

# Copyright and the news in the EU: are we, could we, should we?

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Arts & Humanities  
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## Appraising Potential Legal Responses to Threats to the Production of News in the Digital Environment (AHRC)

Centre for Intellectual Property and Information Law

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About

**Research**

> Appraising Potential Legal Responses to Threats to the Production of News in the Digital Environment (AHRC)

Like music and other branches of publishing, news journalism has faced radical challenges over the last two decades. There is talk of the "death of the newspaper" and questions raised about the very future of journalism. While with music, books and films, the greatest threat to existing business models have been seen as the unauthorised and unremunerated home copying and peer to peer distribution, with news journalism the challenge derives from the fact that advertising has not followed the shift of print-newspapers to the Internet. Given that more than half of newspaper revenue traditionally comes from advertising, newspaper profit margins have suffered badly, many jobs have been lost and titles closed. Consequently, news journalists, including photographers and associated freelance creators, have expressed dismay at their increasingly fragile economic and unsatisfactory legal position.

But, if the central problem has not been copyright piracy, the big question is whether copyright-related business models are part of the solution. Certainly, some newspapers are starting to deploy copyright and para-copyright as part of their business strategies: using firewall systems, bringing actions against news aggregation sites (such as Yahoo!, Google News), which are seen as "siphoning off" advertising revenue; and, most radically, calling for addition legal rights, including rights in news per se. At the same time, aggregators and others are pursuing new business models arising from the use of news archives and other news text and image assets. Because on-line news organisations increasingly use multi-media techniques, there is growing overlap with copyright concerns in television and film.

The research is intended to have three dimensions:

PI: Prof Lionel Bently, University of Cambridge and Prof Ian Hargreaves University of Cardiff. Funded by the AHRC

Copyright and news: are we?



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## Poll

## European Commission considers new law to protect press diversity and quality journalism in Europe

Presswire, 14 March 2016

The European Commission's Vice-President Ansip announced the imminent consultation on a publisher's right today, 14 March, which could ultimately lead to much-needed greater legal clarity in copyright for press publishers.

Publishers are not currently acknowledged in EU law as rightsholders. The expected change would put press publishers' rights on par with other content producers such as broadcasters, film producers and phonogram producers with a related right that would afford publishers more licensing and negotiation opportunities.

Importantly, a new publisher's right:

- would have no impact on contractual relationships between publishers and journalists, nor on the existing provisions in law dealing with the transfer of rights in certain Member States. A new publisher's right would seek only to protect the investment and the creative endeavour of putting together and the making available of the published edition, not the individual article;
- would have no impact on readers' ability to link and share articles by multiple share buttons
- would not lead to a links tax
- would not conflict with any legal exceptions to copyright including for teaching, illustration, research and private use

<http://www.greatreporter.com/content/2728/european-commission-considers-new-law-protect-press-diversity-and-quality-journalism>

# Commission communication Dec 2015



Brussels, 9.12.2015  
COM(2015) 626 final

**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**

- The Commission is reflecting and consulting on the different factors around the sharing of the value created by new forms of online distribution of copyright-protected works among the various market players. The Commission will consider measures in this area by spring 2016. The objective will be to ensure that the players that contribute to generating such value have the ability to fully ascertain their rights, thus contributing to a fair allocation of this value and to the adequate remuneration of copyright-protected content for online uses.
- In this context, the Commission will examine whether action is needed on the **definition of the rights** of ‘communication to the public’ and of ‘making available’. It will also consider whether any action specific to news aggregators is needed, including intervening on **rights**. p10



## Ancillary Copyright 2.0: The European Commission is preparing a frontal attack on the hyperlink

**The European Commission is preparing a frontal attack on the hyperlink, the basic building block of the Internet as we know it.** This is based on an absurd idea that just won't die: Making search engines and news portals pay media companies for promoting their freely accessible articles.

