

Evaluating legal responses to threats to news in the digital environment

Copyright and revenue: an international study



Arts & Humanities
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The problem

- Commercial journalism businesses in EU and US are troubled:
 - Decline in readership
 - Decline in income: advertising revenue and sales
 - Decline in profitability
- Causes include:
 - 2008 economic crash
 - Debt and over-expansion in the 1990s/2000s
 - Digital technology

Solutions being tried

- Business model changes
 - Increase revenue – paywalls, changes in advertising models
 - Costs – reduce data costs
- Legal interventions – litigation and legislation
 - Competition law – unfair competition law
 - Contract law - employee, freelance and User Generated Content contracts
 - Tort law - free riding torts
 - Copyright and related rights

Evaluating the legal interventions

- 2 year project, started April 2014
- AHRC (Arts and Humanities Research Council) funded
 - Examine shifting business models in order to appraise how the news industry is adapting to the digital environment.
 - Consider the methods of assessing these changes, not just on the economy, but also on society.
 - Consider what role, if any, policy makers should play in this field in ameliorating the problems facing news institutions.
- Principal Investigator Professor Lionel Bently (Cambridge University) collaborating with Professor Ian Hargreaves (Cardiff University), Dr Richard Danbury research associate.

Starting with copyright

“One thing that European legislation doesn’t have that British does is the idea of work for hire. This is a major problem for publishers in their relationships with their employee journalists and freelance journalists, and relates to how they acquire rights to do what they need to do.”

– *Interviewee*

But it's more complicated...

Element of copyright *	Problem posed for publishers
Subject matter	Is news information copyright? Is a headline a copyright work? Can you protect the news idea as well as the expression?
Criteria for protection	Is a snippet of text original, and therefore protected by copyright?
Authorship and first ownership	Can a publisher establish they have the right to sue, based on an author's copyright?
Nature of the rights	Do hyperlinking, and making temporary cache copies count as infringing acts?
Infringement	Is the taking of a small snippet of text an infringement?
Defences	Do press reviews and reporting current events (etc) protect those who take news?
Limits of exploitation of copyright	The opt-in and opt-out debate. If publishers post material to the web, can it be assumed that they consent to re-publication?
Related rights	Should publishers have ancillary copyrights? Do database rights assist?
Moral rights	Do these create costs for exploiting content in other formats?

* From L Bently and B Sherman, *Intellectual Property Law* (OUP, Oxford 2014)

Some prominent interventions

Country	Intervention
Australia	<i>Fairfax Media Publications Pty Ltd v Reed international Books Australia Pty Ltd</i> [2010] F.C.A. 984 (Federal Court of Australia)
Belgium	<i>Google v Copiepresse</i> Presented 11/5/2011, Cause List No: 2007/AR/1730 (Court of Appeal of Brussels, 9th Chamber)
Denmark	<i>Iopaq v Danske Dagblades Forening I</i> C-5/08, [2009] EUECJ C-5/08; and <i>Infopaq II</i> C-302/10 (Order 17 Jan 2012) [2012] EUECJ C-302/10
Germany	“Paperboy” Judgment of 17 July 2003 (BGH I ZR 259/00), BGH [2001] GRUR 958 (German Federal Supreme Court)
Germany	Leistungsschutzrecht für Presseverleger (News Publishers’ Ancillary Right)
Spain	Proposed art 32 Spanish Copyright Act
Sweden	<i>Svensson v Retriever Sverige AB</i> C-466/12, [2014] Bus LR 259, [2014] ECDR 9
UK	<i>Newspaper Licensing Agency Ltd and others v Public Relations Consultants Association Ltd</i> , (“Meltwater”) [2013] UKSC 18 and CJEU C-360/13
USA	<i>Barclays v Theflyonthewall.com</i> 650 F.3d 876 (US Court of Appeals Second Circuit)
USA	<i>AP v Meltwater</i> 931 F.Supp.2d 537 (US District Court for NY)

Studying the interventions

- Comparative survey of primary material
 - 10 country sample, doctrinal and semi-structured interviews with participating lawyers, academics, journalists and business representatives.
 - 3 country detailed comparison
 - Non-normative evaluation
- Secondary material includes
 - RG Picard, "'Not with my News": Contemporary Struggles to Protect the Economic Value of News', forthcoming.
 - R Xalabarder, 'Google News and Copyright' in A Lopez-Tarruella (ed) *Google and the Law* (T.M.C. Asser Press, The Hague 2012)
 - H Tworek, 'Protecting News in and Interconnected World', Forthcoming, 2014.

