

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

This work is an output of a two-year study funded by the AHRC (grant H/L004704/1), entitled *Appraising Potential Legal Responses to Threats to the Production of News in a Digital Environment*. The Principal Investigators were Professors Lionel Bently and Ian Hargreaves, and the Research Associate was Dr Richard Danbury. This final report was the work of Dr Danbury, and he gratefully acknowledges the enormous help and assistance he has received, while owning that any errors or omissions remain his responsibility. It does not necessarily reflect the views of Professors Bently or Hargreaves.

Dr Richard Danbury,
Centre for Intellectual Property and Information Law
Faculty of Law
University of Cambridge,
UK
Richard@richarddanbury.com
15 June 2016

Executive Summary

This is a discussion about commercial news production, and copyright-related laws in Europe. It is a response to the consultation opened by the European Commission in March 2016 about whether to create an EU-wide neighbouring right, in the copyright family of intellectual property rights, that will benefit publishers. It examines four arguments for a news publishers' right. These are:

- it will provide a necessary incentive to the commercial production of news, an activity that is valuable to a democratic society;
- commercial news publishers are treated unequally by EU copyright law, and a publishers' right will resolve this;
- online re-distributors of published news are free riding on the effort of commercial news publishers, and a publishers' right can be expected to restrain this;
- commercial news publishers have a natural right to the news they publish, and such rights are being breached by online re-distributors of news: a publishers' right can be expected to protect them.

The incentive argument

The incentive argument provides a cogent set of reasons to intervene to benefit the commercial news industry. This is because on balance, the commercial news industry can be seen as contributing to a healthy democracy in a valuable way, and there is insufficient reason to expect it to be replaced by something as useful if it fails. There are also cogent reasons to expect that the difficulties in which the commercial news industry finds itself are severe, and long-term. If many commercial news operators go bankrupt or withdraw from expensive but democratically important activities, this is likely to significantly impair communication valuable to our democratic states. This leads to the conclusion that an intervention would be useful and beneficial.

However, the incentive argument contains some manifest weaknesses. There is a risk of benefitting those who do not need it, or do no longer need it, or for doing things we do not want to incentivise. The industry has had in the past remarkable levels of profitability, and it would be an error to intervene and replicate these. We must not confuse the need to protect the function of journalism with the need to protect its form, and we need to disregard any arguments from the commercial news industry or others that seek to collapse these together. But, on a balance of risk, it seems appropriate to intervene.

What is less clear is that any incentive should be by a right related to copyright, and even less clear that any such right should be harmonized across the EU. There must remain concerns about whether a publisher's right would be effective, particularly given the experience of the copyright-related laws that were adopted in Germany and Spain in an attempt to benefit commercial news producers. It may well provide a marginal benefit, which would be welcomed by the news industry, but there is also a very real risk that any benefit will become less significant in the future, given the changing patterns of news

distribution in an online world. And, given differences in the news businesses in Member States, intervention might be better if it were not at a European level.

Also significant are the concerns that a publishers' right may harm or damage others. The risk of this should be weighed in the balance against any benefits a publishers' right might be expected to deliver to society. At present, this is difficult because we have no text to consider.

The equality argument

The equality argument seems simple, but this is deceptive. It may, perhaps, be true that news publishers are not afforded neighbouring rights, while other entrepreneurial content producers are, and that this appears inconsistent. But before this can amount to a reason to bring in a new neighbouring right for news publishers, a variety of complex judgments need to be made. What, in detail, will a new right entail; what were the reasons that the old rights were afforded; do those reasons pertain now; are they sufficient to support providing news publishers with rights?

Moreover, other questions need to be answered, that are raised by the equality argument: what other inconsistencies might be created by establishing a news publishers' right, and can these be defended, given the fact that we wish to pass a publishers' right to avoid inconsistencies? And, finally, and importantly, the question arises of the costs that a publishers' right may impose on others. What will these be, and how can they be justified? Any justificatory argument will have to look beyond the fact that publishers are currently treated in an unequal way. Hence, the equality argument is not, by itself, sufficient reason to establish a publishers' right.

The free riding argument

The free riding argument for a publishers' right is based on the assertion that online re-distributors of news are deriving an illegitimate benefit from the actions of news producers: they are, to quote the nineteenth century English judge North J, reaping where they have not sown. Whether this is the case or not is an issue susceptible to empirical proof, but it appears that this has not yet been unequivocal.

What should one do in the absence of an unequivocal answer? It is the disruptors, the online re-distributors of news, who bear the burden of proving their actions amount to promotion rather than substitution. If they are unable to do so, then a publishers' right may be appropriate under the free riding argument.

However, there are some caveats to this conclusion. One is that online redistribution of news may be a different market, and that would undermine the argument that a publishers' right would be appropriate. Another is that what the evidence does show, is that there are differences between the interests of various publishers, and this may result in different answers in respect of different publishers. This means there is an inherent risk that a publishers' right may skew the market in favour of larger players. This is a significant concern, particularly for those who value media plurality and diversity.

It is not clear, therefore, that the free riding argument provides a compelling case for a publishers' right, without further evidence.

The natural rights argument

The natural rights argument for a publishers' right is persuasive, insofar as valid, as labour, skill, judgment and creative choices are involved in the production of an edition of published news. However, there are cogent reasons to be wary of a publishers' right, nonetheless. A first arises because of the integral nature of published news to a democratic state. This connection exists because news is seen as a powerful force in a democracy, and that means that it is advisable for policy makers to think long and hard before increasing any protection afforded to news, including by means of a publishers' right that might entail greater control over information.

Moreover, the natural rights argument for a publishers' right is undermined by the common practice of news publishers frequently not to respect any natural rights that might exist in news that are possessed by other publishers. And finally, even if the natural rights argument for a publishers' right is viable, it should only lead to a limited and restricted right, as can be the case with other natural rights arguments.

On balance, intervention to benefit the commercial news industry is merited, but a publishers' right has not been demonstrated to be an appropriate way to intervene to do so.

Other issues

These concerns about the absence of a specific text lead to some final necessary observations, sketching out some further difficulties related to the wording of any publishers' right that haven't been canvassed so far. The first relates to definition, the second to duration, and the third to the wider doctrinal context into which any publishers' right must fit.

Table of contents

Executive Summary	2
The incentive argument	2
The equality argument	3
The free riding argument	3
The natural rights argument.....	4
Other issues.....	4
1 Introduction	7
What’s being considered?.....	7
How will it be considered?	7
Four arguments for a publishers’ right	9
2 The incentive argument – ‘exposing wrongdoing’ or publishing ‘ordures’?	10
The argument.....	10
News is a democratic as well as an economic good	10
The economic difficulties of commercial news publishers	11
The need for incentives in the commercial production of news.....	12
Causes of the decline	14
How might a publishers’ right help?	16
Why might a publishers’ right be appropriate?	17
Summary.....	19
Counter-arguments	19
Challenging the democratic argument.....	19
Challenging the notion that the news business is not thriving.....	21
Challenging the idea that a publishers’ right should be part of the solution	25
Evaluation.....	30
The challenge to the democratic assumption.....	31
The challenge to the notion that the news business is not thriving	37
The challenge to the idea a publisher’s right should be part of the solution	40
Conclusion	43
3 The equality argument	45
The argument.....	45
HP v Reprobel.....	47
Counter arguments.....	47
Truly similar?.....	48
More inconsistencies will be created	49
The costs this will incur	51
Conclusion	55
4 Free riders – ‘reaping where they have not sown’	57
The argument.....	57
Counter arguments.....	59
Promotion or substitution?.....	59
A new commercial activity?	64
Conclusion	66
5 Natural rights argument – news, coal, and cabbages	67
The argument.....	67
The strong version	68

The weaker version.....	68
Counter arguments.....	69
The unattractive idea of news as property	70
The implications of mutual copying.....	73
The limits of the notion.....	74
Conclusion	75
6 Conclusion	77
The four arguments, considered separately	77
The arguments, aggregated.....	78
Other problems with a publishers' right.....	78
Problems of definition	78
Problems of duration.....	80
Other doctrinal concerns.....	81
Appendix: Some prominent relevant copyright-related cases	83

1 Introduction

What's being considered?

This is a discussion about commercial news production, and copyright-related laws in Europe. It is a response to the consultation opened by the European Commission in March 2016 ('the Consultation') about whether to create an EU-wide neighbouring right, in the copyright family of intellectual property rights, that will benefit publishers ('the publishers' right').¹

Any such right would be the latest in series of similar developments in many countries around the world, as there have been a number of copyright related interventions designed to benefit commercial news producers.² These legal interventions have included litigation and legislation, and negotiation that has taken place against the threat of legal action. Such interventions have been prompted by a variety of factors, including the decline in fortunes of many parts of the commercial news industry in many parts of the world, and the rapid growth of online re-distribution of published news. The suggestion that an EU publishers' right might be appropriate can be ascribed to similar factors. These will be discussed in more detail below.

However, the foregoing interventions differ from the proposed EU publishers' right in a number of ways. One is that the Commission is consulting on whether to create a right that is wider than those seen elsewhere. As well as proposing the idea of a right to benefit news publishers, it is also considering whether to adopt a publishers' right that will benefit publishers in general.³

The legal interventions in other countries – notably Germany and Spain - have been deeply contentious.⁴ It should be no surprise, therefore, that the idea that there should be an EU publishers' right –whether confined to news publishers or of wider scope - is also contentious. This work is intended to contribute to this debate, and evaluate the proposed publishers' right.

How will it be considered?

This paper focuses on the question of whether a *news* publishers' right is appropriate. This is because the analysis draws on a two-year study funded by the AHRC, entitled *Appraising Potential Legal Responses to Threats to the Production of News in a Digital*

¹ European Commission, 'Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception' (2016) <<https://ec.europa.eu/digital-single-market/en/news/public-consultation->

² A selection of cases can be found in the appendix. Legislation was introduced in countries such as Germany in Spain, and was discussed session 2 of the Amsterdam Conference – see text to and n7

³ The differences between news and other publishers will be discussed in the text to nn 8, 44, 91, 196

⁴ These were discussed in session 2 of the Amsterdam Conference.

Environment, which concentrated on the position of news publishers.⁵ Hence when we discuss a ‘publisher’s right’ in this paper, we are only referring to a news publishers’ right. The Principal Investigators were Professors Lionel Bently and Ian Hargreaves, and the Research Associate was Dr Richard Danbury. This final report was the work of Dr Danbury, and he gratefully acknowledges the enormous help and assistance he has received, while owning that any errors or omissions remain his responsibility. It does not necessarily reflect the views of Professors Bently or Hargreaves.

This study consisted of extensive primary legal and interview-based research; and secondary research into sociological, economic, historical and other materials. This was supplemented by a series of workshops and a public conference. In terms of the primary interview-based research, at least thirty-five people contributed, from eight different jurisdictions: UK, Denmark, Belgium, Germany, Finland, Italy, Spain, and the USA. The interviews were semi-structured, designed to discover the views of the interviewees on the nature and extent of any difficulties suffered by the commercial news industry, and the merits of any copyright-related policy response to these. Those who contributed publicly include representatives from, Cutbot, NLA Media Access, *The Guardian*, News UK and RELX. Many others contributed privately, including other news publishers, online redistributors of news, academics, practitioners and policy makers.

A semi-public workshop was held at the Institute of Advanced Legal Studies in London on 3rd November 2015, a summary of which can be found online.⁶ Private meetings and workshops took place in the USA from the 10th to the 13th November 2015, and a public conference was held at IViR at the University of Amsterdam on 23rd April 2016 (the ‘Amsterdam Conference’). A recording of the Amsterdam Conference, and a transcript can be found online.⁷

Three unpublished working papers were prepared: a comparative study of copyright-related legal interventions that focussed on Denmark, Germany and Belgium; an analysis of prominent sociological and communications studies literature that considers the place of commercial journalism and its contribution to democracy in digitally networked world; and a comparative analysis of freedom of speech and copyright and related laws in the US, EU and ECHR. A number of presentations were delivered at a variety of conferences based on this work, in the UK, Italy, America and China. The feedback that was received from these was incorporated into our work.

⁵ Centre for Intellectual Property and Information Law University of Cambridge, <<http://www.civil.law.cam.ac.uk/research/appraising-potential-legal-responses-threats-production-news-digital-environment-ahrc>> accessed 13 June 2016

⁶ R Danbury, 'Evaluating legal responses to threats to news in a digital environment', London workshop' (7 January 2016) <<http://ials.sas.ac.uk/research/infolawcentre/docs/R-Danbury-Public-Summary-of-London-Workshop1.pdf>>

⁷ Centre for Intellectual Property and Information Law University of Cambridge, 'Conference: Copyright, related rights and the news in the EU: Assessing potential new laws' (2016) <<http://www.civil.law.cam.ac.uk/seminars-and-events/conference-copyright-related-rights-and-news-eu-assessing-potential-new-laws>> accessed 13 June 2016

Four arguments for a publishers' right

From this research, four main normative arguments emerged for a news publishers' right. These are:

- it will provide a necessary incentive to the commercial production of news, an activity that is valuable to a democratic society;
- commercial news publishers are treated unequally by EU copyright law, and a publishers' right will resolve this;
- online re-distributors of published news are free riding on the effort of commercial news publishers, and a publishers' right can be expected to restrain this;
- commercial news publishers have a natural right to the news they publish, and such rights are being breached by online re-distributors of news: a publishers' right can be expected to protect them.

The paper evaluates these arguments, and finds that, on balance, intervention to benefit the commercial news industry is merited, but these arguments do not establish that a publishers' right is an appropriate way to intervene.

There are other arguments for and against a publishers' right, and other issues that a publishers' right engages. Many will turn on the exact nature and wording of any right, as there are significant practical problems with a publishers' right, and doctrinal debates are to be had about whether such a right is in accordance with regional and international law. But the Consultation did not provide a legal text to consider, and so it is difficult to engage with these questions. A short summary of the main further issues to consider will be given at the end of the paper.

2 The incentive argument – ‘exposing wrongdoing’ or publishing ‘ordures’?

The incentive argument is perhaps the most important argument for a publisher’s right that emerged from our research. It is worth considering in detail.

In essence, the argument observes the turmoil through which the commercial news industry is going, and suggests that there is reason to fear that the market will not, if left to itself, provide sufficient incentive for news producers to provide, in sufficient quality and quantity, the news that a democratic society considers valuable. It is therefore appropriate to intervene to create an incentive to produce news, and it can be appropriate for this intervention to be by means of the creation of a publishers’ right.

The incentive argument provides a *prima facie case* for a publishers’ right, but there are a number of ways in which it has been challenged. These will be described, and then evaluated. The conclusion is that the argument provides a quite strong argument for intervention to assist the commercial news industry, but only weaker support for the idea that this intervention should be by means of a publishers’ right.

The argument

News is a democratic as well as an economic good

The argument starts with the assertion that commercial news generation is of great value to a democratic society. Such an assertion is a relatively common one to make, and has been advanced since at least the eighteenth century. It is the headline quote, for example, on the website that a group of European publishers have set up to explain why they think a publishers’ right is needed, www.publishersright.eu. This begins by citing Thomas Jefferson, who famously wrote in 1787: ‘were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter’.⁸

The website goes on to say:

The role of press publishers remains inextricably linked with the vital role that a free and independent press plays in democratic societies: enabling the open exchange of information and opinions, exposing wrongdoing and corruption, holding public officials accountable in the public eye, publicising difficult or important matters that need attention or scrutiny, and helping citizens to make informed decisions often creating communities of interest or concern.

The relevance of this for a discussion about a publishers’ right is that it emphasizes that when we consider the commercial news industry, we ought to be aware that political

⁸ European Publishers Council and others, 'Publishers' Right in a Digital Age' (2016) <<http://www.publishersright.eu>> accessed 13 June 2016

issues of fundamental importance to the democratic structures of EU Member States are engaged, as well as mere economic considerations about a content creation industry. Any damage to commercial news publishers may result in damage to the fundamental democratic structures that make up our societies. The desire to avoid such damage can lead to a strengthened case for intervention to assist the commercial news industry, including intervention by means of a publishers' right.

The economic difficulties of commercial news publishers

The argument continues by emphasising that the commercial news industry is increasingly finding it difficult to thrive. These difficulties, particularly those of the legacy newspaper industry, are widely known. True, sceptics have asserted that claims that the industry is in difficulties are nothing new, as commercial journalism – like many other activities – regularly claims to be beset by crisis.⁹ But there is now more substance to the claim than there has been in the past.

Evidence of the decline in the fortunes of the European commercial news publishing industry was presented at length in the first session of the Amsterdam Conference, an account of which can be found online.¹⁰ But it is useful to highlight some of the points made here, to help establish the incentive case for a publishers' right.

The decline in the fortunes of the commercial news industry has been dramatic. In 2010, the average operating margin for publicly reporting US news companies, for example, had fallen from a high of 20% to 5.6%.¹¹ And a similar picture emerged in many parts of the commercial journalism industries in Europe. In the UK, for example, a recent survey found that in 2011, newspaper groups had lost about £2 billion of revenue over five years, down to £6 billion.¹² *The Guardian* has made losses every year since 2004,¹³ and the proportion of operating profit the Daily Mail and General Trust makes from newspapers fell from 86% in 1996 to 27% in 2009.¹⁴

⁹ D Ryfe, *Can journalism survive? : an inside look at American newsrooms* (Polity, Cambridge 2012) for example, cites an article in the *Los Angeles Times* article that argued that 'newspapers [were] challenged as never before', and asked 'are you holding an endangered species in your hands?'. It was published as long ago as 1976. M Welch, 'When Losers Write History' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York, London 2011) notes predictions of the industry's imminent demise from 1999.

¹⁰ N 7

¹¹ G Ellis, *Trust ownership and the future of news : media moguls and white knights* (Palgrave Macmillan, Basingstoke 2014) 16.

¹² Mediatique, 'A Report for Ofcom (Annex 6 to Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport)' (Mediatique, London 2012). Globally, newspaper advertising revenues fell by 22% between 2008 and 2012: Ellis (n 11) 17.

¹³ Ellis (n 11) 184

¹⁴ The underlying figure - £75 million – was the same in both years, which as Ellis observes, shows how the DMGT has diversified away from news publishing. *Ibid.*

In some cases, these numbers may appear to be still relatively healthy, but in others they are much less so.¹⁵ And, overall, the decline in profitability has led to or is associated with a number of consequences, many of which pose cause for concern for the contribution that commercial journalism makes to democracy. It is, for example, linked to falling sales and circulation,¹⁶ declining numbers of journalists employed by commercial news organisations,¹⁷ a net loss of titles,¹⁸ and, ultimately, the insolvency and bankruptcy of many companies.¹⁹ Regional commercial journalists working in both newspapers and radio have been hit particularly hard.²⁰ Financial difficulties are likely to restrict the ability of commercial news organisations to undertake expensive, but largely unprofitable, journalistic activities such as investigative work.

Alan Rusbridger, former editor of *The Guardian*, recently summed up the difficulties the commercial news industry is facing when he wrote to his former staff in May 2016:

We all currently do our journalism in the teeth of a force 12 digital hurricane.²¹

Studies have found similar patterns in other parts of the news market in many Member States in Europe.²² However, it is true that there are significant differences between the businesses in different European countries, and between different sectors of commercial news publication, and that the extent to which the commercial news industry is suffering has been challenged. These points will be discussed below.²³

The need for incentives in the commercial production of news

The decline in the fortunes of the commercial news industry is likely to remove a key incentive that motivates the production of news by the commercial news industry.

¹⁵ J Herrman, 'Media Websites Battle Faltering Ad Revenue and Traffic' *New York Times*, (17 April 2016) <Media Websites Battle Faltering Ad Revenue and Traffic> accessed 13 June 2016, R Tofel, 'The sky is falling on print newspapers faster than you think' (Medium.com 20 January 2016) <<https://medium.com/@dicktofel/the-sky-is-falling-on-print-newspapers-faster-than-you-think-c84a2f9a9df4#.3o4eba9pk>> accessed 13 June 2016

¹⁶ I Hargreaves, *Journalism: A Very Short Introduction* (Oxford University Press, 2014) 112, 121. For a more detailed discussion, see text to n 111.

¹⁷ Ibid. 111; R Levine, *Free Ride: How the Internet is Destroying the Culture Business and How it can Fight Back* (Vintage, London 2012) 111; Ellis 29, 120

¹⁸ The *Press Gazette* reports that between 2005 and 2011, 242 local newspapers in the UK closed, and only 708 new titles launched: Hargreaves 112; and in the UK in 2003 there were 1165 regional and local titles, but only 1054 in 2013: Ellis 30.

¹⁹ Ellis 16, 31 – 32.

²⁰ Ibid. 161, 162, 230

²¹ M Champion, 'Alan Rusbridger Steps Down As Chair Of The Guardian's Owner' (BuzzFeed 13 May 2016) <https://www.buzzfeed.com/matthewchampion/alan-rusbridger-steps-down-as-chair-of-the-guardians-owner?utm_term=.hg0m86705#.rr2YaV0wL> accessed 13 June 2016

²² DAL Levy, R Nielsen and Reuters Institute for the Study of Journalism., *The changing business of journalism and its implications for democracy* (Reuters Institute for the Study of Journalism, Oxford 2010)

²³ Eg, text following nn 61, 122, 131

Without such an incentive, the commercial news industry will be less likely to produce the type of news, or the amount of news, that is valuable in a liberal democracy.

News as a merit good

One important reason for this is because news, particularly general interest democratically salient news, is generally conceived to be a merit good.²⁴ This means that this type of news has a value to society that is greater than the price that people are prepared to pay to read or watch it. Moreover, readers are seldom prepared to pay a sufficient amount to cover the cost of publishing the news that a democratic society considers valuable.

This means that, if left to the market alone, news would be produced in lesser quantities than would be optimal. Some way of incentivising the production of news is therefore required, above and beyond mere payment by customers.

