Digital content and copyright: evaluating the proposed EU press publishers’ right


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Copyright and news project (2014-16)

Summary
These pages are an archive of the research project 'Appraising Potential Legal Responses to Threats to the Production of News in a Digital Environment'. The project was funded by the Arts and Humanities Research Council under grant number AH/L004704/1, and ran from 2014-16. The principal investigator was Professor Lionel Bently of CIPIL, collaborating with Professor Ian Hargreaves of Cardiff University. The research associate was Dr Richard Daniel. The material on these pages is a permanent record of the public output of the research.

The original description of the project can be found here.

How the project developed
The project started by reviewing what copyright-related laws had been developed or deployed in recent years with the intention of benefitting the commercial news industry. On this basis of this research, the first paper that was written, comparing developments in Germany, Denmark and Belgium.

It was presented, in various levels of development and detail:

- at the British Academy conference at Oxford University in September 2014;
- as a poster at the CREATE All Hands conference in Glasgow, in September 2014;
- at a workshop at the Universitat Pompeu Fabra, Barcelona, Spain, Nov 2014;
• The European Commission has proposed a new right, related to copyright. It would benefit press publishers. It applies to digital use of journalism.

• This is a bad idea.
  – It’s badly conceived
  – It’s badly drafted
  – It’s likely not to work
2) Why has this been proposed?

7. Aggregated data on print vs digital revenue trend of daily newspapers and magazines (Europe)

*Source: PwC Entertainment and Media Outlook 2015 - 2019*


Crisis
Why has this happened?
The advertising business model

Digital copying of news

JEE Boys, London's News Press and the Thirty Year War (Studies in Early Modern Cultural, Political and Social History, Boydell Press, Woodbridge 2011) 90. fn 69, 70
Surely it doesn’t matter?

• Citizen journalism and the internet will fill the gap?
  – Disruption
  – Schumpeter’s creative destruction
3) What has been proposed?
EU Copyright reform

- **Press Release**

- **Q&A**

- **COM (2016) 592 final, 14.9.2016**

- **Impact assessment, SWD(2016) 301 final 1, 2, 3 and summary**

- **COM (2016) 593 final, 14.9.2016**
  - [https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF](https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF)
The proposed new right

- Recitals 31 – 35 explain the rationale for the new right
- Article 2 (4) – defines to what the right applies
- Article 11 (1) – delimits the nature of the right
- Article 11 (4) – sets the duration of the right
4) What do other people think of the proposals?

Publishers' Right in a Digital Age

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.

Thomas Jefferson, 1787

http://www.publishersright.eu/
European copyright: there's a better way

Caroline Atkinson
HEAD OF GLOBAL PUBLIC POLICY

For hundreds of years copyright has promoted creativity and progress. It’s a principle that holds true today and one we support through leading-edge efforts to combat copyright-infringing activity.

Today the European Commission announced its proposal to update copyright rules for the digital age. There’s an important balance to be struck—one that enables rightsholders to manage and profit from their work while also allowing the creativity and innovation of the web to flourish.
Commissioner Oettinger is about to turn EU copyright reform into another ACTA

The EU is finally preparing its new copyright law. It's a historic chance to update outdated laws to the new realities and opportunities of the digital revolution. But a leaked draft reveals nothing of the sort.

Instead, Commissioner Oettinger has let the publishing, film and music industries hijack the reform in an attempt to protect old business models from progress – at a tragic cost to freedom of creativity and expression on the internet, startups' right to innovate and the cause of a Europe without digital borders.
5) What do I think about the proposals?

- 1) Badly conceived
- 2) Badly drafted
- 3) Likely not to work
1) Badly conceived: the Press and democracy
Is this the problem? Impact Assessment

**Problem:** The shift from print to digital has enlarged the audience of press publications but made the exploitation and enforcement of the rights in publications increasingly difficult. In addition, *publishers face difficulties as regards compensation* for uses under exceptions.

— *Impact Assessment, SWD(2016) 301 final, part 1* 155
Or is this the problem? Recital 31

• (31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society ...
These are related, but they are not the same...