Earlier attempts at establishing this principle resulted in Germany's and Spain's ancillary copyright laws for press publishers. These attempts [backfired](#) – with tremendous collateral damage. In the European Parliament I was able to defeat [repeated attempts by EPP MEPs](#) to sneak into my copyright report text passages asking for an extension of these laws to the European level. **But this newest attempt is the most dangerous yet.**

”  
**THE NEWEST  
ATTEMPT FOR  
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ATTACK ON THE**

 Date: [6.11.15](#)

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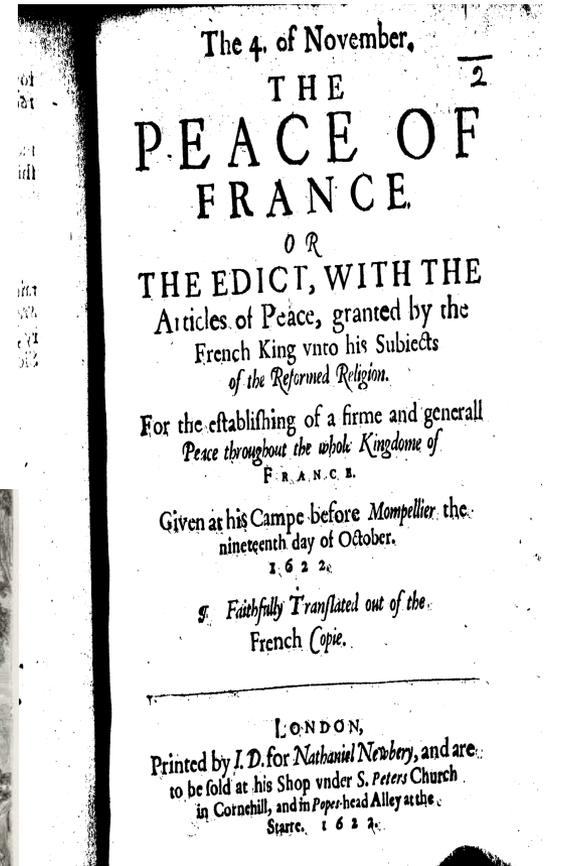
 Author: [Julia Reda](#)