There have been many methods by which the merit good problem has been addressed by commercial news producers. One, not related to subsidy, has been the technique of bundling different types of news together into a package, so they can cross-subsidise each other.²⁵ But there have also been overt and covert subsidies provided by many states to news production. The US, for example, provided postal subsidies, and many countries have provided zero rating for newsprint for tax purposes, and distributed valuable electro-magnetic spectrum to news broadcasters for free.²⁶

The two sided market of sales and advertising

But one of the most important means of subsidising news has, for the past 300 years or so, been advertising revenue. In the US, it was said that Wal-Mart funded the Bagdad bureau,²⁷ and the point is also valid in Europe.

²⁴ See generally the work of Picard, but a good introduction can be found in chapter 6 of L Hitchens, *Broadcasting pluralism and diversity : a comparative study of policy and regulation* (Hart Publishing, Oxford 2006).

²⁵ Discussed in text to n 95

²⁶ Silberstein-Loeb, *The International Distribution of News: The Associated Press, Press Association, and Reuters, 1848-1947* (Cambridge University Press, Cambridge 2014). An account of action taken after 1927 League of Nations Conference of Experts of the Press, UNESCO memo, Paris 12/10/1947 says: "The Association of Journalists accredited to the League of Nations pointed out that the press could not live on its sales and that it constituted a real "public service" in the same way as teaching (but without being able to avail itself, like the latter, of any form of subsidy); the Association accordingly suggested that the answer to the problem be sought in a systematic lessening of the financial demands made by the State on the press (postal and telegraphic charges, duty on paper, taxes, etc.)." H Tworek, 'Protecting News before the Internet' in R John and J Silberstein-Loeb (eds), *Making News: The Political Economy of Journalism in Britain and America from the Glorious Revolution to the Internet* (OUP, 2015)

²⁷ C Shirky, 'Newspapers and Thinking the Unthinkable' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York, London 2011); Levine; G Brock, *Out of Print* (Kogan Page, London 2014) 99; Hargreaves 110.

Advertising has underpinned the profitability of much commercial news since at least 1624, when the first English language news publication carried an advert.²⁸ That event heralded the development of the two-sided market that is characteristic of news publishing in many countries throughout the Europe, and much of the rest of the world.²⁹ Publishers sell news to readers, and readers' attention to advertisers.³⁰

This is a business model that has been extraordinarily robust. It has been the dominant model until recently, yet was well established by the early part of the eighteenth century, and is described in an English pamphlet from 1728:

[newspaper proprietors] are paid on both hands; paid by the advertisers for taking in Advertisements; and paid by the coffee men for delivering them out: which (to make use of a homely comparison is to have a good dinner every day, and be paid for eating it 'Here's luck, my lads!' Never was there so fortunate a business³¹

Causes of the decline

There are a number of reasons for the decline in the fortunes of the commercial news industry, some of which are less relevant to the arguments for a publishers' right. For example, it has been proposed that the decline may well be down to sociological and demographic changes, as younger people lose the habit of buying and consuming news.³² It is difficult to see how a publishers' right could reverse any such change.

Some effects of digitization and the Internet

Other factors, though, are more relevant to a publishers' right, and relate to the Internet and its associated technologies. The publishersright.eu website explains:

technology has radically changed where our readers find and read our content – with profound consequences for the future viability of professionally produced, independent quality journalism and general press content. With a growing shift from print to digital, the problem of funding an independently edited digital press is increasingly challenging. Indeed online press is in most cases still cross-subsidized from the print side of the business where sales and advertising revenues are declining.³³

²⁸ RB Walker, 'Advertising in London Newspapers, 1650 - 1750' (1973) 15:2 Business History 112

²⁹ Although the exact proportions of revenue made up from subsidy, subscription and advertising vary from country to country, as will be discussed later: text to n 61.

³⁰ The economics of broadcast news are different, as they can include a third side to the market – the selling of broadcast formats to third parties.

³¹ A Coffee-Man, *The Case of the Coffee-Men of London and Westminster*. (G Smith (1728), Gale ECCO Print Editions (2010), London 1728), 16

³² Mediatique, Ryfe 34 f.

³³ European Publishers Council and others, (accessed

Part of the problem, from the point of view of news publishers, is the fact that digitization makes the perfect copying and re-distribution of published news a quick and easy task. This has had a number of effects. It disrupts, for example, the first to market advantage – the scooping by one paper of its rivals – from which news publishers have traditionally made money, because digital redistributors can immediately redistribute news content produced and placed online by news publishers. This affects sales and subscription revenue.

But digitization also disrupts advertising revenue. It means online redistributors of news can attract audiences interested in news without producing their own content. The attention of these audiences is valuable, as online operators can sell it to advertisers. Online redistributors can attract an audience by carrying news in general, and because they carry material published by, say, *the Guardian*, or *Die Welt*, or *El Mundo*. The different brand reputation of the news publisher can alter the type of audience that a site can attract, and different audiences will have different values to advertisers. And a site can benefit even if it doesn't sell advertising against news content, because it may enjoy a boost to its perceived utility because it carries news. Being seen as useful will, in turn, mean a site will attract more attention, and this – as has been seen – is a valuable commodity.

Online redistributors can also use Internet-related tools to collect information about the preferences of the audience who are attracted by news, by analysing their online behaviour. This is particularly valuable information, which has been called 'the new oil', for which advertisers will pay a premium. (This is a controversial development that has been called 'surveillance capitalism', but the controversy is not immediately relevant to the discussion about a publishers' right.) If the audience encounters published news on the site of an online redistributor, rather than that of a news publisher, then it will be the online redistributor who will enjoy this benefit.

This extraction of value from commercial news publishers is, as the Commission economist Bertin Martens explained at the Amsterdam Conference, part of a wider trend.

It's indeed very hard to beat platforms and especially large platforms when it comes to the revenue and the attraction that they offer and so there is the risk and we've seen that in many industries, not only in newspapers is that content providers, the ones who actually publish or produce the content, whether it's digital services, media services or even goods, they become a sort of almost a subcontractor to the platform. And the platform has a lot of leverage on the prices and on the margins they extract from them, we see that in the hotel business, we see that in airline bookings, we see that in so many industries and the same is happening to the newspaper industry.³⁴

³⁴ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference, Bertin Martens, Session 3, transcript 42

How might a publishers' right help?

The incentive argument says that a publishers' right may help provide a flow of revenue to incentivise the production of news that society considers valuable. There are a number of ways this may happen.

A publishers' right, it was argued in our research, could help news publishers control the use of the news they produce. They could control when and under what conditions online digital operators could redistribute it, where this is not already regulated by copyright and related rights. It might thereby provide a means of obtaining a share of sales and advertising revenue that flows to online redistributors of news. A publishers' right could in essence be an extra card that publishers can use when negotiating with Internet search, aggregation, social media and other companies.

Other reasons why a publishers' right might help that were highlighted in our research, which relate to enforcement. So, for example, a news publisher in the UK described the difficulties in using copyright to enforce their rights in a particular situation. This occurs when they distribute their news online behind a paywall, and when media monitoring organisations or others scrape the collected material on their site without permission. Such an action potentially results in a variety of authors and copyright owners having their rights infringed, in respect of a wide range of copyright material. It can be difficult to establish that the publisher is entitled to sue for each individual breach of copyright, when pursuing the infringer who has scraped the publisher's collected material. If there were a publishers' right, the interviewee argued, enforcement would be much easier.

Such issues of enforcement are even more important in Member States without a work for hire doctrine. Here, it can be even more difficult for a publisher to establish that they are entitled to sue for breach of copyright, when they publish a variety of different copyright works. A German interviewee explained the point in this way:

In the continental tradition, copyright comes into existence to the creator, and then is transferred to the publisher. There is no idea of work for hire, or producer's copyright, as there is in the UK. As a media publisher you'll have journalists as employees – and these can fully transfer their title by a buyout of their copyright. This isn't so difficult to show. The publisher has exclusive rights for this content. But a publisher will also have thousands [...] of freelancers, and a publisher will get non-exclusive rights when you publish their material. So as a defence for the claim against someone like Google News, the defendant says the rights that are being enforced are non-exclusive right. To win such a claim, you are forced to give evidence in each case of claim of title. This is impossible if there are, for example, 22,000 articles.

A publishers' right can be expected to help resolve this difficulty by simplifying the process of proving that a publisher has title to sue, when large amounts of published material is redistributed by, say, Google News.

Why might a publishers' right be appropriate?

Not only might a publishers' right be useful, but it might be appropriate. After all, part of the problem as characterised above has arisen from the digital duplication and redistribution of news published by commercial news organisations, which *prima facie* invokes issues of copyright.

This is certainly the view of some news publishers. At the Amsterdam Conference, Matt Rogerson of the *Guardian*, placed copyright and related rights at the heart of the matter. He considered that online redistributors of news have been able to flourish because publishers have not in the past sought to enforce their IP rights in the content they publish.

We have rights and we could enforce them if we decided that we wanted to. It's probable, I think, that in doing what they've done over the past decade or so, the caching of articles and the distribution of articles, Google has, you know, it's infringed rights under UK copyright law but it's a conscious decision by 'The Guardian' not to pursue against infringement because they have, kind of, generated this enormous reach. I think what's going on in Europe is publishers wanting to have similar rights; the ability to go after people who infringe copyright in the same way as UK publishers, Irish publishing and Dutch publishers are able to³⁵

This view, though, is contentious. Google and others have denied that it is correct, as a matter of doctrine, and have fought legal actions on these grounds in various Member States. For example, Google fought an action in respect of news aggregation in Belgium, arguing that their actions did not open them up to copyright liability. They argued (amongst other things) that the news material aggregated on their site was not covered by copyright, that they were not performing infringing acts when they aggregated published news, and that even if the material was copyright and they were infringing, that they were protected by one of the copyright exceptions.³⁶ Similar disputes involving copyright and related issues have taken place in a variety of Member States, including France, Sweden, the UK, Germany, Italy, and Denmark.³⁷

In many of these disputes, and on many of these issues, Google lost. Nonetheless, Google's position has been strengthened somewhat by some recent decisions by the CJEU on the question of what particular acts performed online are regulated by copyright. Prominent amongst these is the case of *Svensson v Retriever Sverige AB*,³⁸ which found (in very general terms) that hyperlinking to a copyright protected work was not necessarily an act that infringed copyright. This, on balance, can make it more

³⁵ Ibid., session 1, transcript 9.

³⁶ *Google v Copiepress* Presented 11/5/2011, Cause List No: 2007/AR/1730 (Court of Appeal of Brussels, 9th Chamber)

³⁷ The appendix lists some of these.

³⁸ *Svensson v Retriever Sverige AB* C-466/12, [2014] Bus LR 259, [2014] ECDR 9

difficult for news publishers to argue that some of the actions of online redistributors of news are infringing.

There are other decisions that are also relevant to this issue.³⁹ It is not necessary for present purposes to describe these, as the point is that they confirm that copyright – and so a publishers’ right – might be an appropriate tool to use here, to help assist news publishers.

Indeed, this appears to be the view of Commission, because in December 2015, they issued a Communication that identified copyright and related laws as one of the sources of the difficulties in which news publishers find themselves.⁴⁰ The Communication distinguished three aspects to this.

- The first related to the definition of certain acts performed online that are protected by copyright. These are the rights of ‘making available’ and ‘communication to the public’. The Commission indicated that it considered that there are grey areas around these concepts, particularly the ‘communication to the public’ right. They held that this ambiguity created unwelcome uncertainty both for Internet users, and for participants in the market. The ambiguity for news producers and online distributors of news is said to be whether in an online context, ‘the basic principle of copyright that acts of exploitation need to be authorised and remunerated’.⁴¹
- The second area that the Commission see as highlighted by this issue is whether the current set of rights recognised by EU law is appropriate. This is on the basis, the Commission indicate, that ‘for news aggregators ... solutions have been attempted in certain Member States, but they carry the risk of more fragmentation in the digital single market.’⁴²
- A third area the Commission describe as relevant is the question of the applicability of the exemptions from liability contained in the e-Commerce Directive,⁴³ and more generally the view by some internet platforms that they are not engaging in copyright-relevant acts.

³⁹ For example, *BestWater v Mebes* C-348/13 .

⁴⁰ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework' (European Commission, 2015)

⁴¹ This has been disputed: see text to n 74

⁴² This is relevant as it may provide a competency for EU action – see text to n .221

⁴³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

These issues, the Commission said, would inform its consideration of how value is created and shared by new forms of online distribution of copyright-protected works. In particular, they would inform the evaluation of whether action is needed on the definition of the rights of ‘communication to the public’, and ‘making available’, and whether any action ‘specific to news aggregators is needed’.

The mooted publishers’ right is another way to address these issues.

Summary

In summary, then, there is a *prima facie* incentive case for a publishers’ right. This is on the grounds that that news is a valuable commodity in a democracy, that the commercial news industry is suffering a serious decline in its fortunes, that the general interest democratically salient news has always needed a form of subsidy because it is a merit good, that in the past this was frequently supplied by advertising revenue, that one reason for loss of advertisement revenue and the rise of online re-distributors of commercial news has been aspects of the EU’s copyright and related rights law, and so copyright and a publishers’ right can be seen to be a useful and appropriate response to the difficulties in which news publishers find themselves.

Counter-arguments

Our research uncovered a number of counter-arguments that can be advanced against the incentive argument, of which three of the more significant will be described here.

The first critiques the case that there is a heightened reason to intervene because news is a democratic good. The second argues that any economic difficulties through which the news industry are going are insufficient reason for an EU publishers’ right. The third challenges the notion that, even if there are difficulties and these engage democratic concerns, this should have anything to do with copyright or related laws.

Challenging the democratic argument

The first counter-argument is that news publishers have overplayed the risk of damage to democracy that may occur, if they are not provided with assistance. One reason for this is because the alleged link between the commercial news industry and a healthy democracy is not as strong as the industry asserts. Indeed, the link between the commercial press and a functioning democracy, as well as being proposed since the eighteenth century, has been challenged since about that time. Thomas Jefferson, who it will be remembered is cited on the publishers’ website that defends the need for a publishers’ right, was also highly critical of the press. In 1814, he wrote to a correspondent, Walter Jones:

I deplore... the putrid state into which our newspapers have passed, and the malignity, the vulgarity and the mendacious spirit of those who write for them... [t]hese ordures are rapidly depraving the public taste, and lessening its relish for sound food. As vehicles of information, and a curb on our functionaries, they have rendered themselves useless, by forfeiting all title to belief.⁴⁴

⁴⁴ LW Levy (ed), *Freedom of the Press from Zenger to Jefferson* (Bobbs-Merrill Company, Inc, 1966) 373.

This critique of the case about the strength of the links between a viable commercial news publishing industry and a healthy democracy resonates today, and was expressed at the Amsterdam Conference. Professor Naughton asserted that:

the public sphere is one of the most important things about a liberal democracy. I think we should, as it were, feed one red herring immediately to the nearest available cat and that is the idea much put about by publishers, especially by giant multimedia corporations, that they are great contributors to the public sphere.

By contrast, what he thought was needed is: ‘truthful, high quality journalism ... and when people fret, as indeed they have even today here, about the future of newspapers, they are confusing form with function and it’s the function that’s really important’.⁴⁵

Others attending the conference agreed, and indicated that if we are to intervene with copyright, that we should identify more precisely what we want to incentivise.

I’m interested in thinking about whether or not the ultimate public good is over the generation of new information and how do we achieve that⁴⁶

I think we all have to make sure that there is enough quality journalism to apply the needed check on power, whether it’s in the hands of elected officials or private sector or whoever else. But the question is, how do you get there?⁴⁷

I personally am open to public support, particularly for investigative journalism, which everyone from Clay Shirky to, well, most people in this room, would regard as the most important thing that media does other than facts and opinion which are free⁴⁸

Outside the Conference, this is an argument that has been advanced by others. Benkler is one of the most prominent proponents of this idea, and has argued that one may not need professional commercial news organisations at all, so there is no need for any intervention. This is because, he argues, networks of individual citizen reporters can replicate the useful democratic functions currently undertaken by news publishers. Benkler calls this the ‘networked public sphere’.⁴⁹

That was a view that was echoed at the conference:

⁴⁵ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIIL/IViR Conference, John Naughton, session 4, transcript 60f

⁴⁶ Ibid., Chris Beall, session 2, transcript 37.

⁴⁷ Ibid. Marietje Schaake MEP, session 3, transcript 58

⁴⁸ Ibid. James Mackenzie, session 4, transcript 65.

⁴⁹ Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, New Haven 2006)

The Panama papers was an effort by journalists to collect news that wasn't really under the auspices of a single news organisation and I'm interested in the extent to which the public is still receiving information that it needs to govern itself. They're not receiving it all the time from news organisations. They're receiving it from other sources and that may not be a bad thing⁵⁰

But Benkler pursues this line further, and argues that interventions, including copyright interventions, to assist the news publishing industry are not only unnecessary, but will be positively harmful. This is on the grounds that as they will inhibit the fuller development of a networked public sphere:

[w]e still stand at a point where information production could be regulated so that, for most users, it will be forced back into the industrial model, squelching the emerging model of individual, radically decentralised, and nonmarket production and its attendant improvements in freedom and justice.⁵¹

If true, these arguments undermine the incentive case for a general publisher's right. The weaker version of the argument asserts that we ought not to incentivise all commercial news publishing, only some of it. A strong version of the argument asserts that we ought not to intervene at all, as in doing so we damage the prospects of a networked public sphere – an alternative to the commercial news publishing industry - developing.

Challenging the notion that the news business is not thriving

The second counter-argument against the incentive case for a publishers' right takes issue with the notion that the news publishing industry is in sufficient crisis to merit intervention, by copyright or otherwise. The argument suggests that sufficient incentives remain to make intervention unnecessary, because the crisis in the industry isn't as acute as has been suggested, or is no longer so acute, or is not as acute in all sectors of the industry, and moreover there are significant differences in how it has been experienced in different parts of EU.

A number of different claims can be distinguished in this argument.

Excessive profits

The first is that, in the words of the analyst and former journalist John Morton in the *American Journalism Review*, perhaps one ought to 'stop the ax-wielding and accept that the era of exceptional profitability is over'?⁵² Professor John Naughton took the same line at the Conference:

⁵⁰ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIIL/IViR Conference Chris Beall, session 2, transcript 38

⁵¹ Benkler 26.

⁵² Quoted in J Kaye and S Quinn, *Funding journalism in the digital age : business models, strategies, issues and trends* (Peter Lang, New York ; Oxford 2010) 85.

Every time I hear a spokesman for a very large multimedia company, for example, before the US Senate, shedding crocodile tears about the way in which this awful internet is doing terrible damage to poor authors living in garrets what it reminds me of is something that one of my heroes, Samuel Johnson, once said, a great 18th century British writer and journalist, he said that, “How is it”, he said, “The loudest yelps for liberty are heard from the drivers of slaves?” He didn’t use the word ‘slaves’, he used a word that would not be politically correct now, but that was the point and when I hear publishers complaining about what the internet is doing to them what I’m hearing sometimes are the complaints of organisations which are having to get used to the idea that the era of monopoly rents might be coming to an end.⁵³

If true, this may mean that there is no need to incentivise commercial news, as publishers are merely experiencing an adjustment of their profit levels to more reasonable levels more equivalent to those attainable in other industries. It would be better for the news industry to acclimatise itself to a more sustainable level of revenue, than for there to be any intervention.⁵⁴ But it may also mean that, even if the industry is experiencing real long-term systemic financial trouble, there is a risk that the commercial news industry may be over-benefitted by a publishers’ right, were one to be designed to re-establish the excessive profit levels of the past.

A return to profitability

Even if this is not a persuasive argument, some see a publishers’ right as inappropriate because some news publishers appear to have returned to financial health. To look at News Corp and the UK for instance, while the company itself recorded an operating loss of £35m in 2014, its titles the *Times* and *Sunday Times* and *Sun* had returned to profit. According to the *Press Gazette*, the *Times* and *Sunday Times* reported their first operating profit since 2001 (£1.7m), and while the *Sun*’s revenues were down 5.5% to £489m, this resulted in an operating profit of £35.6m – though this was down year on year from £62.1m.⁵⁵ And the trend may be replicated in other areas, such as local news. In 2013, Johnston Press, following a debt restructuring in 2009, reported an increase in operating profit for the first time in seven years.⁵⁶ Similar evidence can be found in other countries. Indeed, a questioner at the Amsterdam Conference noted that the German company Springer Verlag increased their turnover by 8.5% over the last year.⁵⁷

⁵³ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference' (accessed John Naughton, session 4, transcript 61)

⁵⁴ This is related to the argument for creative destruction, which will be considered below, text to n 84ff

⁵⁵ <<http://www.pressgazette.co.uk/news-corp-records-operating-loss-£35m-down-£51m-profit-company-spends-£100m-legal-costs-and-msc>> accessed 17 December 2014

⁵⁶ Ellis 32

⁵⁷ Germany’s Axel Springer, for example, saw revenues rise by 12.7% in the first quarter of 2015: , 'Axel Springer profits from digital growth in the first quarter' (Axel Springer 2015) <https://www.axelspringer.de/en/presse/Axel-Springer-profits-from-digital-growth-in-the-first-quarter_23325474.html> accessed 16 June 2015

Again, there are at least two conclusions that could be drawn from this. The first is that no intervention is required, because the worst is over, and companies are beginning to find a route back to profitability. The second is that even if this is not the case for all it is true for some, and one should be wary of any intervention because it will unduly benefit profitable companies, despite the laudable intention of assisting others who are struggling.

Other sectors remain profitable

So far, we have just concentrated on the legacy print industry: but some other sectors of the commercial news producing industry are also doing rather well. It's important not to equate the fortunes of some in the legacy print industry, with the entire commercial news-publishing sector. The economics of the television, radio and online industries are different to print, so generalising from the experiences of some in the print industry to make a case about the whole of commercial journalism is inappropriate.