- Supporting the businesses of press publishers is not necessarily the same as encouraging contribution to public debate and the proper functioning of democratic society.
... as Thomas Jefferson pointed out in 1814

• 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...As vehicles of information, and a curb on our functionaries, they have rendered themselves useless, by forfeiting all title to belief.

Why does that matter?

• Because of the risk of over-protection.
• A publishers’ right is content neutral.
• This means it will incentivize content that does not make a fundamental contribution to public debate and the proper functioning of a democratic society, as well as other content.
2) Badly drafted: overbroad

- Article 2 (4) – defines to what the right applies
- Article 11 (1) – delimits the nature of the right
- Article 11 (4) – sets the duration of the right
Art 2(4)

(4) ‘press publication’ means a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.
What publications might it encompass?

- *Rough Guide to China*
- *Time Out San Francisco City Guide*
- *Who’s Who*
- *The Oxford Dictionary of National Biography*
Article 11 (1)

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

• What does this add in substance that isn’t already available in the Database Directive (Directive 96/9/EC, 11 March 1996)?

• It’s a signal not a content ‘copyright’. Will anything be *de minimis*?
Article 11 (4)

The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.
Too long?

• ‘Today’s news wraps tomorrow’s fish’.
• ‘News is a perishable commodity’ Lord Nicholls, Reynolds v Times Newspapers Ltd [2001] 2 AC 127
Hours, not years?

- S 72 Danish Copyright Act – 12 hours
- S 101 Italian Copyright Act – 16 hours
Is this proportional?

• [20 years] allows addressing in a targeted way and in their own merits the specific problems faced by different categories of publishers, without going beyond what is needed to achieve this objective.
  
  – *Impact Assessment, SWD(2016) 301 final*, part 1, 173
3) Likely not to work
Lex Google: **Germany Waters Down Search Engine Legislation**

Last-minute changes to a planned German law on search engines mean that Google will not be subjected to fees from newspaper publishers for its current indexing practices.
Spain moves to protect domestic media with new 'Google tax'

Newspapers in Spain will now be able to demand a monthly fee from the search engine before it can list them on Google News
Why will it be any different this time?

• However, problems experienced by consumers in ES – which are often quoted as a source of concern in relation to a possible intervention on publishers at EU level (given that a major news aggregators decided to discontinue its service in ES) – are not expected to arise under this option since the related right proposed is different from the unwaivable compensation measure under the ES ‘ancillary rights’ law (see above: impact on publishers).

  – Impact Assessment, SWD(2016) 301 final, part 1, 169-70
Oh, and social media sharing...
...and what about small publishers?

• Evidence suggests that small publishers have different interests to big publishers.
6) Conclusion

- Innovation?
- China?
A drag on innovation?

• Consumer organisations have raised concerns that granting additional protection to publishers could negatively affect consumers as a result of the consequences that they believe this intervention could have on online services providing access to press content online ...

  – Impact Assessment, SWD(2016) 301 final, part 1, 169
Notice concerning the Standardization of the Online Reprinting Copyright Order

POSTED ON APRIL 17, 2015   UPDATED ON APRIL 27, 2015

In order to implement the CCP Central Committee General Office and State Council General Office “Guiding Opinions concerning Promoting the Converged Development of Traditional Media and New Media”, encourage lawful and sincere business between newspaper and periodical work units and Internet media, promote the establishment and completion of copyright cooperation mechanisms, and standardize the online reprint copyright order, on the basis of the relevant regulations of the “Copyright Law of the People’s Republic of China”, the “Copyright Law Implementation Regulations of the People’s Republic of China”, and the “Regulations to Protect the Right of Distribution Through Information Networks”, matters concerning standardizing the online reprint copyright order are hereby notified as follows:
Recommendation regarding the revision of China’s Copyright Law

• ?
Other legal responses?

https://www.theguardian.com/media/greenslade/2016/nov/08/make-google-and-facebook-pay-for-public-service-reporting?CMP=share_btn_fb
Thank you

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