# Copying news 1460 - 2016



*the first pole on the Overland Telegraph Line to Calcutta*

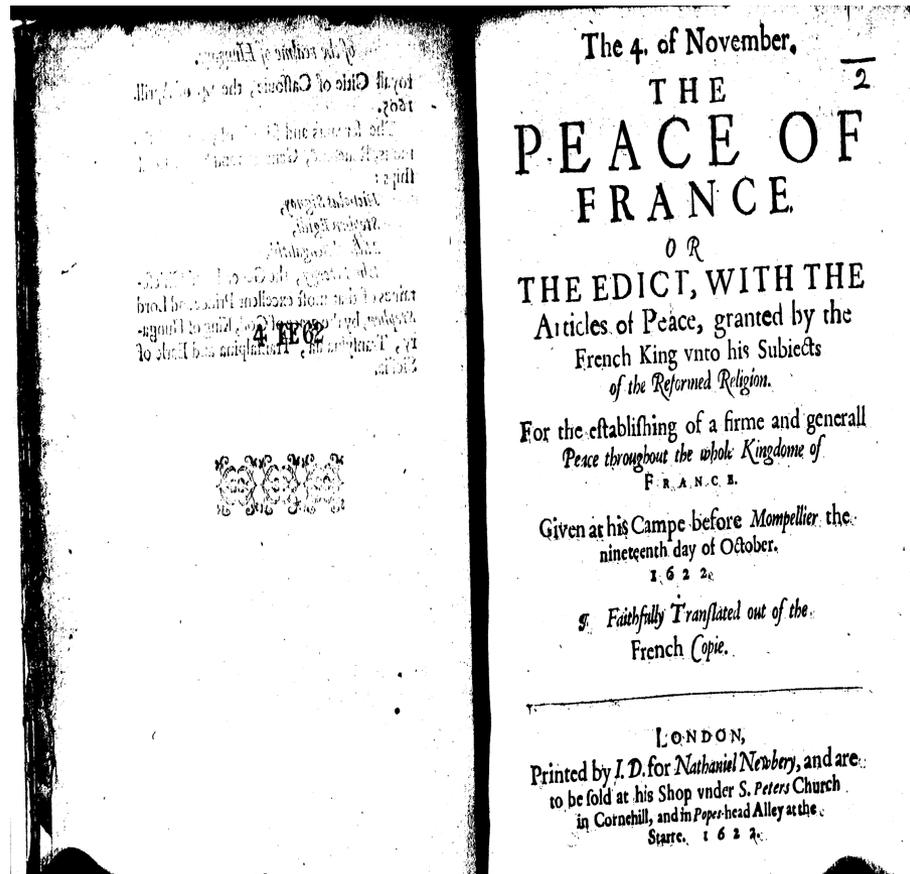


# 1490



A Pettegree, *The invention of news : how the world came to know about itself* (Yale University Press, New Haven ; London, England 2014), 110

1621



*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*

1720s



## *The case of the coffee men (1728)*

A ... method taken by these dexterous sons of mercury, 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 most pitiful trifle, once published, has the sanction of them all.

# 19<sup>th</sup> Century Australia



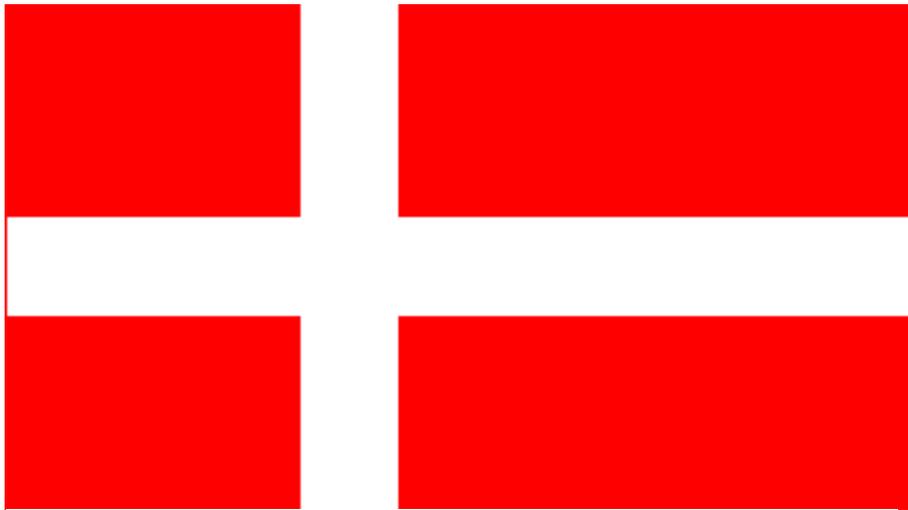
L Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004) 38 Loyola of Los Angeles Law Review 71

‘History rarely, if ever, reveals immutable laws about human behaviour, or about the necessary relationships between practices and ideas, or between technology and the law.’

- L Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004) 38 Loyola of Los Angeles Law Review 71 171

- The current debate about copying, news and revenue is not new
  - This does undermine somewhat some arguments for action: eg, natural rights arguments
- The Internet does give it a new character
  - Eg undermines the 'first to market' advantage - scooping

# Copyright and news: could we?



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Google

## 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

Alex Hern

[@alexhern](#)

Friday 31 October 2014  
15.21 GMT



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## 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.