And some online news organisations, such as *Buzzfeed*, *Vice News* and *Huffington Post*, are far from being in crisis, but have continued to attract funding.⁵⁸ Furthermore, there are salient and important differences in the way money is made in different parts of the news value-chain, and the fact that news publishing is suffering doesn't necessarily mean that news gathering, selection, writing or producing is in difficulty.⁵⁹ The continuing vitality of companies that make their money from providing news selecting services may be taken as evidence of this. If this is so, there is less of a reason to intervene with a publishers' right, as other sectors of commercial news publishing with more viable business models can be expected to step into the breach vacated by legacy print operators, who are suffering economic difficulties.⁶⁰ A publishers' right would be a mistake, as it would impede this.

Differences between Member States

And even for those legacy print news publishers who have not seen a return to rude financial health, there are other concerns about a publishers' right. There is a risk that a publishers' right risks over-benefitting industries and sectors in some Member States that do not need it, to ameliorate the situation for others who do.⁶¹

⁵⁸ *Buzzfeed* for example, has attracted \$70 million of venture capitalist funding: E Bell, 'The Rise of Mobile and Social News and What it Means for Journalism' in N Newman (ed) *Reuters Institute Digital News Report 2015* (Reuters Institute for the Study of Journalism, Oxford 2015)

⁵⁹ A very useful analysis of the different activities can be found in Mediatique, 'The Provision and Consumption of Online News - Current and Future' (Mediatique, 2014)

⁶⁰ Again, this argument is related to the creative destruction argument, which will be considered below, text to n 84ff.

⁶¹ There is some evidence that the news industries in countries less affected by the crisis have benefitted from copyright interventions, for example, in China: Staff Reporter, 'Beijing Tightens Copyright Legislation for News Media' (WantChinaTimes.com 2015) <<http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20150426000003&cid=1104>> accessed 27 April 2015, National Copyright Administration General Office (China) and Rogier Creemers (tr), 'Notice Concerning the Standardization of the Online Reprinting Copyright Order' (Creemers, Rogier 2015)

Research has indicated that there are significant and important differences in the revenue models of commercial news producers in countries in the EU. This was established by work undertaken by the Reuters Institute for the Study of Journalism in 2010,⁶² and continues in the Institute's annual *Digital News Reports*. These track changes in the business and consumption of news in various countries each year.⁶³

The picture here is complex and changing, but for present purposes, the essential point is that this work establishes that the division between subscription and advertising – both legacy print and online - as a source of revenue for news publishers differs in different countries in the EU. Moreover, there are changing patterns in online reading of news, and old-fashioned reading of print newspapers in different Member States. This leads to the concern that any legal intervention, including a copyright related intervention, to assist the commercial news publishers whose business model is at risk in some parts of the EU, risks over-benefitting those in other parts of the EU, who have a different revenue model. This is a particular concern, for example, if the rationale for a publishers' right is founded on the need to replace advertising revenue, as the news businesses of some countries in the EU depend less on advertising, and more on subscription and sales for revenue. A harmonised publishers' right is inappropriate, says this argument, given the variety of business models and news consumption patterns in each Member State.

Reuters' work on Denmark and Germany can be used to demonstrate this, both of which have seen legal interventions in the past decade to protect the position of news publishers.

To take Denmark first, one can focus on 2008, a date that is illustrative as it was in the middle of the seminal *Infopaq* litigation, which dealt with copyright and news publishing.⁶⁴ In this year, just over 60% of Danish newspaper revenue came from sales, as opposed to advertising. This compares with the position in Germany, where sales contributed around 10% less to total revenue – 50%. (This can also be compared with the US, where sales amounted to only around 15% of revenue).⁶⁵ It seems that the extent to which the protection of news content as a commodity to package and sell, rather than the protection of the ability to sell advertising to companies on the basis that people read news material, is of relatively more importance in Denmark than in Germany. Moreover,

<<https://chinacopyrightandmedia.wordpress.com/2015/04/17/notice-concerning-the-standardization-of-the-online-reprinting-copyright-order/>> accessed 27 April 2015.

⁶² Levy, Nielsen and Reuters Institute for the Study of Journalism.

⁶³ For example, N Newman and DAL Levy (eds), *Reuters Institute Digital News Report* (RISJ, Oxford 2014).

⁶⁴ *Infopaq v Danske Dagblades Forening* C-5/08, [2009] EUECJ C-5/08 (16 July 2009), *Infopaq v Danske Dagblades Forening* C-302/10, [2012] EUECJ C-302/10 .

⁶⁵ Levy, Nielsen and Reuters Institute for the Study of Journalism. 12.

far more people read newspapers online in Denmark or downloaded them in 2008 (52%) than a comparable group in Germany (21%).⁶⁶

Thus, even if there it is true that news publishing is suffering financial difficulties, research shows that the mechanisms by which this is happening is different in Denmark and Germany. Any harmonized EU publishers' right is likely to be insufficiently nuanced to recognise these differences, and may over-benefit Danish publishers because it seeks to assist German publishers who have suffered to a greater extent from the decline in advertising. The same point, no doubt, can be made in relation to other Member States.

Challenging the idea that a publishers' right should be part of the solution

The third argument challenges the idea that even if there is a problem, and even if the problem is serious because it engages democracy, that a publishers' right is part of any solution. It says (amongst other things) that a publishers' right is inappropriate for such a task, it would be harmful, ineffective, and would impede the development of a new sustainable model of funding commercial news.

A publishers' right would be inappropriate

One senior policy maker we interviewed was sceptical as to whether, even if news was a democratic good and was going through financial difficulties, copyright should be part of the solution. They suggested that if the problem is the decline of the business model of commercial journalism caused by the rise of the Internet, then they were not sure that there was any reason to bring in a publishers' right. This scepticism was shared by Professor Hugenholtz at the Amsterdam Conference:

realising fully the crisis in which news production, news publishing finds itself in and it is very serious and I know this industry very well too, it is a very serious [...] I don't think intellectual property is going to help us out of this crisis, I really think we should not even waste our energy thinking along those lines⁶⁷

There are a variety of reasons that have been proposed as to why one might not look to IP as part of the solution. One involves the rationales for copyright in a European context. While some countries might consider it appropriate to use copyright as a tool to incentivise the activities of news producers, this is not clearly the case in all Member States. Professor Xalabarder explained:

if we're going to look at it from a copyright perspective, it should be the authors who get the remuneration and no-one is talking about them, right, and the newspapers go to Google and they ask remuneration for them. The authors are not going to get anything, so if it was really a matter of copyright enforcement, we would be talking about completely different ballgame here. So, I think that if the

⁶⁶ Ibid. 27

⁶⁷ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Bernt Hugenholtz, session 3, transcript 47

news publishers have some sort of freeriding concern against what Google is doing, that should be fought in another area, not within copyright, but maybe in fair competition or whatever else it's going to be, but not copyright because we're distorting it.⁶⁸

But even if one only considers an entrepreneurial right to be uncontroversial as a matter of principle, there remain problems. One arises if a publishers' right is intended only to encourage journalism that is worthwhile in a democracy, as discussed above. If this is the case, there must be doubts as to whether copyright or related rights are an appropriate tool to achieve this.

These doubts again engage questions about the function of copyright and related rights. Copyright and related rights are generally considered to be a relatively content-neutral doctrine, in that the nature of the content of a copyrighted work is frequently not relevant to the fact of copyright protection. (There are exceptions to this broad statement, and the US Copyright Clause, for example, explicitly envisages copyright being intended to bring about useful content, and there are content-based restrictions on copyright protection in the UK.⁶⁹) However, it can be asked whether it is evident that the function of copyright in the EU should be to distinguish between 'good' content, which is to be encouraged, and bad content, which is not to be encouraged. That seems to be, at least by the account described earlier, one requirement of a publishers' right.

A particular reason why it might not is the fact that one is dealing with highly subjective judgments of what is good and bad content. This is a notorious issue in relation to journalism, and indeed is a key element in discussions about the appropriate limits of freedom of speech and the Press. This is not least because opinion is likely to vary as to whether journalism is good or bad. Harm, for example, and the incurring of it by journalism, is an insufficient criterion for distinguishing between good and bad journalism, because many people will be harmed by journalism that may be useful to society. A famous journalistic aphorism makes the point: 'news is what someone, somewhere doesn't want you to know: all else is advertising'. Indeed, this is a central problem to the whole of free speech and free press theory and law, and it would be a brave copyright policymaker that steps into this area unawares.

And there are further doubts about whether copyright would be an appropriate tool, even if one can be clear what we mean by 'good' journalism. Does copyright have appropriate mechanisms in-built to its doctrine, to be able to police this boundary? Is it, other words, likely to be a good way of regulating journalism to improve quality? Moreover, is this something that should be done at an EU level, or is it better achieved by Member States? And even if a harmonised EU approach is appropriate, are there not other EU tools - such as the Audio Visual Media Standards Directive, currently under review - which are likely to be more appropriate, and a better fit for the job?

⁶⁸ Ibid. Raquel Xalabarder, session 2, transcript 38.

⁶⁹ For example, s 171(3) Copyright Designs and Patents Act (1988).

A publishers' right would be harmful

There are also a set of concerns are about the potentially harmful effects that can be expected from any change in copyright and related law that is designed to benefit news publishers. These will be discussed in more detail in the next section,⁷⁰ but it's worth describing them briefly here.

The risk that a publishers' right may cause harm has been articulated forcefully by the MEP Julia Reda, who is particularly concerned about the effect of such a right on users of the Internet. Reda is concerned, amongst other things, that any publishers' right will amount to a 'tax on hyperlinks', which at best would create a significant financial drag on the operation of the World Wide Web, and at worst severely hamper the Web's operation.⁷¹

The publishersright.eu website says that there will be little impact on normal internet activity, and the Commission have been at pains to emphasise that a publishers' right will not amount to a tax on hyperlinking.⁷² But it is difficult to see whether this will be so without seeing the text in question. Indeed, if an EU publishers' right alters the position established by the CJEU in *Svensson*,⁷³ for example, that would have a dramatic effect on the operation of the Web, which would be felt beyond the interests of news producers. If it does not, it is difficult to see how it might bring in sufficient revenue to be useful to publishers.

Similarly, Reda raises concerns about the case put forward by the Commission as to why copyright and related rights are *prima facie* relevant. She has challenged the notion set out in the Commission's December Communication that there is ambiguity about the concepts of making available and communication to the public, which acts to the detriment of commercial news producers. Copyright is relatively clear, Reda argues, and the idea that a publishers' right may be appropriate to resolve this ambiguity is misleading.⁷⁴

A publishers' right would be ineffective

Even if copyright is appropriate, some argue that will be ineffective. This was the view of James Mackenzie, one of the founders of a small aggregator called Cutbot at the Amsterdam Conference:

⁷⁰ Text to n 146

⁷¹ J Reda, 'Ancillary Copyright 2.0: The European Commission is preparing a frontal attack on the hyperlink' (Reda, Julia 6 November 2015) <<https://juliareda.eu/2015/11/ancillary-copyright-2-0-the-european-commission-is-preparing-a-frontal-attack-on-the-hyperlink/>> accessed 11 January 2016

⁷² European Commission, 'Making EU copyright rules fit for the digital age - Questions & Answers' (2015) <http://europa.eu/rapid/press-release_MEMO-15-6262_en.htm> accessed 14 June 2016

⁷³ *Svensson v Retriever Sverige AB*

⁷⁴ J Reda, 'Reform of Copyright Law in the European Union' (2015) <<https://juliareda.eu/2015/12/ancillary-copyright-open-letter/>> accessed 14 June 2016. See text to n 41, above.

Think about this: we did not cause the decline in newspaper industry revenue. Squeezing a little bit of revenue out of us won't save it. Putting us out of business won't save the newspaper industry. They need to find their own models⁷⁵

There are figures that validate the claim that a publishers' right would be unlikely to raise much revenue. Industry research in the UK, for example, found that '[i]n a typical week, over 13,000 articles from 5 major newspapers are cut and copied into other sites. These are often professionally run sites supported by advertising and ecommerce services. One site alone took 488 articles in one week.'⁷⁶ This, clearly, represents a loss of sales, attention and therefore revenue to news publishers. A broad-brush indication of how much this is worth, at least in terms of sales, can be found in the *Meltwater* litigation in the UK, where it was indicated that the licensing of newspaper articles by the members of the newspapers' collecting society, NLA Media Access, raised about £20 million per year.⁷⁷ In 2015, the NLA raised a greater amount, £32 million.⁷⁸

These may not represent the position in all countries in the EU, but it is plausible to assume that they represent the general scale of revenue that we are dealing with when considering a publishers' right. Are they enough to solve the problem? Are they, in other words, sufficient to re-incentivize the production of commercial news, lost from the decline in advertising revenue? That is unlikely. They remain small beer given the scale of revenues involved in commercial news production. For example, the entire £32 million raised by the NLA in 2015 would just about have covered the losses incurred by the *Guardian's* newspaper division in 2012-2013.⁷⁹

The concern about the efficacy of a publishers' right was raised at the Amsterdam Conference, when a comparison was made with the utility of the broadcasting right:

Another interesting thing is that the neighbouring right of the broadcasters does not bring them very much, it brings them a little bit of a share in the private copying levy and it gives them a right to take action against rebroadcasting, retransmission, which is always the live rebroadcasting. So it is the signal piracy actually, it's a very short term of protection, it's about ten seconds protection, it's not even 24 hours, it's only against a live rebroadcasting that it's actually used in some cases.⁸⁰

⁷⁵ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference, James Mackenzie, session 4, transcript 65.

⁷⁶ G Shepherd, A Hughes and NLA Media Access, 'Copyright Infringement and Newspapers, Online Article Tracking System (OATs)' (NLA Media Access, 2014), 2.

⁷⁷ *Meltwater v Newspaper Licensing Agency Ltd* CT114/09, 14 February 2012 (Copyright Tribunal (Interim Decision)), [6].

⁷⁸ 'Annual Report' (NLA Media Access, London 2015)

⁷⁹ Ellis, 184

⁸⁰ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference session 3, transcript 52

Another speaker, the Danish lawyer, Søren Christian Søborg Andersen agreed:

I also had the privilege of representing quite a lot of broadcasters and they have, and have had for decades, an ancillary right and I can tell you that they're hurting too. You know, so they blame YouTube which is essentially also Google but they're also... their business is declining because the behaviour of their consumers is changing. Okay. So, I propose to you that if the intended result is to generate more revenue for news publishers, the example of the broadcasters tell you that the way to achieve it is not to introduce a new ancillary right. You have to find something else.⁸¹

Moreover, there are reasons to believe that a publishers' right will become less effective, as the online market in news develops. Social media platforms are fast becoming more important than search engines and aggregation as the main routes by which people find news that has been published online.⁸² It's not clear how effective a publisher's right would be at deriving a flow of income from such organisations. Facebook's Instant Articles platform, for example, is based on permission, and sharing of advertising revenue.

There is a further argument that a publisher's right is unlikely to be effective, based the experience of news-related copyright laws that have been passed in Member States, particularly those passed in Germany and Spain. These were subject to detailed analysis in the second session at the Amsterdam Conference, and the conclusion was that they had been ineffective in bringing in a revenue flow to news publishers.⁸³

A publishers' right would be counter-productive

A final reason against a publishers' right is the argument, at least pursuant to the incentive argument, is that it may impede the development of new business models that, in the long term, will be more sustainable and beneficial to the commercial news industry.

A central idea here is Schumpeter's notion of creative destruction. The Internet can be seen as one in a long history of disruptive technologies that have forced those who seek to make money out of news to change the ways they act. This argument against a publishers' right is that it would be a foolish attempt to preserve doomed business structures. This is an argument that is widely proposed in the wider literature that considers the place of journalism in a digital era. Authors such as Hargreaves,⁸⁴ Picard,⁸⁵

⁸¹ Ibid. session 2, transcript 34.

⁸² Levine 127, 128; 'Facebook and Google continue to build some of the world's most profitable companies based on targeted advertising wrapped around relevant and interesting content.', *Reuters Institute Digital News Report* (Reuters Institute for the Study of Journalism, 2015) 19. Bell.

⁸³ Text to n 129

⁸⁴ Hargreaves chapter 8.

Xalabarder,⁸⁶ Brock⁸⁷ (and others,⁸⁸ including in interview) have suggested that the best thing to do might be to let market forces restructure the commercial news business, rather than intervene, for example with a publishers' right. A simile that has been used to advance this point, is that attempting to preserve the business models of commercial news publishers is like attempting to preserve the interests of buggy whip manufacturers after the development of the motorcar.⁸⁹

Professor John Naughton developed the point at the Amsterdam Conference:

as the discussion went on today, some names of past thinkers came to my mind; one of them was Joe Schumpeter and his view about how capitalism evolves. As you know, Schumpeter's view was that capitalism renews itself in ways of what he called creative destruction. We're all living through one such wave and it's both creative and it's both destructive and it is true that some great things, very valuable things, are being destroyed and it's also true that some very interesting and perhaps potentially very important things are being created. But much of the discussion about this consists of the wailing of incumbents who are now threatened with destruction.⁹⁰

This point is related to Benkler's suggestion intervention may impede the development of a networked public sphere, but is distinguishable. That is because Benkler's proposal was intervention may impede the development of an activity that replicates the function of commercial journalism. This creative destruction argument against intervention turns, in contrast, on the idea that intervention may impede the development of new business models that can help sustain commercial journalism.

Evaluation

I will consider each of the three counter-arguments in turn. It will become clear that the first two are in some ways similar, as they include a similar critique of a publishers' right. This is that a publishers' right risks over-benefitting those who, for policy reasons, we have no compelling reason to benefit: we risk over-benefitting poor-quality news content,

⁸⁵ RG Picard, 'see p000 check' in R John and J Silberstein-Loeb (eds), *Making News: The Political Economy of Journalism in Britain and America from the Glorious Revolution to the Internet* (2015)

⁸⁶ R Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its compliance with International and EU law' (infojustice.org 2014) <<http://infojustice.org/archives/33346>> accessed 10 October 2014 19

⁸⁷ Brock

⁸⁸ For example, P Schlesinger and G Doyle, 'From organizational crisis to multi-platform salvation? Creative destruction and the recomposition of news media' (2014) *Journalism: Theory, Practice and Criticism*

⁸⁹ Ryfe 29; W Patry, *How to Fix Copyright* (OUP, Oxford 2011) 3; D Simon, 'Build the wall' in R McChesney and V Pickard (eds), *Will the Last Reporter Turn Out the Lights: The Collapse of Journalism and What Can be Done to Fix it* (2016) 50.

⁹⁰ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Professor John Naughton, session 4, transcript 61

and already profitable news organisations. On this basis, the question of whether they are persuasive or not will come down to an assessment as to whether it is appropriate to provide these benefits to people who may not need them, set against the costs of not benefitting those who do need them. It is here that the relevance of the commercial news industry to democracy becomes significant.

The third counter-argument is somewhat different, as it criticises the notion that copyright and related rights are an appropriate tool to bring to bear on any problem that exists. This is difficult to evaluate without seeing a definite text— and in particular, it is difficult to assess what the costs and harm will be caused (if any) by a publishers’ right. However, some general observations can still be made, which lead to the conclusion that, whilst intervention itself may be appropriate, it’s far from clear that intervention by means of an EU publishers’ right is the way forward.

The challenge to the democratic assumption

It will be remembered that the first challenge to the incentive argument had two parts – a strong and a weak argument. The weaker argument was that the commercial news industry damages the public sphere as well as benefits it, and a publishers’ right would over-benefit harmful acts we ought to deprecate. The stronger argument asserted that a publishers’ right would be inappropriate, as it would impede the emergence of Benkler’s networked public sphere, which can be expected to replace the commercial news industry. Neither are convincing.

The weak argument

The weaker argument against the incentive case is that a publisher’s right will benefit the malignity, vulgarity, mendacious spirit, and the ordures, to use Jefferson’s words, manifest in contemporary journalism. This is true: it will. Even those who support commercial news production should accept that it can both detract from democracy, and contribute to it, and indeed this was conceded at the Amsterdam Conference. But does that mean that a publishers’ right is inappropriate?

A first way of could seeking to resolve this is by asking whether commercial journalism, on balance, promotes democracy more than it harms it? If commercial journalism on balance promotes more than harms democracy, a publishers’ right becomes appropriate. If harm comes to the fore, it is not.

However, this is a complex debate with an extended pedigree. It predates the current dilemma, and indeed the Internet, by centuries, and has raged in many different countries. As the briefest of example, Habermas is perhaps the most prominent contemporary European critic of the argument that the advertising funded commercial news industry contributes to public sphere,⁹¹ and I have already cited Thomas Jefferson’s 1814 letter to

⁹¹ J Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (Polity, Cambridge 1989). A recent American, but relevant to Europe, critique has been made by R McChesney, *Digital Disconnect* (The New Press, New York, London 2013).

a similar effect.⁹² But this view remains deeply contentious.⁹³ It cannot be expected that this question be resolved before any right can be said to be appropriate.

Perhaps, then, one could seek to incentivise only the production of democratically useful – ‘good’ journalism, and impede the production of harmful journalism? This sounds like an attractive way of resolving the dilemma, but it is in practice, not. Two reasons show why this is so.

The first is, as has already been mentioned, because of the extreme difficulties in defining ‘good journalism’. Even if one adopts a more nuanced definition, say democratically salient journalism, there are legitimate differences of opinion as to what this entails. These are manifest, for example, in the jurisprudence of the European Court of Human Rights about the appropriate balance between article 8 rights of privacy and article 10 rights of freedom of speech.⁹⁴ ‘What content is it in the public interest to publish?’ these cases ask, an issue very closely aligned with the question of what journalism is ‘good’ journalism for present purposes. It is difficult to see a publishers’ right being a mechanism that could be expected to provide a convincing way of determining what is democratically salient or ‘good’ journalism, given the content-neutral nature of copyright and related law.

