The search engine provides a combination of value and money flows as well as non-monetary benefits for all parties and this constitutes a win-win situation. This well-balanced system is disturbed by the neighbouring right, under which the press publishers now demand that the defendant, as the operator of the search engine, pays remuneration for something that is also in the economic interest of the website operator".
- 52 Bild (2017) Richter stellt Leistungsschutzrecht für Verleger in Frage, available at <http://www.bild.de/digital/aktuelles/digital/richter-stellt-leistungsschutzrecht-fuer-50153364.bild.html?wmc=twtr.shr>
- 53 *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, modified by Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril*
- 54 Concha P., García A., Cobos H. (2015) Op. Cit.
- 55 Allied for Startups (2017) EU Copyright Reform is coming, available at <http://www.innovatorsact.eu/>
- 56 See BEUC (2017) The Role of Publishers in The Copyright Value Chain, Response to public consultation available at http://www.beuc.eu/publications/beuc-x-2016-065_are_the_role_of_publishers_in_the_copyright_value_chain.pdf
- 57 <https://cdt.org/blog/eu-copyright-proposals-do-two-wrongs-make-an-ancillary-right/>
- 58 European Commission (2017) Synopsis Report on the Results of the Public Consultation on the Role of Publishers in the Copyright Value Chain, available at ec.europa.eu/information_society/newsroom/image/document/2016-37/synopsis_report_-_publishers_-_final_17048.pdf
- 59 Id. bid.
- 60 See http://www.aepp.com/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf and <http://mediapublishers.eu/>
- 61 This notion of publisher of press publication shall also be interpreted by each member states, according to its national legislation. For example in France, it was stated in the report of the CSPLA (see above note n°4) that "the press publisher (and the news agency) is the individual or legal entity which has the initiative and the responsibility of the manufacturing or the realization, as well as the publication and the distribution to the audience or its customers, under a printed and/or digital shape and under its editorial control, of a newspaper, a magazine or contents appearing at regular intervals".
- 62 Which, as we know, establishes that the use of a hyperlink that points to a website with free access is not a new act of communication to the public and consequently does not require the authorization of the rights holders of the site
- 63 CJEU 8 September 2016 case C_160/15
- 64 CJEU 31 May 2016 case C 117/15
- 65 Portugal, United-Kingdom, Italy, Spain... Cf. Article 12 of the Directive of 22 May 2001.
- 66 CA Brussels 5 mai 2011 R n° 2011/2999. On this case law see A. Strowel aforementioned p. 68
- 67 CJCE, 16 July 2009. C-5/08: Propr. intell. 2009, p. 379, obs.V.-L. Benabou
- 68 We can read in the Franceschini report that "In any event the massive and systematic aspect of the use of the press content creates great difficulties, in particular as regards a second publication or archives, to enforce the copyright because the publishers have to provide all the elements of proof which give evidence that they acquired the rights for every news content."
- 69 Newspapers in France were seen for a long time as collective works. This notion, which is not imposed in every copyright legislation of the European Union, leads to invest the rights on the whole newspaper in the project manager. The proof is thus strongly facilitated.
- 70 See, regarding photos, Vivant M. and Bruguière J.-M "Copyright and ancillary rights", *Precis Dalloz* 2015 § 287
- 71 European Copyright Society (2016) Answer to the EC Consultation on the role of publishers in the copyright value chain, available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2016/06/ecs-answer-to-ec-consultation-publishers-role-june16.pdf>
- 72 CA Paris 9 November 2012 D. 2012, p. 2796, obs. C. Manara
- 73 Tucker C., Chiou L. (2011) Content Aggregation by Platforms: The Case of the News Media, NET Institute Working Paper No. 11-18, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1864203
- 74 Economics online (2016) Types of market failure, available at http://www.economicsonline.co.uk/Market_failures/Types_of_market_failure.html, accessed on 14 August 2016
- 75 Library Economics Liberty (2016) Market Failures, Public Goods, and Externalities, available at <http://www.econlib.org/library/Topics/College/marketfailures.html>, accessed on 14 August 2016

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