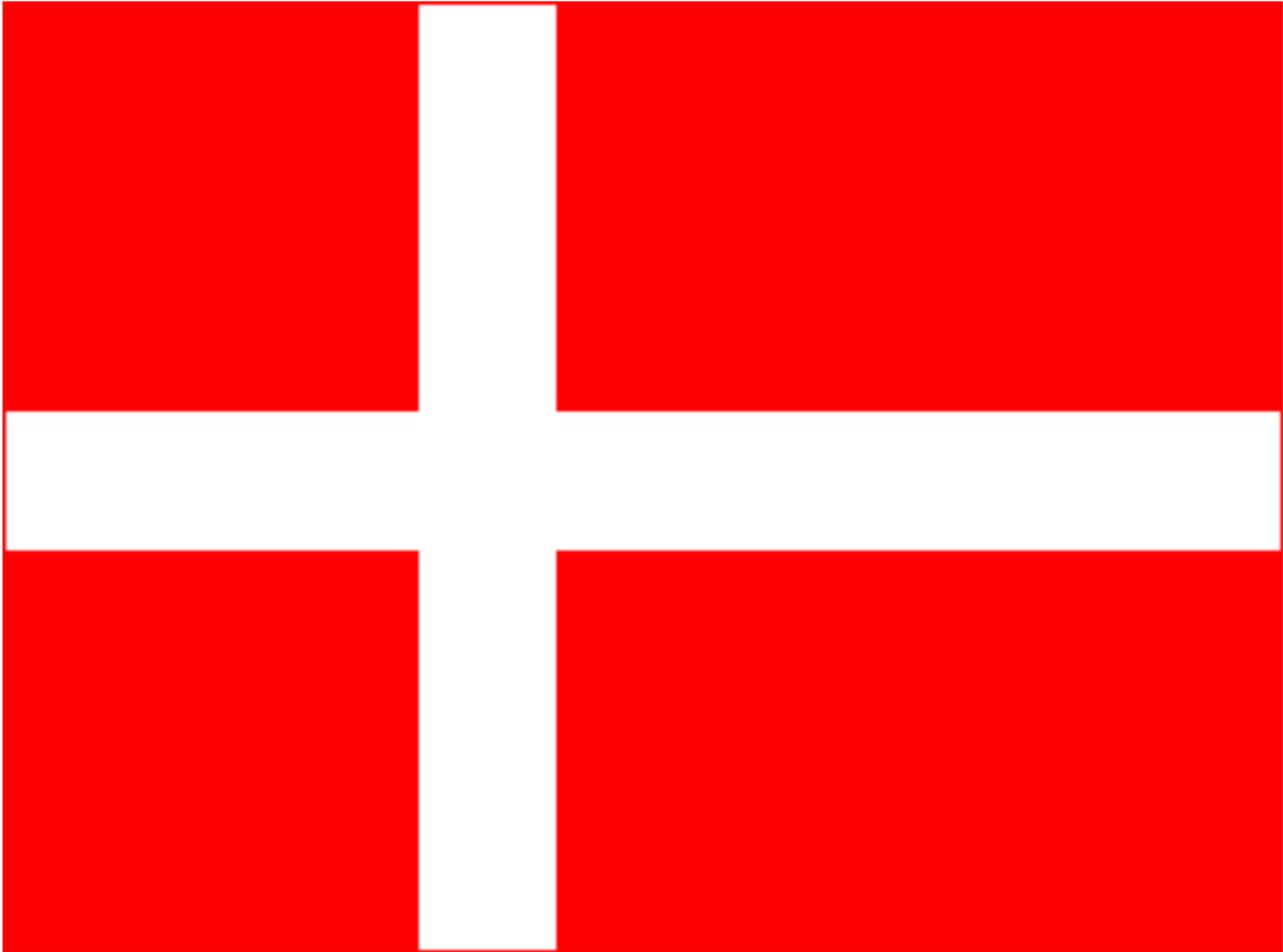
Element of copyright *	Problem posed for publishers
Subject matter	Is news information copyright? Is a headline a copyright work? Can you protect the news idea as well as the expression?
Criteria for protection	Is a snippet of text original, and therefore protected by copyright?
Authorship and first 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)

# Copyright and news worldwide

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	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)