A second point is that a problem arises for the idea of incentivising only good journalism from the observation that disseminating content is only one part of the picture of what a news publisher does. The other half is encouraging the audience to read or consume the content. Journalism is, by its essence, an activity that involves communication not just dissemination. This is commonly achieved by mixing democratically salient news with other forms of journalism designed to attract the attention of the audience.

This process of mixing content has been called ‘bundling’ when describing print journalism, and hammocking when describing broadcast journalism. Bundling or hammocking are undertaken for various reasons. One is economic – to attract more audience to make more money. But another is psychological: popular, but less democratically salient journalism attracts the attention of an audience to more worthy journalism, and - in effect - cross subsidises the attention deficit in democratic

⁹² Text to n 44. Not that it is relevant to the current argument, but the criticisms are distinguishable: Habermas objects to advertising-funded journalism, Jefferson objected to partisan journalism.

⁹³ Such a wealth of work exists on this subject in a variety of disciplines that it can be misleading to select any examples to demonstrate the point. Habermas himself has spawned a large secondary literature. However some important material relied on in this research that tends to support the argument that commercial news remains of great value to democracy in a digital era includes CR Sunstein, *Republic.com 2.0* (Princeton University Press, Princeton ; Oxford 2007), M Schudson, *The Sociology of News* (2nd Edition edn W W Norton & Company, 2011), and some of the essayists in R McChesney and V Pickard, *Will the Last Reporter Turn Out the Lights: The Collapse of Journalism and What Can be Done to Fix it* (New Press, New York 2011).

⁹⁴ This can be illustrated by the trio of Von Hannover cases: *Von Hannover v Germany (No 1)* (2006) 43 EHRR 7 *Von Hannover v Germany (No 2)* 55 EHRR 15 (Grand Chamber) *Von Hannover v Germany (No 3)* [2013] ECHR 835

journalism. It is the psychological point that is relevant to the argument about a publishers' right.

Now, if copyright were to incentivise the production only one type of journalism – investigative work, for example, ironically there is a strong chance that this would lead to consequences we may not wish to see. At the least, there is no guarantee that using copyright and related laws to encourage the production of one type of content would necessarily increase the consumption by the audience of this content, which is ultimately the purpose of incentivising democratically relevant content.

This is because it is not clear that encouraging commercial news publishers to produce one type of content will change the psychological fact that some news is less attractive to the audience other sorts of news. Encouraging the production of some type of content will not necessarily encourage its consumption.

The irony is, therefore, that if copyright incentives are tailored to encourage commercial news publishers only to produce more democratically useful content, such as investigative work, this might not lead to an increase in the amount of people would in the end read or watch this content A publisher's right might incentivise production, but not necessarily attention.

Indeed, one reason for this is due to the Internet. This has facilitated the unbundling of print journalism, and the de-hammocking of broadcast journalism. As Brock, for example, argues:

[the internet] works against the logic of bundling a varied collection of content for delivery to the reader. The internet [...] allows [readers] to go straight to the material they want without passing through the rest of the package⁹⁵

If this is so, then we return to the central dilemma. It seems one cannot avoid the difficulties raised by this critique of a publishers' right, by asking whether commercial journalism on balance promotes democracy, or by attempting to promote only one type of content. Accepting that some commercial journalism damages democracy, then, the question becomes whether this is sufficient reason to not intervene? Should one, to put the point another way, refrain from benefitting the good because one will also benefit the bad?

There is no clear answer to this. Sceptics of a publishers' right are wary of benefitting the producers of harmful material, but advocates of a publishers' right emphasise what good there is that would be lost. At the Amsterdam Conference, for example, Andrew Hughes said:

⁹⁵ Brock 151. See also J Keane, *Democracy and Media Decadence* (Cambridge University Press, Cambridge 2013) 7 -8.

Not all newspaper activity is good, that's for sure, and we picked up some references to that. But I was in Washington last week and visiting AP and also 'Washington Post' who are proudly clutching a couple of Pulitzer prizes: 'Washington Post', for having created a database of the police shootings of civilians, which is having a direct and positive impact on public policy there; and AP for having invested in creating a story about slavery in the fishing trade in the Pacific and tracing how fish caught using slaves, literally a camp on an island of slave labour, is being fed back through into not just American but other Western restaurants. That kind of activity, I think, is very easy to see as terribly important. What 'The Guardian' have done with Snowden is a classic and more local example of that. So, that's a statement of the bleeding obvious, but it's worth restating, I think, and losing that is what we're talking about and copyright policy has to fit into that view.⁹⁶

But one resolution may be found in the words of the author of America's First Amendment. James Madison famously said in 1876 'some degree of abuse is inseparable from the proper use of every thing: and in no instance is more true that that of the press.'⁹⁷ The context of Madison's argument is of course different from the current dilemma, and there is no reason for a European necessarily to pay regard to Madison's opinion. But the point he articulated remains forceful in a contemporary European context: one has to accept the risk of harm if one is to encourage an activity that can also produce good. The more attractive view is, therefore, that the fact that the commercial news industry can create harm should not be a reason, by itself, not to intervene. Hence the failings of the commercial news industry are not by themselves a reason to refrain from a publishers' right.

That said, one should bear in mind Professor Naughton's point that we should ultimately not confuse form with function. What we seek to protect is journalism's contribution to the public sphere, and the activity of engaged participatory journalism. It just happens to be the case in our society that these functions are largely performed by the commercial news industry. But this may not always be the case.

The strong argument

This leads to the strong argument, which argued that no intervention at all is appropriate, as this may hinder the development of a networked public sphere that may replace commercial news. The expectation is, in other words, that a new form can be expected to arise to undertake the functions of the commercial news industry.

A problem with this suggestion is that it's difficult to believe that such a development would truly replicate the scale and resources of commercial professional journalism. These resources include access to lawyers, collective expertise, various professional

⁹⁶ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Andrew Hughes, session 1, transcript 9.

⁹⁷ 4 Elliot's Debates on the Federal Constitution at 571

codes (which are more respected in broadcast, perhaps, than print, because broadcast is more highly regulated) and the like. This means that institutions, in short, can do things that networks of individuals cannot (or are unlikely to be able to). This has been argued by a variety of authors, such as Jones,⁹⁸ Schudson,⁹⁹ Levine,¹⁰⁰ and Starr¹⁰¹ Indeed, the point was also made at the Amsterdam Conference by Matt Rogerson, drawing on his experience at the Guardian:

the idea that kind of an individual blogger could have done the Panama Papers at all so is ridiculous. An organisation like The Guardian or the Times that did the Lance Armstrong story, it requires teams of journalists and teams of lawyers to go through a story line by line so I think this idea that kind of bloggers on their own can survive and can produce public interest journalism is kind of fantasy.¹⁰²

And yet, many will be unconvinced by this. Indeed, this is another debate with a substantial pedigree, as even before the development of the Internet, scholars were arguing about whether citizens with pens, or lonely pamphleteers, who perform functional journalism, can replicate the activities of institutions that do journalism.¹⁰³ Clearly it cannot be resolved conclusively in a discussion about a publishers' right.

What can be said, though, is that even if - as Benkler expects to happen - these qualities can be replicated by networks of individuals, that hasn't happened yet. In fact, it seems that a quite different pattern is emerging. Some research has shown that the networked public sphere is actually, to a large extent, dependent on the work of the commercial news industry. It recycles and churns content produced by legacy print journalists.

This was the conclusion of research has been done in the US into the provenance of online stories. This found that newspaper journalists generated the vast majority of news reporting, with one estimate putting the figure as high as 85% of the total material produced in a particular area at a particular time. Another, a frequently cited Pew Centre survey of news in Baltimore in 2010, reported that 95% of stories with new information

⁹⁸ A Jones, *Losing the News: The Future of News that Feeds Democracy* (Oxford University Press, Oxford 2009)

⁹⁹ Schudson

¹⁰⁰ Levine

¹⁰¹ P Starr, 'Goodbye to the Age of Newspapers' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York, London 2011)

¹⁰² Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Matt Rogerson Session 3, transcript 57

¹⁰³ This was an issue in, for example, *Branzburg v Hayes* 408 US 665 (1972). The case concerned, in basic terms, the question of whether the Press were sufficiently functionally distinct in the US state to merit special protection under the First Amendment to the Constitution. The Supreme Court decided they were not, because individuals could perform the same tasks as institutional journalists. The issue generated a large amount of discussion, some of which is collected in part 1 of E Barendt, *Media Law* (International library of essays in law and legal theory, Dartmouth, Aldershot 1993).

arose from traditional media, of which newspapers produced the lion's share.¹⁰⁴ This is perhaps unsurprising, as US newspapers used to employ three times as many journalists as were employed by other media.¹⁰⁵

One cannot be sure that this US research reflects what is happening in the EU. But there are reasons to expect that it does. As Levy and Nielsen argue in their comparative study of the news business in an online world, the legacy print industry is the engine room of journalism and the flow of news.¹⁰⁶ Indeed, even in the UK, which might be expected to reflect a different picture because its news ecology is dominated by the non-commercial journalistic behemoth of the BBC, a similar position about the important contribution made by print journalists has been established.¹⁰⁷

This evidence makes it reasonable to suggest that it is too optimistic to base the justification for failing to intervene to protect commercial journalism, and in particular print journalism, on the hope that something equivalent will arise to take its place. Benkler himself has conceded that it is unclear whether this is happening.¹⁰⁸ A more likely view of the facts is that commercial journalism, particularly legacy print journalism, is unlikely to be replaced by something functionally equivalent any time soon, and so the incentive argument remains viable. There may well develop a symbiosis between the two forms of production of journalistic information, as Naughton has argued,¹⁰⁹ but that is insufficient reason to refrain from taking steps to protect the viability of commercial news.

Summary

Neither the weak nor the strong argument are a compelling reason not to create a publishers' right. However, it is appropriate to recognise the limitations of the democratic argument for a publishers' right. Publishers do harm as well as good, and one should not confuse protecting the function of journalism with its form. This means any intervention bears the risk of rewarding content that is harmful to democracy,

¹⁰⁴ Levine 132; McChesney 179

¹⁰⁵ N Gamse, 'Legal Remedies for Saving Public Interest Journalism in America' (2011) 105 *Northwestern University Law Review* 329

¹⁰⁶ Levy, Nielsen and Reuters Institute for the Study of Journalism.

¹⁰⁷ Ibid. 4. One survey found that the majority (65%) of the spending on news in the UK is accounted for by the print sector, with the national press spending about £875million and the regional press £470 million. Mediatique, 'A Report for Ofcom (Annex 6 to Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport)'.

¹⁰⁸ Y Benkler, 'Giving the Networked Public Sphere Time to Develop' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York London 2011)

¹⁰⁹ J Naughton, *From Gutenberg to Zuckerberg: Disruptive Innovation in the Age of the Internet* (Quercus, New York, London 2014)

The challenge to the notion that the news business is not thriving

The second area to address is the notion that the commercial news publishing industry is not faring as badly as it seems, and so no intervention is necessary. Here, again, there are a variety of points that can be made.

Concerns about the long term remain potent

The first is that it may be premature to conclude from any returns to profitability that parts of the industry have enjoyed, that any crisis has been successfully weathered. There are reasons to expect that the longer-term trends in the commercial news industry will be downwards, due to substantial long-term systemic problems. Intervention, therefore, remains potentially appropriate.

These fundamental difficulties have been widely noted. Indeed, one example has been discussed above, namely the decline of the traditional advertisement revenue model, which was for so long a stalwart of the news industry's finances.¹¹⁰ Another long-term problem is the protracted and extended decline in circulation figures that show little sign of being reversed. People in Europe and the USA seem to be, in general, consuming less and less news, and printed news in particular,¹¹¹ and while this is particularly true of the young, social and demographic changes have also been identified as reasons why older people are also losing the habit of purchasing news.¹¹² Falling circulation figures have knock-on effects that create a vicious circle for the commercial news industry, as advertising revenues are frequently linked to circulation figures.¹¹³ Moreover, declining revenues makes it more difficult to spend sufficiently to create good quality journalism.¹¹⁴

Indeed, when Professor Dr Hegemann was pressed at the Amsterdam Conference on how a publishers' right may be justified when Axel Springer had returned to profitability, he said:

rising turnover and profits are not stemming from the traditional news business. As you might know, Springer has sold quite a group of its traditional regional newspapers, [...and...] decided some years back to completely restructure its activities and to invest almost more than a billion into internet or digital-based companies that have not much or nothing to do with the traditional publishers'

¹¹⁰ Text to n 9.

¹¹¹ Ryfe 1, 34; Hargreaves 112, 121; Schudson 225; S Wunsch-Vincent, 'Online News: Recent Developments, New Business Models and Future Prospects' in DAL Levy and R Nielsen (eds), *The Changing Business of Journalism and its Implication for Democracy* (2010); , *Reuters Institute Digital News Report* 64-66.

¹¹² Starr. Some have argued that it may be that these figures are misleading, and there is a decline in the consumption of print journalism only – and there is less of a decline when consumption of digital journalism is taken into account. However, this has not been demonstrated yet.)

¹¹³ Ellis 33, provides a survey of other problems that have been identified.

¹¹⁴ Kaye and Quinn 5

business. The publishing side of the business today is ‘Die Welt’, ‘Bild’, and so on, and the ‘Bild’ is profitable; ‘Die Welt’ is not, as you know. But Springer has understood that they will not be able to keep on their traditional content, journalist-driven content business without backing it with activities that are far away from the classical journalism.¹¹⁵

Other sectors, and the commercial news industry

This suggestion was that there should be no general intervention to benefit the legacy print news industry, because such an act will benefit other sectors – such as broadcast and online – that are not suffering to the same extent. An answer is that, to begin with, it’s not clear that this statement is true, and if it is, whether it is likely to be true for long: there is evidence of significant closures of local radio stations that might have transmitted news,¹¹⁶ and there are concerns that the Internet will undermine television’s advertising model, as it did that of print.¹¹⁷

Moreover, for example, optimism about the long-term prospects of digital native commercial news producers is not clearly well-placed. They have not been around long enough for us to have a robust idea of their continued viability, and indeed many of them are funded by venture capitalist money, or philanthropy, or other means rather than by profit, which may not be sustainable in the long run. *BuzzFeed*, for example, recently announced it missed its financial targets by over \$80 million,¹¹⁸ and *Vice Media* recently laid off 20 staff, including two foreign correspondents.¹¹⁹ It is too early to tell whether online digital news operators have developed sustainable business models that will generate valuable news content, as opposed to – for example – paid advertising material, dressed in the garb of journalism.

But perhaps more importantly, there remain other cogent reasons to pay particular attention to the legacy print industry, as legacy print journalists constitute the prime motive force of the news industry. This was argued earlier, based on research that analysed the provenance of various forms of news in circulation.

This shouldn’t be taken as an argument for the preservation of the dissemination of news by ink on paper: a confusion, in Professor Naughton’s terms, form with function. Rather,

¹¹⁵ Centre for Intellectual Property and Information Law University of Cambridge, ‘CIPIL/IViR Conference, Jan Hegemann, session 1, transcript 15 -16.

¹¹⁶ GMG Radio, the UK’s third largest radio broadcaster in 2010 suffered losses of £68.6m, which were greater than losses of Guardian and Observer together. It was sold in 2011 Ellis 162

¹¹⁷ McChesney 128

¹¹⁸ S Thielman and M Sweney, ‘BuzzFeed cuts projected revenue by half after missing 2015 financial target’ *The Guardian* (12 April 2016) <<http://www.theguardian.com/media/2016/apr/12/buzzfeed-projected-revenue-cuts-missed-financial-target>>

¹¹⁹ B Quinn and J Jackson, ‘Vice Media lays off 20 staff in restructuring plans’ *ibid.* (24 May 2016) <<http://www.theguardian.com/media/2016/may/24/vice-media-lays-off-20-staff-in-restructuring-plans>> accessed 14 June 2016

as Ellis observes ‘[t]he concern should not be with the predicted demise of the ink-on-paper edition but with the possible death of the type of serious journalism for which the printed page has become an idealised metaphor.’¹²⁰ Perhaps even more so, the argument should be to attempt to preserve those who are skilled and trained to undertake ‘difficult journalism in the public interest – either requiring large resources or resilience against attack’, who for historical reasons exist in large, predominantly print-based companies, that can cross-subsidize news operations and afford expensive staff lawyers.¹²¹

Excess profits

These points aside, there remains force in other aspects of this argument against a publishers’ right. In particular it is a fair to say that the levels of profitability that commercial news expected in the past were excessive, and some drawing in of belts is appropriate. A publishers’ right that is intended to bring back the historic levels of high profitability enjoyed by commercial news publishers would be indefensible.

That said, there are some complicating factors that need to be taken into account. One is that there are reasonable grounds to believe that, given the longer-term trends affecting the commercial news industry that were described earlier, any financial adjustment will be not merely to levels of profitability that are closer to those found in other industries. These long term trends give us reason to suspect that the decline may well be to levels insufficient to support a large-scale news industry. This is likely to have a detrimental affect on the ability of the commercial news industry to perform some of the tasks we have come to expect of it in our democracy.

Specifically, a reduction in profitability may well have an affect on the character of the news material that is generated. The absence of a generous profit line may encourage some commercial news producers to produce cheaper, and lower common denominator material that will please advertisers and pander to audiences, rather than more expensive, less popular and less remunerative journalism, such as investigative work. Indeed, to some extent, this appears to have been the pattern in broadcast news, in some countries.¹²²

Differences between Member States

The fact that there are differences in business models, and the patterns of economic difficulties predicated on differences in subscription, sales and ad revenue in different Member States is a significant argument against a publishers’ right. It leads to the concern that a EU harmonized publishers’ right may risk of over-benefitting those whom there are policy reasons not to benefit. In this respect, when evaluating the publishers’ right, one again comes to the question of whether it is acceptable to provide a benefit to those that may not need it – in this case, some profitable commercial news businesses in some Member States.

¹²⁰ Ellis 17.

¹²¹ Brock 122.

¹²² Hitchens chapter 6.

But it is true that, as was the case earlier, the better view is that the concerns about the seriousness of the potential cost in democratic terms, of losing the commercial news industry are greater than the concerns about providing a benefit to some elements of the industry who do not need it. But that does not mean that measures cannot be taken to attempt to reduce the levels of over-benefit. One way of achieving this is to ensure that the targeting of benefits to assist those who need them is done at the level of Member States, rather than a European level. This is because Member States will be better placed to calibrate the benefits of an intervention so that it deals with the specific problems in its news industry. Clearly, however, this would lead to the development of different solutions in different Member States, and therefore would be in tension with the desire to create a digital single market.¹²³

The challenge to the idea a publisher's right should be part of the solution

The final set of arguments to assess suggests that there is no sufficient reason to think copyright as part of the solution to any problem. Again, there are a variety of points to be made.

The suggestion that a publishers' right is not appropriate

One preliminary question was the issue about whether copyright and a publishers' right was an appropriate tool to incentivise the production of commercial news. An aspect of this was that it was not appropriate, on the grounds that copyright and related rights should, as a matter of principle, focus on the interests of authors. This seems to be a bad point, as far as it goes. A publishers' right could be an entrepreneurial right. Entrepreneurial rights are already part of the EU's copyright acquis, and are designed to protect financial investment in the production of content by other content producers.¹²⁴ There is therefore nothing problematic *per se* in the creation of a publishers' right as another entrepreneurial right.

Indeed, the fact that news publishers do not already benefit from such a right leads to the claim that news publishers suffer from unequal treatment, as other content producers benefit from these entrepreneurial rights, but news publishers do not. This leads to the equality argument for a publishers' right, which will be discussed at length below.¹²⁵

By contrast, another point that was raised is more telling. This is the argument that copyright and related rights are ill-suited to incentivise the production of a particular content or type of journalism. For reasons discussed earlier, it is unlikely that a publishers' right could incorporate a test that appropriately distinguished some content from others, and only incentivised content that was desired – even if there could be consensus about what journalistic content was desirable. This means that if a publishers'

¹²³ This is an aspiration of the Commission, and a rationale for EU legislation see text to n 42.

¹²⁴ Directive 2001/29/EC 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. For a discussion, see L Bently and B Sherman, *Intellectual Property Law* (OUP, Oxford 2014) 32-33, chapter 13.

¹²⁵ Text following n 132.

right is intended to achieve this outcome, it is likely to be a bad choice as a means of intervention.

More difficult to assess are the questions that have been raised about the appropriateness of a publishers' right by, for example, by Julia Reda MEP. Some of the concerns here are that a publisher's right may give rise to harmful unintended consequences on others. The harms that may arise will be set out in more detail in the next section,¹²⁶ but it is sufficient to mention here that they present a considerable challenge for the notion that a publishers' right is an appropriate means of dealing with the difficulties that face the commercial news industry.

The suggestion that a publishers' right is not effective

The second argument was that it is unlikely that a publishers' right would be effective. It would not bring in sufficient income to create an incentive of the sort required to produce commercial news in the future. Here, it is true, a publishers' right is unlikely to be sufficient.

However, while a publishers' right will not resolve news publishers' financial difficulties, it may well help. As Andrew Hughes said at the Amsterdam Conference, 'copyright reform is not the solution to the news problem, but the solution to the news problem is a much bigger and more challenging issue than that'. And this was the argument advanced at the London Workshop by representatives of the publishing industry, who 'observed that even if copyright wouldn't provide enough revenue to resolve the difficulties facing the news industry, it would likely help. It should be seen as an 'and-and', not an 'either-or'. Newspapers are not looking, it was said, for a magic bullet, but for help in areas that are 'leaking revenue',¹²⁷

More difficult, though, for those seeking to defend a publishers' right, are other concerns about its efficacy. One of the more pertinent is the worry that a publishers' right may be a solution to yesterday's problem, not tomorrow's. It was described how a publishers' right seems primarily aimed at the problems publishers have with news aggregation, but aggregation is becoming eclipsed by social media, particularly Facebook, as a means by which news is distributed. A publishers' right is unlikely to be well-tailored to enhance the generation of more revenue from the distribution of news by social media platforms.