Some results

Copyright area	Intervention
Subject matter, criteria for protection (originality), infringement	<i>Australia Fairfax, Belgium Copiepresse, Denmark Infopaq I, UK Meltwater litigation, USA AP v Meltwater</i>
The rights of copyright (hyperlinks, temporary copying)	<i>Belgium Copiepresse, Denmark Infopaq II, Germany Paperboy, Sweden Svensson, UK Meltwater litigation</i>
Limits of exploitation (implied licenses etc)	<i>Belgium Copiepresse, Germany Paperboy, USA AP v Meltwater</i>
Defence	<i>Spain proposed art 32 Spanish Copyright Act, USA AP v Meltwater</i>
Related rights	<i>Germany Publishers' Ancillary Right</i>

Summary of 3 country comparison

- Denmark
 - Successful use of litigation. No legislation. No Google News.
- Germany
 - Unsuccessful use of litigation. Legislation. Google and others at odds with publishers.
- Belgium
 - Successful use of litigation. No legislation. Publishers negotiated with Google.

Denmark

- *Danske Dagblades Forening v Newsbooster* SHD February 19, 2003, Case V 110/02
 - EU data base right, infringed by aggregator's deep hyperlinks
 - Judgment of a lower court, but effectively used as a precedent
- *Infopaq* litigation – referred to Court of Justice of the European Union
 - Short text snippets (11 words) can be original if 'author's own intellectual creation'
 - Temporary copying exemption (art 5 (1) Information Society Directive)* clarified and applied. No defence for *Infopaq*
- The litigation is seen as a success for publishers. But a lawyer for the other side said in interview the case was 'a huge loss' for publishers, as it and opened the way for 'new companies to enter the market and make a business in the area'.
- His view is bolstered by the European Court judgment in *Newspaper Licensing Agency Ltd and others v Public Relations Consultants Association Ltd* Case C-360/13: browsing copies and caches are not reproductions

* 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 (InfoSoc Directive)

Germany

- Ancillary right for publishers: s 87 f German Copyright Act
 - A news producer has the exclusive right to make news available to the public for commercial purposes
 - Does not apply to ‘very small text snippets’
 - The owner of the producing company shall be considered the producer
 - News publication defined as “editorially determined compendium of journalistic articles within the scope of a collection periodically published under a particular title that, considering the overall situation, must be deemed predominantly typical of a publishing house, and that is not issued primarily in service of self-promotion”
 - Interviewees agreed the provision is poorly drafted: ‘a bit of a mess’ said one.
- Aggregators and search engines to pay a tariff to a publishers’ collecting society
- A collecting society, VG Media, has been formed, a tariff is being set but:
 - Challenged by Google
 - Google said it would de-list from Google News publishers who did not waive the right. Many publishers did waive the right

Belgium

- *Copiepress* litigation: 2006 – 2011
 - Resounding win for the publishers' association on almost every element of copyright
- But there was a significant loss of traffic in publishers' websites when de-listed from Google: from 15% to 26% according to some contemporaneous reports.
- In 2012, the publishers negotiated a result with Google:
 - Re-entry into Google News for publishers
 - Google will help publishers to 'optimise monetization'

Some possible conclusions about copyright interventions

- The quickness with which digital technology changes makes copyright interventions difficult
 - Denmark?
- Copyright not always effective, or a good idea?
 - Belgium?
 - Denmark?
- Legislation can lead to expensive and unforeseen results
 - Germany

Epilogue: should there be interventions?

- Will there be creative destruction? Is the Internet more like:
 - Writing and paper, printing, telegraphs, radio, television? Or more like:
 - Cable TV, interactive TV, local community TV, CB radio?
- What is worth protecting?
 - The production of news?
 - Passive reporting and Habermas' Public Sphere
 - News institutions?
 - Active polemic, *J'accuse!* and the 4th Estate conception of the Press