A further serious concern about the efficacy of a publishers' right derives from the experience of the Spanish and German laws. As Professor Xalabarder and Professor Dr Gruenberger described at length at the Amsterdam Conference, these were not an effective way of raising revenue. Professor Xalabarder said that after the Spanish law, 'Google was not affected. Google simply closed the Google news site and went on with its business. Instead, such a provision puts a Damocles sword on top of the small

¹²⁶ Text to n .146

¹²⁷ Danbury

aggregators and blog sites which fear that maybe one day the newspapers will come and ask for the compensation'.¹²⁸ Of the German law, Professor Dr Gruenberger said:

The ancillary right in Germany has been a complete regulatory failure. It promised way more than it could ever deliver. Eventually, it re-created, with regard to Google, exactly the same de-facto situation as before, however, with substantially higher transaction costs. The ancillary right – and this is a point regulators really should look into, particularly with regard to Google – is also responsible for possible competitive disadvantages of other search engines. Finally, copyright law needs technology and media sensitive access rules. The German press publisher's right as an exclusive right does not meet that standard.¹²⁹

Clearly, though, a publishers' right is likely to be different in form to either of these examples, so perhaps it might fare better? Whether this is so, or not, again depends largely on the wording of any provision. But there are some reasons to be pessimistic. If, for example, a publishers' right is not a mandatory right, then Google may respond to it in the way it responded to the German News Publishers' Ancillary right, and make indexing and listing on its servers conditional on publishers signing a waiver. If, by contrast, it is mandatory, there is a real risk that Google may respond in the way they responded to the Spanish amendment to the quotation exception, and shut down their news aggregator. This is because – given the size and revenue model of Google – that the news industry needs Google more than Google needs the news industry. The same, arguably, applies to the other major online redistributors of published news.

Creative destruction

That leaves the argument about creative destruction, that we ought to leave the commercial news industry alone, so that the hidden hand of the market can develop a new viable business model, just as it did out of advertising some three hundred years ago.

'Creative destruction' is a powerful metaphor, but there are a number of problems with applying it to the real world, some of which have been prefigured in the related discussion about the networked public: it hasn't happened yet, and how can we be sure it will happen? Of these, perhaps the most pertinent is how can we be sure that any destruction will be creative? And why should we be phlegmatic about the levels of destruction? Given the fact that a commercial news publishing industry is (on balance) valuable to democracy, there are significant concerns about what will happen if it is destroyed.

How, in other words, can we be sure that anything that replaces the commercial news industry will be of equal or greater value to that which may be lost? How can we be sure

¹²⁸ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference transcript 31

¹²⁹ Ibid., transcript 23.

that the new business models that evolve will create something that is functionally similar, rather than functionally worse? Indeed, some evidence –namely the rise of advertorials, sponsored content, and click-bait journalism, and the continuing failure to find an effective business model that replicates the type of journalism we have today, leads one to be sceptical. Andrew Hughes made this point at the Amsterdam Conference:

I agree absolutely with John that, you know, the Schumpeter diagnosis of creative destruction is what we're going through and it's going to be a very exciting time to see what emerges from that. You cannot hold on to what you've got and hang on to it and assume you have got a right to your model lasting forever. I think everybody would agree with that. I just hope that the new models that emerge are not dominated by PR paid for by corporate rather than independent journalism, of admittedly very varying qualities over the years¹³⁰

Here, we must balance risks. Even if there is creative destruction at work, this does not rule out the fact that intervening – for example with a publishers' right. Such a right would still be appropriate, on the grounds that what we stand to lose is of such value to democracy, and after recognising that the production of democratically salient journalism has always been subsidised.

Conclusion

The incentive argument provides a cogent set of reasons to intervene to benefit the commercial news industry. This is because on balance, the commercial news industry can be seen as contributing to a healthy democracy in a valuable way, and there is insufficient reason to expect it to be replaced by something as useful if it fails. There are cogent reasons to expect that the difficulties in which the commercial news industry finds itself are severe, and long-term. If many commercial news operators go bankrupt or withdraw from expensive but democratically important activities, this is likely to significantly impair communication valuable to our democratic states. This leads to the conclusion that an intervention would be useful and beneficial.

However, the incentive argument contains some manifest weaknesses. There is a risk of benefitting those who do not need it, or do no longer need it, or for doing things we do not want to incentivise. The industry has had in the past remarkable levels of profitability, and it would be an error to intervene and replicate these. We must not confuse the need to protect the function of journalism with the need to protect its form, and we need to disregard any arguments from the commercial news industry or others that seek to collapse these together. But, on a balance of risk, it seems appropriate to intervene.

What is less clear is that any incentive should be by a right related to copyright, and even less clear that any such right should be harmonized across the EU. There must remain concerns about whether a publisher's right would be effective, particularly given the experience of the copyright-related laws that were adopted in Germany and Spain in an

¹³⁰ Ibid., Andrew Hughes session 4, transcript 70.

attempt to benefit commercial news producers. It may well provide a marginal benefit, which would be welcomed by the news industry, but there is also a very real risk that any benefit will become less significant in the future, given the changing patterns of news distribution in an online world. And, given differences in the news businesses in Member States, intervention might be better if it were not at a European level.

Also significant are the concerns that a publishers' right may harm or damage others. The risk of this should be weighed in the balance against any benefits a publishers' right might be expected to deliver to society. At present, this is difficult because we have no text to consider.

In summary, the incentive argument leads to the conclusion that some intervention is appropriate, but it does not lead to the conclusion that a publishers' right is the appropriate means of intervention. As Professor Hugenholtz said at the Amsterdam Conference:

it is a common reflex, look at IP law, it's always IP law that is at fault here, but I don't think IP law in any imaginable world is going to help us out of this conundrum. Other business models surely are, that's not my department of course, I'm not competent here but I would obviously look at that. Subsidies, always interesting, I'm from the Netherlands, we love subsidies, I'm all in favour of that. Re-routing money that now goes to public broadcasts to the press, I'm all in favour of that. More taxing Google and having them pay their taxes in the countries where they're really making money, yes please.¹³¹

¹³¹ Ibid., Bernt Hugenholtz, session 3, transcript 47.

3 The equality argument

The second argument, the equality argument for a publishers' right, has only emerged recently. It is less complex than the incentive argument, but is more involved than at first appears. It is not, by itself, sufficient reason to establish a publishers' right.

The argument

The equality argument has arisen because news publishers claim that they are not treated the same way in EU copyright law as others who conduct similar activities. They argue that other content producers – phonogram producers, broadcasters and film-makers – receive rights under the Related Rights Directive in respect of reproduction, communication and making available to the public and distribution, but news producers do not. This is a point that the Commission have acknowledged is relevant to their considerations about a publishers' right, and is on the Commission's consultation website:

Current EU copyright law grants neighbouring rights to performers, film producers, record producers and broadcasting organisations. Publishers are not among the neighbouring right holders at European level.¹³²

This is unequal treatment, publishers argue, and inconsistent. A senior decision maker interviewed for our research explained: 'why should broadcasters, record producers have neighbouring rights, but [publishers] don't?' This inconsistency, publishers argue, can be remedied by the creation of a publishers' right.

The equality argument sounds simple, but there are other aspects to it. It is not merely a claim for equal treatment, but is a claim that equal treatment is merited given the fact that the activities undertaken by news producers are of a similar nature to those undertaken by producers who already enjoy these neighbouring rights, and that these activities are valuable to society.

Publishers have indicated what some of these activities are. The democratic argument has been discussed at length,¹³³ but there are others. A significant example is the result of financial investment that publishers make in producing news. Such an investment is important because it sustains the legal, professional and other institutional aspects of news publishing that contribute to the value in a democracy of commercially published news. But such investment also, as the publishersright.eu website argues, has wide economic benefits, equivalent to those created by other neighbouring rights-holders.

¹³² European Commission, 'Commission seeks views on neighbouring rights and panorama exception in EU copyright' (2016) <<https://ec.europa.eu/digital-single-market/en/news/commission-seeks-views-neighbouring-rights-and-panorama-exception-eu-copyright>> accessed 14 June 2016

¹³³ Text to nn 8, 44, 91, 196

Being acknowledged, as rightsholder is an important basis for publishers to maintain sustainable journalism and would benefit employees, freelancers and photographers alike. It will allow for further investment in digital skills and the creation of new jobs. This would ultimately benefit the EU's economy as well as society.¹³⁴

This was an argument that was forcefully expounded at the Amsterdam Conference. Andrew Hughes said:

You employ 1,000 people to make and create news for you and then when you get into the courts in Europe, less so in the UK, you aren't recognised as existing at all in copyright here. It's an obvious nonsense that needs to be addressed and it will simplify and streamline licensing. It will put news organisations, who are not dissimilar, particularly in the digital age, from the other publishing organisations that have that protection¹³⁵

Publishers also argue there is a creative act in the production of commercial news that should be recognised, and this is another reason why a copyright-like publishers' right is appropriate. This arises because a news publisher does not just collate news reports, but creatively selects, edits, and produces news in such a way that the brand identity of the publishers is adhered to and promoted, and an audience attracted and retained. As the publishersright.eu website explains:

A press publisher does not merely publish content created by journalists and photographers. The publisher is responsible for overseeing the entire operation involved from the initial concept to the financing, production and management of a newspaper or magazine, in print or online, and takes legal responsibility together with the editor for the making available to the public of the final published edition(s) and any updates thereafter. Crucially, the publisher creates an editorial brand.¹³⁶

This will be discussed in a little more detail later, as it is relevant to the natural rights argument for a publishers' right.¹³⁷

The equality argument suggests a relatively easy way of creating a publishers' right. The Information Society Directive, and/or the Related Rights Directive, could be amended to recognise news publishers as rightsholders in European copyright acquis.

¹³⁴ European Publishers Council and others, (accessed

¹³⁵ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Andrew Hughes, session 1, transcript 11.

¹³⁶ European Publishers Council and others, (accessed question 5

¹³⁷ Text to n187.

HP v Reprobel

The equality argument has become more significant of late because of the recent CJEU decision in the case of *Hewlett-Packard v Reprobel*.¹³⁸ This decision has limited the extent to which publishers – and not only news publishers – are entitled to certain types of compensation. The compensation in question is that payable under the reprography and private copying exceptions, as provided for in article 5 (2) of the Information Society Directive. The CJEU indicated that only authors are entitled to such remuneration. This means that article 5(2), properly construed, precludes national laws from allocating a part of that compensation to publishers, where the publishers are under no obligation to ensure that the authors benefit from this allocation of funds.

The funds in question can be substantial in many countries in Europe, and publishers would feel their loss acutely. Professor Dr Hegemann explained at the Amsterdam Conference how the decision would affect German publishers, by referring to a recent German case.

Following a decision of the European Court, the Federal Court, Civil Court, ruled that the publishers are not any longer more qualified to get money out of these reproduction fees but rather will have to repay what they got in the last couple of years to the authors which will sum up to a three digit million. This causes really a danger of insolvency for small and mid-sized book publishers.¹³⁹

However, if by applying the equality argument, publishers can establish themselves as rights-holders in EU copyright law of equal status to other neighbouring rights-holders, they might have a greater chance of sharing the revenue restricted by the *Reprobel* ruling. The creation of a publishers' right may achieve this.

This provides an incentive for publishers other than news publishers to seek recognition as EU rights-holders, as the *Reprobel* ruling applies to all publishers. It presents a threat to all of their income. This may be one reason the Commission's consultation is now envisaging creating a neighbouring right for all publishers, a proposal that was not canvassed in the Commission's Communication in December 2015.¹⁴⁰

Counter arguments

There are a number of problems with the equality argument. First, though, it is important briefly to discuss one aspect of the *Reprobel* decision. This is because it is appropriate to distinguish the case for a news publishers' right from the case for a general publishers' right. It was discussed at some length in the last section how the publishing of news

¹³⁸ *Hewlett-Packard Belgium SPRL v Reprobel SCRL* Case C-572/13 (CJEU (Fourth Chamber))

¹³⁹ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Jan Hegemann, session 1, transcript 6.

¹⁴⁰ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework' (

engages issues related to the functioning of a healthy democracy,¹⁴¹ but these arguments only apply to news publishing. They do not to publishing more generally. It follows from this that the arguments about whether news publishers should benefit from a copyright-like right are different from the arguments about whether publishers in general should benefit from such a right. To conflate news with general publishing will create confusion: it will either inflate the importance of general publishing to democratic communication, or to undervalue the importance of news publishing.

Turning to the equality argument more generally, the claim that the law is inconsistent needs further investigation – is it, and is it in ways that are important? And even if the law is inconsistent, resolving this inconsistency may create other inconsistencies, and this is something we wish to avoid. Indeed the force of the equality argument derives from its desire to remove inconsistencies from the law, and it must be an error if by changing the law we create more inconsistencies. Moreover, even if the creation of other inconsistencies is not a problem, the fact that changing the law will incur other costs, including harm to others, will need to be justified. They cannot be justified merely by claiming that the law is inconsistent, and other considerations will have to come into play.

Truly similar?

The first point rests on the claim that publishers undertake similar tasks as those performed by phonogram producers, film-makers and broadcasters. Do they? And, what do we mean by ‘similar’? To answer that, we need to find out what reasons were put forward at the time of the Related Rights Directive to explain why the law should afford rights to these entrepreneurs. We then have to consider the similarities and differences between news publishers and those who currently hold rights, and establish whether any similarities engage the reasons that were advanced for creating the original neighbouring rights. If they do not, then the claim of inconsistency falls.

This is quite a task, and we do not have space to undertake it here. That may seem unsatisfactory, but it is sufficient for the moment to note that the equality argument is more complex than it first appears. If it is to be persuasive, this work needs to be done to establish that there is indeed an inconsistency.

Moreover, there are reasons to believe that the original rationales for the introduction of the other neighbouring rights in EU law may have been, in fact, rather different from the reasons that publishers are now seeking a right, This was a point suggested by Professor Hugenholtz at the Amsterdam Conference:

I would like once again to draw the comparison with the neighbouring rights for the broadcaster. First of all, of course, the funny thing is why did we get that right in the first place? Most people were involved in getting it here in the 1960s are dead but I have been told that the only reason why this right came about was to give them something where they would be the people who had to pay for the

¹⁴¹ Text to n 44, 91, 196

other new neighbouring rights. So it was the performing artists who got their own right and obviously the Phonogram producer got that right because they were the strong lobbyist at the time and especially the public broadcaster at the time were very much against it, especially in the Netherlands as late as the 1990s were against it, and only when they were convinced and was absolutely sure that the Olympic Games would come to Amsterdam in 1992 and that it was necessary for them to have their own neighbouring right at the time were they convinced it was a good idea. So it was a funny reason why we got the neighbouring right for the broadcasters in the first place.¹⁴²

We also need to ask whether, whatever the reasons why the original set of neighbouring rights were granted, these reasons remain apposite. A lot has changed since the Related Rights Directive was passed, and the rationales for its existence may no longer be persuasive. That means that it cannot necessarily follow that the mere fact that news entrepreneurs were left out of the Related Rights Directive in the past, that there is sufficient reason to provide them with rights now. A hard look is required into the question of the ways in which the Internet has changed things, and the effect of such changes on the normative question of whether neighbouring rights are appropriate, before we can accept the equality argument as providing a reason for a publishers' right.

In any event, evaluating the claim that an inconsistency would be removed by a publishers' right is hampered by the fact we do not know, at the moment, what a publishers' right would entail. This makes assessing whether there is or is not an inconsistency very difficult, as Professor Bently explained to the Amsterdam Conference:

people who know something about what neighbouring rights contain know that they all differ. So having a consultation about having a new neighbouring right for publishers just doesn't tell you anything about what the content of the right that's being proposed is, and how can you possibly respond to a consultation when you don't know what the content of the right being proposed is?¹⁴³

More inconsistencies will be created

The second set of difficulties arises because if one admits publishers into the class of recognised rightsholders under EU law, who will now be left out? Who, in other words, will then have a claim that they have been treated inconsistently? For if consistency is our watchword, and we are motivated by a desire to ensure that the law is treating anyone consistently, we need to be very careful not to leave out another group if we create a publishers' right.

Part of the problem here is in identifying who we want to benefit, and how, and drafting a publishers' right in such a way that that they are benefitted in the way we want, and

¹⁴² Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference', Bernt Hugenholtz, session 3, transcript 52

¹⁴³ Ibid., session 3, transcript 53

others are not. These problems were articulated by Professor van Eechoud at the Amsterdam Conference:

there are too many worrisome concepts that we need to pin down: what type of use are we talking about; by whom; can we make meaningful distinctions between different actors in the light of changing technologies about who should be limited from doing what exactly? Can you make a meaningful distinction between commercial and non-commercial uses? I'm not sure, particularly if you start looking at social media, you know, and who should be the addressees of this norm? Is it just traditional search; is it news aggregators; is it all kinds of platforms? Very importantly, also, who are the beneficiaries? How would you demarcate those? Even in an ideal world where you could actually come up with a legal provision that clarifies this enough to provide a certain level of legal certainty then the other question, of course, is okay, that's the law in the books and what happens on the ground? How does it actually affect the market? How does it play out in markets?¹⁴⁴

But, even if it is possible to identify and specify to whom and to what we wish a publishers' right to apply, any line drawing exercise will leave some people out. These people may then themselves have a claim that they have been inconsistently treated, and this is a problem. Three possible groups of claimant can be readily identified.

The first are the wire services – news wholesalers – like Reuters, Associated Press, the Press Association, and Agence France Presse. These, and similar organisations, provide a task that is similar to news publisher, in that they collect and distribute news. But the difference, historically at least, between news publishers and wire services is that news publishers distribute news to the audience, and wire services – the news wholesalers - distribute news to the publishers.

Will the creation of a publishers' right extend to news wholesalers, as well as news publishers? We do not know at the moment, because we do not have the text of the legislation to consider. But if it does not, then we will have created a further inconsistency in our attempts to remove one. The wire services will surely have the same type of claim of inconsistency that the publishers have now.

The second group of people who may have a claim are others who undertake functionally similar tasks as news publishers. In other words, people who gather and distribute news in our society. Now, it is notorious that the Internet has made everyone – arguably – functionally equivalent in terms of news gathering and publishing to those who used to buy ink by the barrel. The barriers to entry to the news market have fallen. Given this, there is a claim by any citizen journalist or blogger who publishes news online to be treated the same way as news publishers.¹⁴⁵ If the text of any legislation

¹⁴⁴ Ibid., Mireille van Eechoud, session 4, transcript 67. See also text to n 209.

¹⁴⁵ It was argued earlier that individuals and networks of individuals are unlikely to be functionally equivalent to institutional commercial journalism. However, aspects of what individuals and networks of

omits these people, then – again – they may have a claim to equality of treatment under the law of the same type as is currently being advanced by news publishers.

A third group of people may also have a claim to inconsistency, but it's unlikely that they'll voice it. That is because the inconsistency that they face may be beneficial to them. The people in question are the broadcasters, who already are afforded rights under the Related Rights Directive. If the law is changed in such a way that those who publish news are benefitted, then there is a risk that they'll receive two sets of benefits – both under the Related Rights Directive as broadcasters, and when they publish news as news publishers. Is that a defensible situation? It's unlikely that it is, and if it is not we will have created a new inconsistency – one group of people benefitting twice – from our attempt to resolve an old one.

It may be that with appropriate and subtle drafting, these problems – particularly the last one - can be avoided. But, however subtle the drafting, there is always a risk – a systemic risk from the nature of drafting laws that include some and exclude others – that resolving one consistency will create others. The upshot of this is that a claim of inconsistency is not by itself enough to justify establishing a publishers' right, and it also ceases to look like a simple argument.

The costs this will incur

The third problem with the equality of treatment argument is the fact that making the law consistent – assuming that it isn't consistent at the moment, and that it can be made consistent without creating other inconsistencies – will cause costs to be placed on others. This, of course, is a consideration that the Commission have recognised. They say:

The Commission will take into account the impact that introducing a new neighbouring right for publishers would have on all relevant stakeholders and ensure the coherence of any possible intervention with other EU policies.¹⁴⁶

One of the curiosities of the equality argument is that it does not, by itself, provide us with a reason why we should accept these costs. To understand why it might be appropriate for others to bear any costs created by a publishers' right, we have to examine other arguments beyond questions of equality. This makes the equality argument by itself deficient as a rationale for adopting a publishers' right.

Who might suffer these costs? There are at least three types of people whose interests should be considered. The first class is Internet operators who currently redistribute published news online. The second is individual users of the Internet. The third is society in general.

individuals do undoubtedly replicates some of the activities of news publishers, and it is on this that any claim would lie.

¹⁴⁶ European Commission, 'Commission seeks views on neighbouring rights and panorama exception in EU copyright'

Online operators

A specific example of the first type of person who will suffer costs is, of course, Google – whether in respect of their provision of search tools, or news tools. Indeed, imposing costs on Google and others who redistribute published news online is exactly one of the results of a publishers’ right is intended to bring about, as the incentive argument showed, and the free riding argument will show. But a publishers’ right is also likely to also affect media monitoring organisations, and other news aggregators. This was emphasised at the Amsterdam Conference by James Mackenzie, who runs a small media monitoring organisation called Cutbot.

We are not the target. Even if you get this through you would aim at Google; you would miss. They would close down Google News or they would take Spain out of it or take Belgium out of it and you would hit us and you would be putting small businesses out of work in a failed attempt to try and get big businesses who do behave unethically. [...] ¹⁴⁷

Leaving aside, for the moment, the question of whether the imposition of such costs are appropriate,¹⁴⁸ the point is that the interests and legitimate expectations of these online operators need to be taken into account, when considering whether to establish a publishers’ right.

Users of the web

The second group of people who may suffer from the introduction of a publishers’ right comprises ordinary users of the web.

One reason that users of the Web may suffer costs from a publishers’ right is if a publishers’ right placed a financial drag on hyperlinking or embedding to news content. This is a point on which Julia Reda has campaigned, as was mentioned earlier.¹⁴⁹ At the moment, generally speaking, after *Svensson*¹⁵⁰ and similar cases, there is frequently no such financial liability. But Reda and others are concerned that a publishers’ right would create financial obligation that would arise when news material was hyperlinked to, or embedded. Many would find this deeply problematic, as Professor Naughton said at the Amsterdam Conference.

There are some people in this discussion, although I hope nobody in this room, who actually thinks that we should do something about hyperlinking. If anybody thinks that the publishing industry will do anything about what has become one of

¹⁴⁷ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference, session 4, transcript 72

¹⁴⁸ This will be addressed in the text to n 159.

¹⁴⁹ Text before n 72.

¹⁵⁰ *Svensson v Retriever Sverige AB* C-466/12, [2014] Bus LR 259, [2014] ECDR 9

the most fundamental technologies of the whole world then I begin to wonder what these people are smoking. [...] ¹⁵¹

It was described earlier how both the publishers' website, publishersright.eu and the Commission have strongly asserted there is no intention to create a 'tax on hyperlinking'. But, be that as it may, it is difficult to assess whether there is any damaging effect on users of the web by a publishers' right, as predicted by Reda or in another way, on because we don't have a text to consider.

Even if a publishers' right has no effect on hyperlinking and the like, there are other ways in which it might have a detrimental impact on users of the web. It may deprive them of a benefit to which they have become accustomed because, for example, they have become used to services that would be curtailed by a publishers' right.. This was a point raised by the representative of the BEUC, the European consumers' association, at the Amsterdam Conference.

Of course, I'm not defending here Facebook or Google, you know, they have all these trade associations in Brussels so they can do the job, but we have to acknowledge that these have given the possibility for consumers to reach or creators also to reach their audiences in a greater way. ¹⁵²

The economist Bertin Martens provided a reason why this is so:

people go to aggregators because you get an overview of all the newspaper articles anywhere in the world or in your country, in your language or on your subject and that's where if you're more targeted research. So that is the main advantage of these news aggregators from a consumer perspective ¹⁵³

Society

The third class of people who may suffer a cost from providing a publishers' right, and so making the law consistent, is society in general. This is a less evident point, but society in general may suffer a cost if a publishers' right curtails beneficial activities. One concern is about suppressing innovation. Society may lose the possibility to benefit from something that does not exist yet, and could not develop if a publishers' right is created. This may seem somewhat remote, and indeed the notion was expressly challenged at the Amsterdam Conference by Andrew Hughes.

creating a connection between looser copyright laws and innovation is utterly ridiculous. I don't see any evidence and I don't think any of you can produce any evidence that relaxing copyright law creates innovation. All it does is encourage

¹⁵¹ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference, John Naughton, session 4, transcript 62

¹⁵² Ibid. Agustin Reyna, session 4, transcript 63

¹⁵³ Ibid., Bertin Martens, session 3, transcript 54

people to sit in bedrooms and play with taking other people's content and trying to resell it, that's not innovation and I think we should be clear in our heads about that.¹⁵⁴

But this is too strong a view. It's important to recognise it is at least plausible, and many think it has happened. Indeed the Hargreaves review was (in part at least) set up because of a concern that Google would not have been permitted to arise in the UK because copyright law would fetter this type of innovative use of content created by other people.¹⁵⁵ And there are extensive works that describe how loosening copyright can be a spur to innovation: either to those who are not motivated by profit, or who are motivated by profit in particular ways.¹⁵⁶

Andrew Hughes' assertion was challenged at the Amsterdam Conference, Marietje Schaake MEP, for example, responded:

Well I think exceptions for example are crucial for remixing just to give you an idea for access to culture, for digitising cultural heritage and making it available to the public and not only in Europe but globally. For scientific cooperation across borders, I think there are actually a lot of ways in which exceptions and more flexible copyright can help innovation but I understand that's a political discussion.¹⁵⁷

And James Mackenzie, provided an example of innovation being suppressed:

A few years ago I met the former founder of a start-up who sought to use software to scan newspaper articles and conduct sentiment analysis which is, for programmers here, a difficult field. So they didn't have a single customer. They weren't sure how they were going to monetise this. They were a university spin-off, but from day one they were required to pay a licence for the articles that their software was looking at; a licence that obviously had no revenue. They had a very small amount of money and this requirement put them out of business. So it might have been a great business; it might have been a terrible business, but because the law has treated those unpublished server site copies as potentially infringing we'll never know. [...] Neither of these rights would undermine the business of publishing, nor would they prevent new media from entering the media market. There's no substitute here for the necessary work being done by journalists, but they might lead to the kind of flowering of sophisticated analytical

¹⁵⁴ Ibid., Andrew Hughes, session 3, transcript 57

¹⁵⁵ BBC, 'UK copyright laws to be reviewed, announces Cameron' (BBC 2010) <<http://www.bbc.co.uk/news/uk-politics-11695416>> accessed 14 June 2016

¹⁵⁶ Examples include L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury Academic, London 2008) Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, and Patry

¹⁵⁷ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Marietje Schaake, session 3, transcript 59

businesses that we so rarely see in the European Union. It's not a coincidence that innovation happens elsewhere.¹⁵⁸

The publishers' response

Now it may well be that the costs of the sort described here should be borne by the various people described. Google, for example, may be free riding on news publishers' effort, and so may be is appropriate to impose costs on them. And the costs on users of the web might be justified, because if they continue to enjoy a free aggregated news service, the funding that generates the news itself may dry up and the production of news grind to a halt. There is much force in Andrew Hughes' observation to the Amsterdam Conference that:

[y]ou can say at this moment in time consumers are benefiting; infinite demand for a free good, is what I remember from my economics, but I don't think you can impute from that, that that's an acceptable or a sustainable position and I don't think what you're suggesting there really is sustainable. [...] ¹⁵⁹

It may also be appropriate to prevent innovative use of publishers' content, because such use is immoral in some way, amount to free riding, or breaches publishers' natural rights. And there may be other reasons it is appropriate that a publishers' right imposes the costs described here.

But in a way, these arguments establish the point at issue. That is that the equality argument can only amount to a small, contributory case for the establishment of a publishers' right. Other considerations need to be taken into account, beyond a claim of inconsistency, before a publisher's right can be justified. For, as we have seen, when evaluating the appropriateness of any costs imposed on others by a publishers' right, it will be necessary to look beyond the mere claim of inconsistency to see if they are appropriate.

Conclusion

The equality argument seems simple, but this is deceptive. It may, perhaps, be true that news publishers are not afforded neighbouring rights, while other entrepreneurial content producers are, and that this appears inconsistent. But before this can amount to a reason to bring in a new neighbouring right for news publishers, a variety of complex judgments need to be made. What, in detail, will a new right entail; what were the reasons that the old rights were afforded; do those reasons pertain now; are they sufficient to support providing news publishers with rights?

Moreover, other questions need to be answered, that are raised by the equality argument: what other inconsistencies might be created by establishing a news publishers' right, and can these be defended, given the fact that we wish to pass a publishers' right to avoid

¹⁵⁸ Ibid. James Mackenzie, session 4, transcript 65

¹⁵⁹ Ibid., Andrew Hughes, session 4, transcript 69

inconsistencies? And, finally, and importantly, the question arises of the costs that a publishers' right may impose on others. What will these be, and how can they be justified? Any justificatory argument will have to look beyond the fact that publishers are currently treated in an unequal way. Hence, the equality argument is not, by itself, sufficient reason to establish a publishers' right.

4 Free riders – ‘reaping where they have not sown’

The third argument that emerged from our research, as a rationale for a publishers’ right, is the free riding argument. This is the argument that online redistributors of news benefit from the effort of news publishers without paying for it, or providing sufficient other compensation.

This is an argument that is susceptible to empirical proof, as economic studies can reveal whether or not there is unrecompensed benefit, and so whether or not a publishers’ right is indicated. However, such evidence seems to be at the moment equivocal, and there are reasons to suspect that it will continue to be so. This is partly because online redistribution of news affects different publishers in different ways. Better-known publishers may suffer from free riding, while smaller publishers may benefit from having their brands promoted. It is also because re-distributors of news may be building new markets, rather than free-riding in older established ones.

This, therefore, is an area that would benefit from more primary research, and perhaps a meta-study, that distinguishes the different interests of different publishers, and pays regard to the new market argument.

The argument

The benefit that online redistributors may receive from published news may be direct, as is the case with commercial media monitoring organisations, clipping services, or news aggregators, who collate published news and sell it to clients. Or, alternatively, it may also be direct where a social media service attracts the attention of the audience by presenting published news, and then sells this attention on to advertisers, or advertising brokers. An indirect benefit may arise where an online service bolsters its brand by redistributing news, or by gains goodwill from doing so, without directly selling advertising against it.

In each case the actions of the online redistributors of news is free riding, publishers argue, and is wrong and something the law should restrict: this could be achieved by a publishers’ right.

The publishersrights.eu website explains the point in a way that brings to the fore the risk of diverted sales and subscription revenue, lost to news publishers:

Whilst the significant role of the press has not changed, the way in which press publishers’ content is created and distributed is vastly different from the pre-digital era. In a purely analogue world no third party has been free-riding on publishers’ services during the regular marketing period of the daily, weekly or even monthly press. But in the digital world, the online press in particular runs the risk of, and often is, partially or completely taken over by a third party in seconds

and exploited and marketed in a variety of ways, without any remuneration to the rightholders.¹⁶⁰

At the Amsterdam Conference, Andrew Hughes emphasised the concern extends to the diversion of advertising revenue:

What they do, in Google's case, is take everybody else's content and index it and create a utility based on that. In Facebook's case they encourage everybody, including me, to create a lot of content and in doing that they also gather a tremendous amount of very interesting information about the individuals using it and a huge amount of traffic. That makes them phenomenally powerful as an advertising resource. [...] bear in mind what the business model of news is; it's about gathering enough readers together and selling them something, which is news, and then selling advertising to those readers. The issue for newspapers and the issue that any change to copyright law has to be put in the context of is that their ability to sell that advertising is declining and declining very rapidly¹⁶¹

There is a close relationship between the free riding argument and the other arguments explored in this paper. So, for example, it may be that as the incentive argument claims, an incentive is needed to produce news because the free riding of online redistributors redirects revenue away from news publishers. And the argument is also linked to the natural rights argument, which will be considered in the next section. This, it will be seen, suggests that a publisher might be able to own and control published news in some way. If so, then those who use 'owned' published news without sufficient recompense are probably freeriding.

However, the arguments are distinguishable. In the case of the natural rights argument, it's important to describe how, as the two are closely connected. The distinction arises because one doesn't have to agree with the natural rights argument that news is property, for the free riding argument to be viable. There are serious difficulties with the notion that news should be considered property, but even if news should not be seen as property, third parties may be free riding on acts news publishers.

This is recognised in much traditional copyright doctrine.¹⁶² So, for example, while declining to consider news property, North J in the 1892 English case of *Walter v Steinkopff* still found there to have been free riding.

In the present case what the Defendants have had recourse to is not a mental operation involving thought and labour and producing some original result, but a

¹⁶⁰ European Publishers Council and others, (accessed

¹⁶¹ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference, Andrew Hughes, session 1, transcript 10

¹⁶² See also the American Supreme Court case of *International News Service v Associated Press* 248 US 215 (1918), which is discussed in the text to n 190.

mechanical operation with scissors and paste, without the slightest pretension to an original result of any kind; it is a mere production of ‘copy’ without trouble or cost. [...] For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the Plaintiffs in procuring news for the purpose of saving labour and expense to themselves.¹⁶³

Counter arguments

What can be said against the free riding argument? Our research highlighted two main challenges, both of which concentrate on the assertion that any actions by online redistributors of news actually amounts to free riding. The first argues that online redistributors of news actually promote news publishers’ content, rather than free ride on it; and second that online redistributors of news are actually creating a new market, rather than free riding in an old market.¹⁶⁴

Promotion or substitution?

The first challenge, then, is whether it is in fact true to say that there is free riding. Online redistributors of news argue that they promote the activities of news producers, rather than free ride on them. Publishers, evidently, reject these claims. One senior opinion-former interviewed for our research framed the issue in this way. Aggregators may, they said, promote news publishers’ interests in part, by bringing published news to the attention of a much larger group of people than publishers themselves can. But, on the other hand, it’s a common sense that people in a hurry may read any headlines generated by news publishers, and snippets of text on a mobile device, and not click through to visit the publishers’ sites. Publishers are thereby deprived of the attention of an audience – which, as can be discussed, can be sold to advertisers. The opinion former said that they’d heard the promotion argument before. It is used by anyone who wants to use someone else’s content without paying, and was used by the broadcasters about music in the 1950s. But broadcasting didn’t promote music, it substituted it.

The question of whether there is promotion or substitution can be addressed by empirical economic research. There has been a considerable amount of work done on this subject, some of which was discussed in the third session at the Amsterdam Conference.¹⁶⁵ But a problem with the empirical evidence is that it may be equivocal, as some studies support the idea that there is promotion and some substitution.

¹⁶³ *Walter v Steinkopff* [1892] 3 Ch 489–495. See also another historic UK news and copyright case, *Walter v Lane* [1899] 2 Ch 749. ‘I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill, and capital of another’, per Lord Halsbury, 545.

¹⁶⁴ As is the case with most of the arguments addressed in this paper, this is an incomplete survey, as there are other challenges that can be made. It can be asserted, for example, that free riding is not wrong, that it is not something the law should seek to restrict, or that even if it is wrong and should be restricted, a publishers’ right is not an effective way of restricting such action.

¹⁶⁵ Centre for Intellectual Property and Information Law University of Cambridge, ‘CIPIL/IViR Conference Bertin Martens.

Substitution

It is not surprising that publishers rely on studies that show that there is substitution. Some have shown that even if Google is driving some traffic, many more Google visitors do not click through to the source sites. Some show that though Google is driving some traffic to newspapers, 44% of Google visitors do not visit the original newspaper sites).¹⁶⁶ And others note that even if clicks are being driven to publishers' sites, that does not translate into much revenue. Andrew Hughes said at the Amsterdam Conference:

One of the things that I've found frustrating at times is being told by people, "Oh, we should be allowed to do this because we're sending clicks to your website and these are tremendously valuable and they will change the future of your business". Well, you might believe that, and a number of newspapers might have strategies based on that. I, personally, as a business person, broadly don't believe that to be true and, actually, the fact that they're now running into this brick wall of ad blocking, which is the big new topic in the industry. They think in some segments, particular younger populations in Europe, up to 50 percent are using ad blockers now. The idea that that traffic on freely supplied content is going to employ the journalists that you need to uncover slavery in the south Pacific or do some of the other great things that news organisations have done is, I think, slightly specious.¹⁶⁷

The point here is that even if there is some promotion, it is not sufficient for the news industry to be viable in the longer term. This, publishers have argued, is galling because online distributors – and in particular Google – benefit disproportionately. A German newspaper publishers' spokesman put this argument succinctly, when he said: 'the problem is that Google earns billions, and we earn nothing'.¹⁶⁸ And the point has been echoed by American commentators: 'it is a point of ironic injustice, perhaps, that when a reader surfs the Web in search of political news he frequently ends up at a site that is merely aggregating journalistic work that originated in a newspaper, but that fact is not likely to save any newspaper jobs or increase papers' stock valuation'.¹⁶⁹

Promotion

Those arguing against a publishers' right rely on studies that show that digital redistributors promote news publishers websites. Xalabarder quotes a study that indicated

¹⁶⁶ Cited in R Xalabarder, 'Google News and Copyright' in A Lopez-Tarruella (ed) *Google and the Law* (T.M.C. Asser Press, The Hague 2012), footnote 179

¹⁶⁷ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IVI Conference Andrew Hughes, transcript 10.

¹⁶⁸ E Pfanner, 'An Antitrust Complaint for Google in Germany' *New York Times* (18 January 2010) <http://www.nytimes.com/2010/01/19/technology/19antitrust.html?_r=0> accessed 14 June 2016. Cited in R Xalabarder, 'Google News and Copyright' in A Lopez-Tarruella (ed) *Google and the Law* (T.M.C. Asser Press, The Hague 2012)

¹⁶⁹ R McChesney and V Pickard, *Will the Last Reporter Turn Out the Lights: The Collapse of Journalism and What Can be Done to Fix it* (New Press, New York 2011)

that Google news sends one billion clicks a month to newspapers' sites,¹⁷⁰ and that when extracts are reproduced, this sends more traffic than when headlines are reproduced.¹⁷¹ Other studies have been undertaken that replicate these findings.

One of the more interesting was undertaken in Spain, after the Spanish law sought to make aggregation an activity that was regulated by copyright. This meant that Spain provided a natural experiment, in that it allowed economists to study what the effect was of stopping aggregation. The research was undertaken by Nera, the economic consultancy, at the request of an association of small Spanish publishers, the Asociación Española de Publicaciones Periódicas (AEEPP).¹⁷² The Nera study showed that publishers saw traffic to their sites fall after the Spanish law was enacted, and so their ad revenue also fell. Clearly this study supports the view that in these circumstances at least, aggregators promoted, rather than substituted.

Commenting on this study at the Amsterdam Conference, the economist Bertin Martens concluded that: 'what we know from this empirical evidence is that the impact of dropping Google news aggregation is actually negative for newspapers'. He said that this 'leaves a puzzling question for an economist, why would newspapers want to do this or have this change in the law, have this neighbouring right when it doesn't bring them any benefits'. Moreover, he said:

What the study also showed is that indeed users, rather than going through the Google News aggregator that did not longer operate in Spain, went back to the old search engine, Google search and that way found their newspaper articles. But for me as an economist this is possibly the worst of all possible solutions in the sense that the newspapers lose in terms of traffic and ad revenue and consumers lose because it sets them back five years in time in access to internet [day? 00:15:42] services.¹⁷³

And Agustin Reyna, of BEUC – the European Consumers' Association – was also acute to the interests of consumers:

Of course, nobody should be making money out of the work or the effort that somebody has put without sharing, you know, a piece of the gain, but I think that it's also leading to the interesting discussion there was before with snippets, you know. It's the fact that these aggregations cannot be considered as a substitute of the news piece as such because, nevertheless, if you are a user you go to the news

¹⁷⁰ European Publishers Council and others, (accessed

¹⁷¹ Xalabarder, 'Google News and Copyright' footnote 181, Citing a Google study saying Google News sends a billion clicks a month to newspapers' sites.

¹⁷² Association of Publishers of Periodical Publications. Nera Economic Consulting, 'Impact of the New Article 32.2 of the Spanish Intellectual Property Act' (Nera, 2015) 43.

¹⁷³ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference', Bertin Martens, session 3, transcript 41

aggregator and you would go, if you're interested on the topic or you're interested on the title with something that draws your attention, then you will go, then you go and look for the whole piece.¹⁷⁴

On the basis of research like this, it was not surprising that James Mackenzie, of the small aggregator Cutbot, observed:

We and Google create revenue for papers. We send clicks their way. In the case of Google vast numbers. In the case of us, tiny numbers. But if newspapers aren't making money from those extra clicks they need to work out how to improve their business model rather than blaming us for decisions that are taken elsewhere and changes that have happened in other parts of the industry.¹⁷⁵

Publishers have different interests

One important point can be drawn from Nera's Spanish study that helps clarify one issue. This study found, as was mentioned earlier, that stopping aggregation resulted in a lowering of traffic and hence revenue for publishers. But the interesting fact was that there were differences between publishers in the extent to which traffic fell. The Asociación de Editores de Diarios Españoles¹⁷⁶ (AEDE), a group representing larger publishers, that had lobbied for the law to be brought into force, reported that their traffic was down by 2%. But traffic to less well-known news publishers fell more, and some sites saw a reduction of traffic of up to 12%.¹⁷⁷ The Nera study concluded that:

the reform followed the interests of a particular group of publishers which, given the deterioration of their business, sought to obtain an additional source of income from one of the Internet giants, even to the detriment of other publishers, to the development of the online news production and aggregation sectors in Spain and, ultimately, to consumers (including advertisers) and to social welfare.¹⁷⁸

Smaller publishers may have suffered more than larger publishers may because their brands are less well-known. That means they are less likely to be found through search on a search engine, and are more likely to be found accidentally through a news aggregator, or by other online redistributors. Bertin Martens expanded on this point to the Amsterdam Conference:

¹⁷⁴ Ibid. Agustin Reyna, session 4, transcript 70

¹⁷⁵ Ibid. James Mckenzie, session 4, transcript 65

¹⁷⁶ Association of Editors of Spanish Dailies

¹⁷⁷ telecompaper, 'Spanish News Sites Down up to 12% after Google News closure' *telecompaper* (30 January 2015) <<http://www.telecompaper.com/news/spanish-news-sites-down-up-to-12-after-google-news-closure--1062419>> accessed 13 January 2016

¹⁷⁸ Nera Economic Consulting(), viii

What happens is that let's say the middle of the road, provincial or national newspaper that produces a bit of everything but is not very specialised in anything can lose out from these aggregators. But the more high end newspapers, the quality newspapers or the more long tail newspapers that specialise in a particular topic and people who really want to read that newspaper because they're interested in that topic, they don't lose out, they gain a lot of traffic from these news aggregators. It depends as a newspaper on where you are in that spectrum. We've seen these superstar versus long tail mechanisms in many other media industries. Search engines put a lot of pressure on the middle ground but increased the superstar effect and increase the long tail effect.¹⁷⁹

This is important. It demonstrates that all news publishers are not affected equally by actions by an online re-distributor of news. For larger publishers, aggregation may amount to free riding, and as when people consume news from the aggregator, the aggregator becomes a substitute for the sites of news publishers. But for smaller, less well-known brands, the actions of online re-distributor may well amount to promotion.

It is likely, therefore, that there will not be a simple answer to the question 'do online aggregators promote or substitute?' Publishers are affected in different ways by online re-distributors of news. If this is not recognized, there is a serious risk that unsophisticated studies that show online redistributors of news generally amount to substitution, and so a publishers' right is appropriate, will result in the market being skewed in favour of larger players. This is a serious problem, as it would damage media plurality and diversity.

Who bears the burden of proof?

The empirical evidence, therefore, seems equivocal. Clearly this is an area which would benefit from more studies, either primary economic research, or a dispassionate meta-study that summarises and compares the research that has taken place.

However, in the absence of this, a question that becomes important is who should bear the burden of establishing the facts in issue? This is important as in the absence of clear evidence, we do not know whether or not there is free riding. Consequently, we do not know whether a publishers' right is appropriate. Should publishers have the burden of showing that their product is being substituted before a publishers' right can be accepted as legitimate? Or should the starting point be to assume that there is substitution and consequently a publishers' right is indicated, unless online re-distributors of news can establish that their actions are actually promotion.

A senior figure we spoke to in our research was firmly of the view that it is for online news redistributors to prove that their actions are not free riding. They said that it was up to those who argue there is no free riding to provide empirical arguments to show that this is the case. But this person didn't provide reasons to back up such an assertion, and it

¹⁷⁹ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference session 3 transcript 44.

could equally be argued that it is up to those who assert that there is free riding, to provide empirical evidence to support their position.

But such reasons can be found. If the starting point is that, as the Commission say in the December Communication, ‘the basic principle of copyright that acts of exploitation need to be authorised and remunerated’,¹⁸⁰ then it should be up to those agents who seek to depart from the basic principle to prove their case. In this debate, therefore, the onus falls on those who redistribute news, rather than those who publish it. Another way of arriving at the same conclusion is to observe that it seems fair to ask those who claim that their actions do indeed sufficiently remunerate rights holders, to show that this is the case. It is the online news redistributors who are the disruptive force, and it makes sense that the burden should be on them to explain why the change they are bringing about is beneficial.

Whether they have demonstrated that this is so, or not, is beyond the expertise of this paper, given the lack of clarity in the empirical research. But this is clearly an area that would need to be explored before a publishers’ right is brought into force. If they have not, and until they do, then on balance (and subject to the concerns about there being differences in the interests between publishers) a publishers’ right is supported by the free riding argument.

A new commercial activity?

There is a second argument against the charge of free riding. This is the suggestion that the new online redistributors of news are not free riding, because they are creating a new product or service. They are transforming news publishers’ product. If this is so, the argument that they are free riding becomes weaker, as it can be met with the counter-argument that the activity that is being undertaken is not one that it is appropriate for any publishers’ right to restrict. James Mackenzie advanced this case at the Amsterdam Conference:

we’re not using your content in that way. We’re not republishing it. What we do with it, I believe, is entirely outwith copyright, should be outwith copyright. You ask how your businesses and their staff should get a fair amount of money from our business. I think the fair amount of money that you should get from our business is zero. You don’t contribute to our indexing; to our analysis; to our email server building; to any of the work that we actually do. The work we do is not the duplication of the articles, it’s the smart searching which is what people pay for. They pay for the news coming in, in a... Their company was mentioned in the ‘South China Post’ which they would never have noticed and then we drive a little bit of traffic to the ‘South China Post’. So, we cost you nothing and we bring you revenue. If there’s a financial transaction which should go on here you should be paying this.¹⁸¹

¹⁸⁰ Text to n 40.

¹⁸¹ Centre for Intellectual Property and Information Law University of Cambridge, ‘CIPIL/IViR Conference James Mackenzie, session 4, transcript 71

This argument has found favour in some of the courts in Member States: in the German *Paperboy* action, for example. Xalabarder's analysis on this is valuable, and is worth quoting at a little length.¹⁸²

In the “Paperboy” decision, the German Federal Supreme Court concluded against any finding of unfair competition taking into account the fact that this service offered considerable added value in terms of providing access to information. It is undeniable that search engines (and also news search engines) offer considerable added value and are not competing with the copyright owners' businesses; whether or not the same may be said about the news aggregation sites is more disputed. This leads us to another paramount question: whether news aggregators are in direct competition with the copyright owners or instead are they acting in different markets?

Ultimately, this question may touch on the scope and goal of the exclusive rights granted by the law: can copyright be exercised in a manner that avoids (directly or indirectly) the development of new markets? Usually, the exercise of copyright will not result in obstructing a whole new market (rather, it commonly affects the development of different means of exploitation within the same market); but when it does, competition law may intervene and force owners to grant a license - thus, de facto reducing the scope of their exclusive rights.

Following the ECJ's “Magill”¹⁸³ essential facilities doctrine, when the copyright holder with a dominant market position on one market competes with other parties on a second market where the use of the copyrighted contents is necessary in order to build a position in (hence, an “essential facility”), a refusal to license these essential facilities to the competitor/s is considered to be unfair exercise of a dominant market position (this includes where the user depends on entering into an agreement with each of the several entities sharing the dominant market position, i.e., the copyrighted contents)

If we accept that news aggregation amounts to a different market from the production and first distribution of news, then news works could be deemed an essential facility and copyright owners (newspapers, broadcasters and news agencies) be forced to license aggregators (as incumbents in the new market).

Whether we do accept this, of course, is a contentious point. This is territory in which that the doctrines of competition law can help, and so this is a question to which there is a legal answer. This work ought to be undertaken – and it should be established that news aggregation and the like is not a new market – before one can conclude that the free riding argument for a publishers' right is appropriate.

¹⁸² Xalabarder, 'Google News and Copyright', 161

¹⁸³ ECJ Judgement of 6 April 1995, C-241/91 and C-242/92, “Radio Telfis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Community”.

Conclusion

The free riding argument for a publishers' right is based on the assertion that online re-distributors of news are deriving an illegitimate benefit from the actions of news producers: they are, to quote the nineteenth century English judge North J, reaping where they have not sown. Whether this is the case or not is an issue susceptible to empirical proof, but it appears that this has not yet been unequivocal.

What should one do in the absence of an unequivocal answer? It is the disruptors, the online re-distributors of news, who bear the burden of proving their actions amount to promotion rather than substitution. If they are unable to do so, then a publishers' right may be appropriate under the free riding argument.

However, there are some caveats to this conclusion. One is that online redistribution of news may be a different market, and that would undermine the argument that a publishers' right would be appropriate. Another is that what the evidence does show, is that there are differences between the interests of various publishers, and this may result in different answers in respect of different publishers. This means there is an inherent risk that a publishers' right may skew the market in favour of larger players. This is a significant concern, particularly for those who value media plurality and diversity.

It is not clear, therefore, that the free riding argument provides a compelling case for a publishers' right, without further evidence.

One final point is worth emphasising. This is that even if the empirical evidence establishes that there is promotion, not substitution, this may not be the end of the matter. This is because beyond the economic argument, there is an ethical argument that engages issues of fairness. It might still be fair and right for there to be a publishers' right, even though online redistributors of news promote news publishers.

These are issues that economics is ill-equipped to deal with. As Bertin Martens said:

I understand that the newspapers want to get a fairer share of the advertising revenue that the platforms get from this business, but as an economist and I think for most economists of the word fairness or the lack of it, unfairness, is a concept we have a hard time to deal with.¹⁸⁴

But the fact that economists have a hard time dealing with issues of fairness is not a sufficient reason not to explore such arguments. It only means that the answers to the dilemmas they raise are not to be found in empirical economic research. This brings us to the last argument for a publishers' right, as this is based – amongst other things – on ethical considerations.

¹⁸⁴ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Bertin Martens, session 3, transcript 42

5 Natural rights argument – news, coal, and cabbages

The last argument for a publishers' right that emerged from our research is the natural rights argument for a publishers' right. This does *prima facie* support a publishers' right, though a very limited one, not least because there are very significant policy dangers in permitting any increase in the private control of information that would result from it.

The argument

The central idea of the natural rights argument is that significant amounts of labour, skill and judgment are involved in the production of items of news and published collections of news – in its sourcing, verifying, selecting, writing or producing, compiling, publishing and distribution.¹⁸⁵ The expenditure of such effort should *prima facie* merit protection, the publishersright.eu website claims:

Given the huge investment and resources required to produce professional press and other published content, it is only natural that press publishers should enjoy the same rights as producers from other creative industries, as regards reproduction and communication to the public (as set out in Articles 2 and 3 (2) of the InfoSoc Directive 2001/29/EC), as well as a distribution right (as set out in Article 9 (1) of Directive 2006/115/EC).¹⁸⁶

But the argument is not only based on labour, skill and judgment. For, as was described earlier, publishers argue that creative choices are made in assembling a published news product, which is not a mere compilation of facts.¹⁸⁷ As one interviewee emphasised in our research, 'there is more to putting a news publication together than making a telephone directory'. This is because a key aspect of news publishing is that it occurs in a vigorous market for attention, and the creative choices of news publishers are not marginal, they are central, to the activity of publishing news in such a context. There is a need to exercise skill and creative judgment in selecting, editing, and producing news to attract and retain an audience, and build a brand.

One way of conceiving of a published news brand is as a collective personality, and creative choices are involved in establishing how it should express itself. This leads some almost see news publishers as stepping into the shoes of authors. For example, at the Amsterdam Conference, Professor Dr Hegemann argued:

The question is – and I'm now looking to the author – how can we make it possible that the author gets a reasonable share of the revenues that a third person

¹⁸⁵ A useful account of the different elements of the process of news production in various different sectors of journalism can be found in Mediatique, 'The Provision and Consumption of Online News - Current and Future'

¹⁸⁶ European Publishers Council and others, (accessed

¹⁸⁷ Text to n 136.

makes on its contents that he produced? If they answer this question then the news publishers come in with, as I'm convinced, a very reasonable claim to say the author would not find its public without our creative work; with our financial impact; our organisational impact; with what we do when putting together a group of journalists as a 'redaktion' as we call it in Germany [...] That's the reasoning behind that, at least in the German discussion, the news publishers say, well, if here is a product that is the result of some creative doing we are in the position that even us, the news publishers, should also be entitled to take a reasonable share, whatever reasonable be, in the revenues third parties in the triangle make¹⁸⁸

Given the involvement of labour, skill, judgment, and the creative choices in publishing news and collections of news, publishers argue that copyright-like protection is appropriate. This can be established through a publishers' right.

The strong version

There can be stronger and weaker versions of the natural rights argument. A strong version asserts that taking news without authority amounts to theft, as Rupert Murdoch has claimed:

Producing journalism is expensive. We invest tremendous resources in our project from technology to our salaries. To aggregate stories is not fair use. To be impolite, it is theft. Without us, the aggregators would have blank slides. Right now content producers have all the costs, and the aggregators enjoy [the benefits].¹⁸⁹

Inherent in this variant of the argument is the notion of control, as one interviewee observed in our research:

In my view copyright is more of a moral and ethical issue. Popper and Hayek are relevant. If copyright means anything it means if you make it you have the right to choose who else copies it - especially commercially. That's why many publishers (and authors) object so deeply to Facebook, Google et al presuming the right to do as they please with others content.

The weaker version

There are also weaker versions of the natural rights argument. One rejects the notion that news is property and taking of it is theft, but recognises that news publishers should be able to control the news they publish, in limited circumstances. This was the position adopted by Pitney J in the famous case US Supreme Court case of *International News*

¹⁸⁸ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Jan Hegemann, session 4, transcript 68

¹⁸⁹ Rupert Murdoch, Chairman and Chief Executive of News Corporation December 1, 2009 Source: <http://www.guardian.co.uk/media/2009/dec/01/rupert-murdoch-no-free-news>. Cited in R Xalabarder, 'Google News and Copyright' in A Lopez-Tarruella (ed) *Google and the Law* (T.M.C. Asser Press, The Hague 2012)

Service v Associated Press, which established the US doctrine of hot news misappropriation.

And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.¹⁹⁰

The natural rights argument can stand even if other arguments for a publishers' right fail. So, it might amount to a convincing reason for a publishers' right even if (say) the incentive argument was rebutted by the fact that insignificant revenue would be raised from a publishers' right, or the equality argument was rebutted by the fact that there was no true inequality. The strong natural rights argument might still, under these circumstances, be a reason to adopt a publishers' right, on the grounds that publishers ought to have a right to control what happens to the news they publish, as a question of first principle. This is an ethical point: just as others can control what they produce from the sweat of their brows, so news producers should be able to control the news they produce.

Counter arguments

Is it convincing? Up to a point, yes. The skill and labour aspects of the argument may seem inappropriate in relation to reporting patent facts, but are clearly relevant in other circumstances. An example of this is where investigative work is involved. The natural rights argument fits very well here, as labour, skill and judgment is required to gather information in the first place, as well as to assess and formulate in a way that is attractive to an audience, and to resist the common legal pressures that arise from those who want to prevent publication.

But, even where the subject matter relates to basic patent facts, the argument is still persuasive. Significant skill, labour and judgment is still required to put such facts in context, evaluate them, and work out how to effectively communicate the information and gain an audience's attention by arranging them with others, while contributing to the development of the news brand. Hence, as both situations involve creative acts and creative choices, the natural rights argument for a publishers' right is *prima facie* a convincing one.

¹⁹⁰ *International News Service v Associated Press*

That said, there remain cogent reasons why policy makers need to be wary about the prospect of a publishers' right that derive from natural rights arguments.¹⁹¹

The unattractive idea of news as property

The first reason is because the natural rights argument for a publishers' right is associated with the notion that news is a sort of property, and many liberal democratic societies have been very wary of this idea.

This can be seen after considering a little history. The natural rights argument for a news copyright-related law is not new. Tworek notes that 'from the 1880s onwards, news procurers attempted to combine Locke's labour theory with the cost of collecting news, hoping to create an indivisible association between protection of labour and the protection of financial outlay'.¹⁹² These notions were evident in, for example, a leader in *The Times* published in 1899:

The principle is that when a newspaper has expended labour, forethought, and money in producing something which the public want to read, it ought to have the same rights of property in its production that are enjoyed by those who uses [sic] brains and capital in producing other articles having commercial value...¹⁹³

Such arguments were still prevalent in 1936, when Sir Roderick Jones, the Managing Director of Reuters tried to persuade a League of Nations conference to grant news protection under the International Convention for the Protection of Industrial Property. He argued that 'news is as much an article of property as coal, or cabbages, or diamond'.¹⁹⁴

But these arguments failed to result in international treaties of copyright protection or industrial property. The reasons for this are essentially the reasons why one should be wary of a publishers' right today. They are diverse, as Professor Hugenholtz noted at the Amsterdam Conference:

in copyright all Berne union states and that's about 168 states including all the states that we consider civilised and a lot of uncivilised as well, are under an

¹⁹¹ This is leaving aside the cogent arguments that can be made against natural rights theories in general as a means of justifying intellectual property. These are briefly indicated in Bently and Sherman 36-37.

¹⁹² Tworek 196

¹⁹³ *The Times* 11 August 1899. Cited in J Bellido and K Bowrey, 'From an Author's to a Proprietor's Right: Newspaper Copyright & The Times (1842-1956)' (2014) *Journal of Media Law*, 6 (2) 206. An earlier editor had a different view, when he wrote that the purpose of the *Times* was 'to obtain the earliest and most correct intelligence of the time and instantly, by disclosing them, to make them the common property of the nation'. Hargreaves 15

¹⁹⁴ Tworek 213

obligation not to protect news of the day under copyright. There are a number of reasons for not doing this: ideological, systemic, conceptual.¹⁹⁵

News is a democratic good

One reason engages the notion explored earlier in this paper of how integral commercial news is to the healthy functioning of a democratic state. News is part of the lifeblood of an informed, participatory democracy.¹⁹⁶ Indeed, if publishers seek to rely on this fact as a reason for them to be treated in a way distinct from general publishers, then they need to recognise that the close connection between news and democracy militates against the natural rights argument for a publishers' right.

One central reason this is so, is that permitting news to be owned as property, or governed by a publishers' right, risks imposing too much control over a very important commodity. This risk is a motivating factor behind particular provisions in various fields of law. One example can be found in the sector specific media merger regulations that exist in many countries to prevent concentrations of media ownership.¹⁹⁷ These are designed to ensure media plurality and diversity. They exist, in part at least, to limit undue concentrations of power arising from excessive control of the flow of information. There is a risk, as a publishers' right would increase the copyright-like protection of news, that it would increase some political risks in democratic societies that other fields of law have been designed to reduce.

One way of demonstrating this is to look at some features of historic and contemporary international copyright law relating to news. These can be interpreted as a manifestation of the view that news is a special case. We can start, as Xalabarder notes, with the Berne Convention.

At the end of the nineteenth Century, the protection of news articles under copyright was very limited and contested. In fact, Article 7 of the original Act of the Berne Convention (1886) expressly stated that newspaper and magazine articles published in any Berne Union country could be reproduced, in the original language or in translation, unless the authors or editors had expressly reserved so.¹⁹⁸

This article no longer represents the law, but the current Berne Convention contains provisions that are a legacy of this view. Article 2(8), for example, provides: '[t]he protection of the Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.' And it is also apparent in article

¹⁹⁵ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Bernt Hugenholtz, session 3, transcript 45

¹⁹⁶ Text to nn 8, 44, 91.

¹⁹⁷ Comparative studies are found in Hitchens and chapter 7 of T Gibbons and P Humphreys, *Audiovisual Regularion under Pressure* (Routledge, Oxford 2012) provides a critique of the EU's approach.

¹⁹⁸ Xalabarder, 'Google News and Copyright'

10bis(1), which says that articles published in newspapers or periodicals as well as broadcasts on current economic, political or religious topics may be reproduced by the press as well as broadcasted and communicated to the public, provided that such uses have not been expressly reserved. Arguably, it is also present in the current article 10 of the Berne Convention, the sole mandatory exception to copyright in the convention. This provides:

It shall be permissible to make quotations from a work which has already been lawfully available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.¹⁹⁹

The wariness of affording copyright protection to news is also evident in the history of many national copyright doctrines. Bently, for example, describes the ambiguity in the 19th century as to whether copyright protected news.²⁰⁰ This was manifest in a series of cases that culminated in the recognition of the distinction between ideas, which copyright does not protect, and expression that it does.²⁰¹ This can be seen as an attempt to strike a balance between the interests of rights owners and the interests of the public in free-flowing news.

This balance has been baked in to areas of copyright law. The idea/expression dichotomy just described is one, and others include the various exceptions that exist in relation to news reporting and press clippings. These can, no doubt, be seen by publishers as a bug – a failure – of copyright and related doctrine, which impede their ability to control ‘their’ news. But it is better to see these doctrines as being deliberately constructed, a feature of copyright, present to try to strike an appropriate balance between ownership, arguments for natural rights, and the free flowing of information in a democracy.²⁰²

This does not mean that the natural rights argument has no merit. But it does mean that there are cogent reasons – evidenced in the structure and history of copyright law - to be

¹⁹⁹ For a fuller study of the relationship between the iterations of the Berne Convention and news, see S Ricketson and J Ginsburg, 'Intellectual Property in News? Why Not?' in S Ricketson and M Richardson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar (Forthcoming))

²⁰⁰ L Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004) 38 *Loyola of Los Angeles Law Review* 71, L Bently, 'The Electric Telegraph, and the Struggle over Copyright in News in Australia, Great Britain and India' in B Sherman and L Wiseman (eds), *Copyright and the Challenge of the New* (Wolters Kluwer, Alphen aan den Rijn, The Netherlands 2012).

²⁰¹ *Walter v Steinkopff*

²⁰² RP Merges, *Justifying intellectual property* (Harvard University Press, Cambridge, Mass. ; London 2011), 19. The argument that this ‘baking in’ is enough - that it pays sufficient regard to the interests of free speech (of which free flowing information is an element) - has been widely criticized, for example, in relation to UK law and article 10 of the European Convention on Human Rights, J Griffiths, 'Copyright law after Ashdown - time to Deal Fairly with the Public' [2002, 3] *Intellectual Property Quarterly* 240.

wary of a publishers' right. Such a right would upset the delicate balance that has been struck between natural rights arguments that support copyright, and other societal goods.

In short, news is somewhat different to other forms of content, because of its close connection with democracy. One should be careful about upsetting the balance that has been struck over the years within the doctrines of copyright law by enacting a publishers' right.

The implications of mutual copying

A second problem with the natural rights argument arises from the actions of news publishers themselves. This is because news publishers have honoured natural rights theories of news more in the breach than the observance. There has been a long history, which stretches back long before the days of printed news, of commercial news publishers copying from each other.

This can be demonstrated with few examples. First, for example, Pettegree in his history of news, describes the early news market in the low countries in the seventeenth century.

A comparison of a weekly issue of the Delft news-sheet of 10 May 1623 with that of Broer Jansz two days before shows that 90 per cent of the Delft reports were lifted unaltered from the Amsterdam paper.²⁰³

A hundred years later, and in England, the practice is mentioned as being so commonplace, it is hardly worth mentioning:

A third method taken by these dexterous sons of mercury [newspaper publishers], to supply themselves with matter, is to steal from one another. They copy every tale that is published to their hands, good and bad, without distinction; and the most bare-faced lie, as well as the post pitiful trifle, once published, has the sanction of them all. But every body knows this so well, that 'tis needless to dwell on it. [...] Most of the said papers having little of novelty, or any other merit, to recommend them, being only copies or extracts from one another...²⁰⁴

And the practice is prevalent today, was noted at the Amsterdam Conference by Bertin Martens:

Ripping nowadays is the universal phenomenon in the newspaper industry. Somebody did a study last year on the French newspaper industry, Julia Cage and some of her researchers from Paris Telecom and they monitored a number of newspaper websites, 50 or 60 newspapers in France for a period of time. What they found is as soon as a new event, news item appears on one newspaper's website, within half an hour or 40 minutes it appears on everybody else's website,

²⁰³ A Pettegree, *The invention of news : how the world came to know about itself* (Yale University Press, New Haven ; London, England 2014)189,

²⁰⁴ Coffee-Man

which means that they are just monitoring each other and as soon as something news appears they take that news event, rewrite it a little bit and then post it on their own website. So ripping in that sense has become a universal phenomenon in the newspaper industry, not because of the aggregators but in the industry itself.²⁰⁵

What are the implications of this for a publishers' right? It tends to undermine the natural rights argument for copyright, or copyright-like protection. The fact that news publishing does, and has always, involved re-writing the published news of others, means it is somewhat incoherent for newspapers to complain when the activity they undertake themselves, is undertaken by others – in this case, online news redistributors.

Of course, it remains appropriate to complain about the consequence of the activity, because for example it is happening to such a degree that commercial news is no longer a viable activity (the incentive argument), or because it is unprecedented in scope (the free riding argument). But it undermines publishers' complaints about others exerting control over the material which they assert they have a natural right to, when at the same time they are breaching exactly similar natural rights possessed by others. It is difficult, in other words, for news publishers to assert a natural rights argument for the protection of news, when they themselves violate the natural rights of others, just as their forebears have done for centuries.

The limits of the notion

Even if, despite this, the natural rights argument still provides a reason to adopt a publishers' right, an analysis of the way natural rights arguments work in practice supports the observation that it should be limited. This is because, even when natural rights arguments are reflected in copyright and related laws, they are not absolute. Again, to quote Professor Hugenholtz at the Amsterdam Conference:

even in societies like the ones where we are here and like the ones in Germany where authors' rights are primarily grounded on natural rights' philosophies, the scope of rights are not limitless. The scope of rights is not limitless. We have everywhere in Europe accepted, including in Germany, a rule of exhaustion, for instance. We do not control after-markets for reasons that have a lot to do with competition and manageability of rights and legal certainty. All the same reasons, I think, that also would restrict any kind of an aggregation right into something very limited if existent at all.²⁰⁶

²⁰⁵ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Bertin Martens, session 3, transcript 42. See also *Express Newspapers v News (UK) Ltd* [1990] 1 WLR 1320 Sir Nicholas Browne-Wilkinson VC, 380 & 383 'I think [it] is the practice of the national press, [...] to search the columns of other papers to find stories which they have missed and then using the story so found in their own newspaper by rewriting it in their own words.'

²⁰⁶ , Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Bernt Hugenholtz, session 4, transcript 73

As there frequently are appropriate limits set to the legal rights that flow from natural rights arguments for copyright and related rights, and so it is also appropriate to limit any publishers' right that arises from natural rights arguments. Moreover, there are particularly strong reasons to limit such a right in such a case. This is again because of the central importance of news to democracy. If there is an extensive right over news, in time, ambit or strength, then the risks of undue control over the flow of information described in the last section become more cogent. Hence, even if a publishers' right is appropriate, it should be afforded to a limited class of people, limited in duration, in the acts that it regulates, and made subject to a wide range of exceptions.²⁰⁷

The fact that the natural rights argument should only lead, if at all, to a limited publishers' right was highlighted by one, slightly cryptic, question at the Amsterdam Conference. The question concerned school books, but the point was more general.

[my question relates] to the basic idea that right owners should participate in the revenues that are generated by using their content. Should school book publishers participate in the live income of the kids that read their books? That's the question, I think. I mean, they base everything on that.²⁰⁸

One must ensure, the questioner was implying, that the ramifications of any natural rights argument are not excessive. Just as any natural rights of book publishers do not extend to control the benefits that accrue from their work to their child readers, so too any publishers' right based on an idea of natural rights must also be limited.

Conclusion

The natural rights argument for a publishers' right is persuasive, insofar as valid, as labour, skill, judgment and creative choices are involved in the production of an edition of published news. However, there are cogent reasons to be wary of a publishers' right, nonetheless. A first arises because of the integral nature of published news to a democratic state. (This is a connection that is asserted by publishers in other contexts, for example when they seek to establish why they are different to other publishers.) This connection exists because news is seen as a powerful force in a democracy, and that means that it is advisable for policy makers to think long and hard before increasing any protection afforded to news, including by means of a publishers' right that might entail greater control over information.

Moreover, the natural rights argument for a publishers' right is undermined by the common practice of news publishers frequently not to respect any natural rights that might exist in news that are possessed by other publishers.

²⁰⁷ The point about the limited duration of any right is discussed further in the text to n 213.

²⁰⁸ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference session 4, transcript 74

And finally, even if the natural rights argument for a publishers' right is viable, it should only lead to a limited and restricted right, as can be the case with other natural rights arguments.

6 Conclusion

On balance, intervention to benefit the commercial news industry is merited, but a publishers' right has not been demonstrated to be an appropriate way to intervene to do so.

The four arguments, considered separately

Four arguments for a publishers' right were considered, which emerged from our research.

The incentive argument was considered the most important, and was examined in most detail. This proposes that commercial news is of great value to our democracy, that it is likely to be under-incentivised partly as a result of the growth of the Internet, and that EU copyright and related laws were arguably part of the reason for this. The argument provides a persuasive case for intervention to assist the commercial news industry, but does not give sufficient reason to justify that intervention being by means of a copyright-related publishers' right.

The equality argument asserts that news producers have been omitted from the corpus of rights-holders under EU copyright and related law, and that this is an inconsistency that a publishers' right would remedy. However, for such a case to be convincing, more work needs to be done on why various rights holders have been afforded rights in EU law in the first place, whether these reasons are still pertinent, and whether news publishers are substantively in a similar position to those rights-holders. Furthermore, any attempt to resolve this apparent inconsistency is likely to raise other inconsistencies, and impose costs on third parties. Some justification for this needs to be provided, but the equality argument is incapable of providing this. In any event, the absence of any text of a publishers' right makes it difficult to assess what costs might be created by a publishers' right, and whether they'd be appropriate.

The free riding argument claims that online news re-distributors are benefitting from the work of news publishers without paying sufficient compensation. But more empirical economic research is required before this can be accepted. In particular, regard has to be paid to the different interests of different news publishers, and to the question of whether a new market has been created by online actors such as news aggregators and media monitoring organisations, and it must be borne in mind that any right might benefit larger publishers, damage smaller ones and therefore risk media plurality and diversity.

Finally, the natural rights argument for a publishers' right was considered. This holds that a publishers' right would appropriately reflect the effort and creativity of news publishers in producing both news and published collections of news. This argument is convincing as far as it goes, but it would only support a limited publishers' right. The main reason for this is that any publishers' right would tend to increase private control over the flow of information in a democracy. And, moreover, any case that publishers have a natural

right to news they publish is undermined by the fact that they copy each other's news, and always have done.

The arguments, aggregated

When each of these arguments is considered separately, they do not provide unequivocal support for a publishers' right. But when aggregated, they may.

An aggregated argument would run as follows. The incentive argument provides a reason for intervention, as news producers are losing money, and because they face a systemic risk, intervention is merited. The reason a publishers' right is an appropriate intervention can be provided by the natural rights argument, as publishers ought to have a right to control the news they produce. Moreover, the free riding argument says that one reason they are losing money is because their product is being misappropriated without sufficient compensation by online news-redistributors. And one reason this situation has been allowed to arise, says the equality argument, is because news publishers are not protected in EU law in the same way other publishers are.

In aggregate, it seems there is a plausible case for a publishers' right. But there are two reasons why the argument is still not convincing.

The first is that each of the caveats to each element of the aggregated argument still applies. So, for example, it remains unclear whether there is free riding, in the absence of better and more thorough empirical economic research. And the case that there is an inequality in the provision of rights under EU copyright law has not convincingly been established, because we don't know in sufficient detail why the earlier rights were created, and so whether there really is any inconsistency. The aggregated case is no stronger than the weakest of its composite parts.

The second reason why a publishers' right is still not sufficiently supported by this account is that, and this has been a recurrent theme in this paper, so much turns on the detail what a publishers' right, and we do not have this detail. The devil, as is frequently the case, is in the detail. It is therefore impossible to say whether – for example – a publishers' right will be efficient, effective, and appropriate, and will not incur indefensible costs on third parties, because we do not have a text. Aggregating the arguments together does not remove this difficulty.

Other problems with a publishers' right

These concerns about the absence of a specific text lead to some final necessary observations, sketching out some further difficulties related to the wording of any publishers' right that haven't been canvassed so far. The first relates to definition, the second to duration, and the third to the wider doctrinal context into which any publishers' right must fit.

Problems of definition

The first problem is that it is very difficult to identify what, exactly, should be the ambit of any right, given the difficulties that exist in defining news. What is it for which

protection is sought? Can we in any way relevant to copyright laws distinguish the news from other content? It is notorious that it is difficult to describe what news is, as has been recognised for a number of years.²⁰⁹ Hence, we have another problem in boundary drawing, which inherently leads to problems of inconsistency and over-breadth. Again, Professor Hugenholtz made the point at the Amsterdam Conference:

So there, even if we would generally accept in Europe your proposition, which is sympathetic to all of us, that at least authors deserve some participation in whatever profit is made wherever of their works, even that does not necessarily lead to the recognition of a right if, as we have seen in all the discussion so far, such a right is impossible to define. Its subject matter is vague, if definable at all. Its implementation at a national level are hopelessly unsuccessful.²¹⁰

True, problems of definition and line drawing are widespread in law, and indeed inherent to law making. Perhaps there will always be inconsistencies where line-drawing is concerned, as was argued earlier. And there is reason to suspect that, as Professor Schauer, an American legal philosopher has observed (albeit in another context) treating things that are unlike as alike is simply what rules do.²¹¹ So perhaps one shouldn't be too concerned about difficulties of definition.

But there is a particular concern in relation to news. This is related to the idea/expression dichotomy, described earlier. The problem is that it is difficult effectively to protect news, without protecting creating a right of great ambit. To quote Professor Hugenholtz, again:

News simply does not have sufficient form to produce, to generate creative original works to which copyright can actually attach. Items of information in other words are too abstract, there are only so many ways to express a news item. [...] How could we prove infringing misappropriation of these abstract facts that have no shape? How could we prove that we extracted it from this news producer and not from that? [...] Introducing a neighbouring right for news publishers could perhaps solve this originality issue but it would never deal with in a satisfactory way with the issues of scope and of evidence that are attached to that.²¹²

²⁰⁹ 'I think news is an impalpable thing and I have never seen a formula composed to define it [...] Whatever it is interesting to the man in the street is news, it may be great events, or it may be trivial things, but, if it interesting to him, any event, I would say, was news.' Sir Roderick Jones (1878-1962), MD Reuters, Sykes Broadcasting Commission, June 5 1923, cited in a draft of Tworek. This is a rather wide definition, to say the least. See also Part II in Ricketson and Ginsburg. See also text to n 144.

²¹⁰ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Bernt Hugenholtz session 4, transcript 73

²¹¹ F Schauer, 'Towards and institutional first amendment' (2005) 89 *Minneapolis Law Review* 1256, 1269

²¹² Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Bernt Hugenholtz, session 3, transcript 46

Hence, this instance of over-breadth is something to which we should pay especial attention. This is because of the central importance of news to democracies. Here we have reason to be particularly careful of over-breadth, because we ought to be concerned about some agents gaining too much control over too much information, which they would if ‘news’ is defined too broadly.

Problems of duration

A second issue is that, given the concerns described at length earlier, if there is any publishers’ right, it should be no longer than is necessary. There can be no justification for a right to protect a perishable commodity like news that lasts 70 years from the death of its author. However, that is what a neighbouring right might provide. Professor Hugenholtz drew attention to this issue at the Amsterdam Conference.

There have been in the past many attempts at the international level, particularly to introduce some sort of specific protection for the news industry, particularly in the form of news bureaus, news agencies like Reuters and AP in the past. Many of those proposals were about very short term protection schemes of 24 hour or 48 hours in line with [the American doctrine of hot news appropriation]. A very short period of protection would probably be sufficient that’s totally different from what neighbouring rights generally has on offer. There a term of 20 years is sort of the minimum and it’s moving towards 50 or even 70 years, so we’re talking about very different kind of rights and needs. There are actual several countries, I’ve been studying this, in the world that have such unfair competition law based very short term protections, for news producers I don’t think these are ever enforced in the digital realm but we have them and they are yes, certainly an interesting model to look at. They’re not neighbouring rights, they’re specific rules of unfair competition.²¹³

It is therefore worth considering, as an alternative to a neighbouring right, ‘hot news’-like laws when considering what any publishers’ right might look like. These are laws that resemble the US ‘hot news’ misappropriation tort, which was described by Chris Beall at the Amsterdam Conference.²¹⁴ In essence, ‘hot news’ laws protect news against other news publishers, but only for the short time it remains commercially valuable.

Indeed, as Professor Hugenholtz mentioned, there are some contemporary European laws of this type. For example, s 72 of the Danish Copyright Act provides that ‘Press releases supplied under contract from foreign news agencies or from correspondents abroad, may not without the consent of the recipient be made available to the public through the press, the radio, or in any other similar manner until after 12 hours after they have been made

²¹³ Ibid. Bernt Hugenholtz, session 3, transcript 51

²¹⁴ Ibid. Chris Beall, session 2. These flow from the US Supreme Court decision of *International News Service v Associated Press* : see text to n 190.

public in Denmark'.²¹⁵ A similar provision can be found in Italian copyright law, but the duration of protection is 16 hours.²¹⁶

But our research confirmed Professor Hugenholtz's findings that these are doctrines that are not considered effective in those jurisdictions where they are present. Uncertainty and lack of use seem to surround them, and it seems they have not been used significantly in contemporary times. In relation to a provision that exists in Danish law, an interviewee said 'no one knows what it is protecting – news as such, or the complete formulation of the press release...there have never been any cases on it.' An Italian interviewee said he thought the law had been ineffective, and there had been little litigation on the subject.²¹⁷

Other doctrinal concerns

The third point is to emphasise that the text of any publishers' right will have to be considered against various legal doctrinal requirements.

In general terms, the text would have to comply with international or regional copyright law. Professor Xalabarder has undertaken such an analysis of the Spanish law,²¹⁸ and Professor Bently laid out some of the considerations that an EU publishers' right would need to take into account at the London Workshop.²¹⁹

More specifically, there are important discussions to be had about the extent to which any publishers' right complies with the Berne Convention, particularly the mandatory quotation exception provided for in article 10. There are also significant questions of the extent to which a publishers' right would comply with the Information Society Directive.²²⁰ Bently has argued that as well as creating a ceiling limiting the extent of exceptions to copyright that are permissible, one of the effects of the Information Society Directive has also been to create a floor. This means that any legislation that the EU or

²¹⁵ An English translation is available from the Danish Ministry of Culture: Kulturministeriet, 'Consolidated Act on Copyright 2014, Act No 1144 of October 23rd, 2014' (Kulturministeriet 2014) <http://kum.dk/fileadmin/KUM/Documents/English%20website/Copyright/Act_on_Copyright_2014_Lovbekendtgørelse_nr_1144__ophavsretsloven__2014__engelsk.pdf> accessed 18 January 2016

²¹⁶ Article 101. An unofficial English translation is available from Unesco Unesco, 'Italian Copyright Statute' (2004) <http://portal.unesco.org/culture/en/files/30289/11419173013it_copyright_2003_en.pdf/it_copyright_2003_en.pdf> accessed 22 January 2016

²¹⁷ In contrast, a Finn interviewed for our research indicated that the Finnish version of this law was, in his opinion, effective, even if there had been little litigation on the subject. This, perhaps, reflects different cultural evaluations of how the effectiveness of laws can be gauged with reference to the presence or absence of litigation. The Finnish provision is section 50 of the Copyright Act, and sets out a timescale of 12 hours. An English translation is available from the Finnish Ministry of Education and Culture, 'Copyright Act' (2010) <<http://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf>> accessed 21 January 2016.

²¹⁸ Xalabarder.

²¹⁹ Danbury, (accessed

²²⁰ Info Soc Directive 2001/29/EC

Member States bring in – such as a publishers’ right - that is more protective of copyright material than is permitted by the EU legal acquis, may well be in breach of EU law.

Further, as Professor Hargreaves observed at the Amsterdam Conference, questions need answering about the basis in EU law of any proposed right. It would have to be clarified why such a right promotes the aims of the Digital Single Market, or is appropriate under another source of EU competence.²²¹ Similarly, thought would have to be given as to the extent to which such a right might violate the principles of free movement of goods and services within the EU, and if so whether this would be doctrinally acceptable. In other areas of law, Dr Henning Grosse Ruse-Khan has observed that the extent to which any right complies with the requirements of World Trade Organisation law might need to be considered.²²²

Finally, and of great importance, as was highlighted at our conference by Professor Eechoud, is the fact that any new right would have to comply with the EU’s fundamental rights regimes, either set out in the Charter or the Convention.²²³ Professor Eechoud summed up her view of the difficulties a publishers’ right faces:

the million dollar question [becomes] is such a right necessary in a democratic society to protect legitimate interests? This is European Convention of Human Right type analysis. [...] So, from the free speech perspectives I’d definitely say to the European Commission this is a case where you really need to err on the side of caution and follow the precautionary principle and do not legislate publishers rights because we know it has certain costs, even if we don’t know the scale of them, and it has undefined benefits²²⁴

²²¹ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference' (accessed Ian Hargreaves, session 3. See text to n 42 for a possible answer.

²²² Personal communication and H Grosse Ruse-Khan, 'The End of Google's Reign in Spain?' (2014) <<http://worldtradelaw.typepad.com/ielpblog/2014/12/the-end-of-googles-reign-in-spain.html>> accessed 14 June 2016

²²³ Charter of Fundamental Rights of the European Union [2000] OJ 364/01, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950.

²²⁴ Centre for Intellectual Property and Information Law University of Cambridge, 'CIPIL/IViR Conference Mireille van Eechoud, session 4, transcript 67

Appendix: Some prominent relevant copyright-related cases

Australia	<i>Fairfax Media Publications Pty Ltd v Reed international Books Australia Pty Ltd</i> ²²⁵
Belgium	<i>Google v Copiepresse</i> (First Instance, re-hearing) ²²⁶
Belgium	<i>Google v Copiepresse</i> (Appeal) ²²⁷
Denmark	<i>Danske Dagblades Forening v Newsbooster</i> ²²⁸
Denmark	<i>Infopaq v Danske Dagblades Forening I</i> (CJEU) ²²⁹
Denmark	<i>Infopaq v Danske Dagblades Forening II</i> (CJEU) ²³⁰
Denmark	<i>Infopaq International A/S v Danske Dagblades Forening</i> ²³¹
EU	<i>Svensson v Retriever Sverige AB</i> ²³²
Germany	"Paperboy" ²³³
Germany	<i>Elektronischer Pressespiegel</i> Judgment of 11 July 2002 I ZR 255/00
Spain	<i>Megakini</i> (Pedragosa v Google), Supreme Court ²³⁴
UK	<i>Newspaper Licensing Agency v Meltwater Holdings</i> (Court of Appeal) ²³⁵
UK	<i>Public Relations Consultants v Newspaper Licensing Agency</i> (Supreme Court) ²³⁶
UK	<i>Newspaper Licensing Agency Ltd and others v Public Relations Consultants Association Ltd</i> (CJEU) ²³⁷
USA	<i>Barclays v Theflyonthewall.com</i> (Appeal) ²³⁸

²²⁵ [2010] F.C.A. 984 (Federal Court of Australia)

²²⁶ 13 February 2007; No 06/10/928/C of the general roll (Court of First Instance, Brussels)

²²⁷ Presented 11/5/2011, Cause List No: 2007/AR/1730 (Court of Appeal of Brussels, 9th Chamber)

²²⁸ SHD February 19, 2003, Case V 110/02

²²⁹ C-5/08, [2009] EUECJ C-5/08 (16 July 2009)

²³⁰ C-302/10, [2012] EUECJ C-302/10

²³¹ Case 97/2007, 15 March 2013

²³² *Svensson v Retriever Sverige AB* C-466/12, [2014] Bus LR 259, [2014] ECDR 9

²³³ "Paperboy" Judgment of 17 July 2003 (BGH I ZR 259/00), BGH [2001] GRUR 958 (German Federal Supreme Court)

²³⁴ *Megakini [Pedragosa v Google]* Tribunal Supremo (Civil ch.) Sentencia n. 172/2012, 3 April 2012, discussed in R Xalabarder, 'Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?' (2012) 3 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 162

²³⁵ *Newspaper Licensing Agency v Meltwater Holdings* [2011] EWCA Civ 890

²³⁶ *Public Relations Consultants Association v Newspaper Licencing Agency (Meltwater)* [2013] UKSC 18

²³⁷ *Newspaper Licencing Agency Ltd and others v Public Relations Consultants Association Ltd* Case C-360/13; [2014] WLR (D) 244

²³⁸ *Barclays Capital Inc v Theflyonthewall.com Inc* 650 F.3d 876, 2011 Copr.L.Dec. P 20,117, 99 U.S.P.Q.2d 1247, 39 Media L. Rep. 2009, 77 A.L.R.6th 793

²³⁹ *Associated Press v Meltwater* 931 F.Supp.2d 537, S.D.N.Y. Mar. 21, 2013 (US District Court for Southern District of New York)