# Denmark



# Germany

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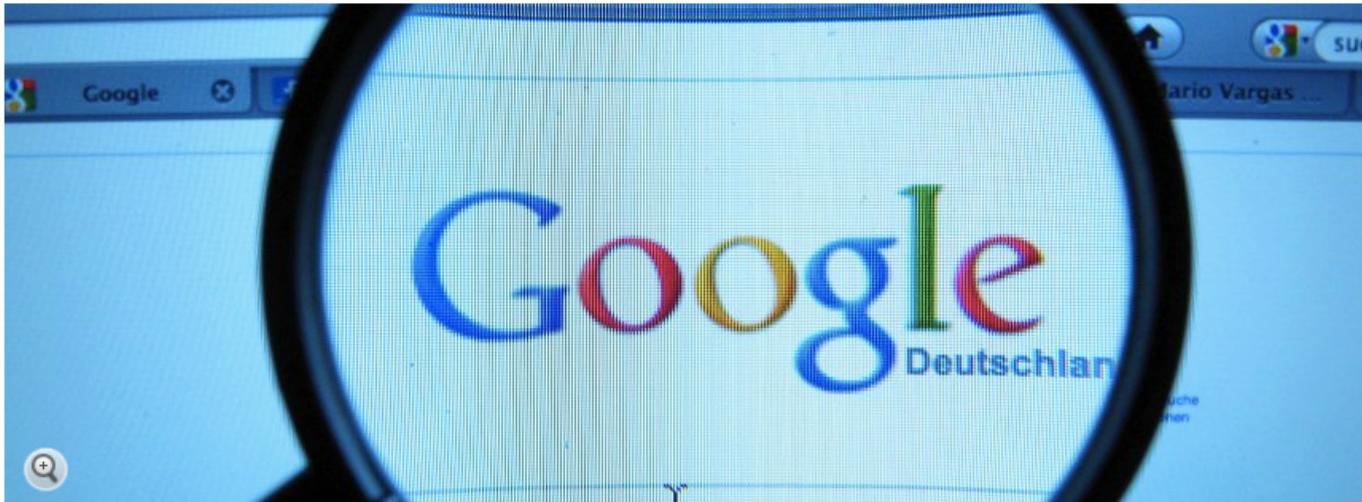
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## Lex Google: **Germany Waters Down Search Engine Legislation**



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Google

## Spain moves to protect domestic media with new 'Google tax'

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Alex Hern

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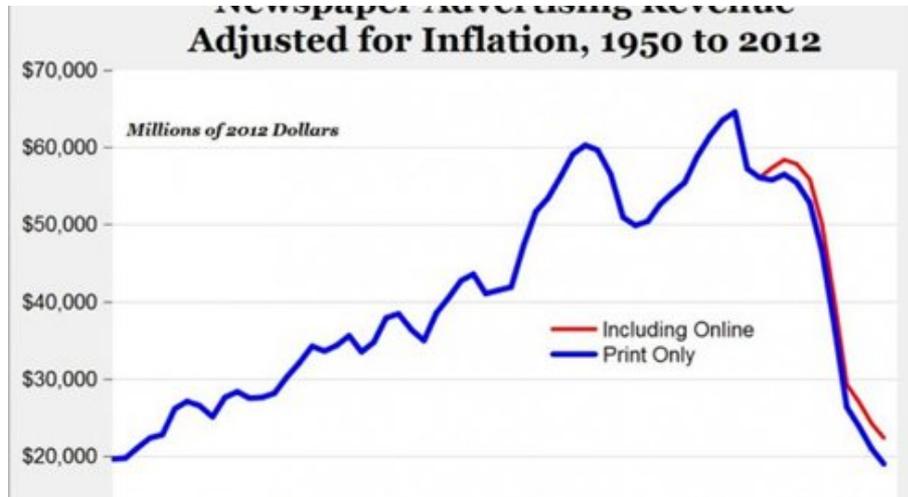
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# Copyright and news: should we?



Review article

## Making sense of the newspaper crisis: A critical assessment of existing research and an agenda for future work

Ignacio Siles and Pablo J. Boczkowski  
Northwestern University, USA

### Abstract

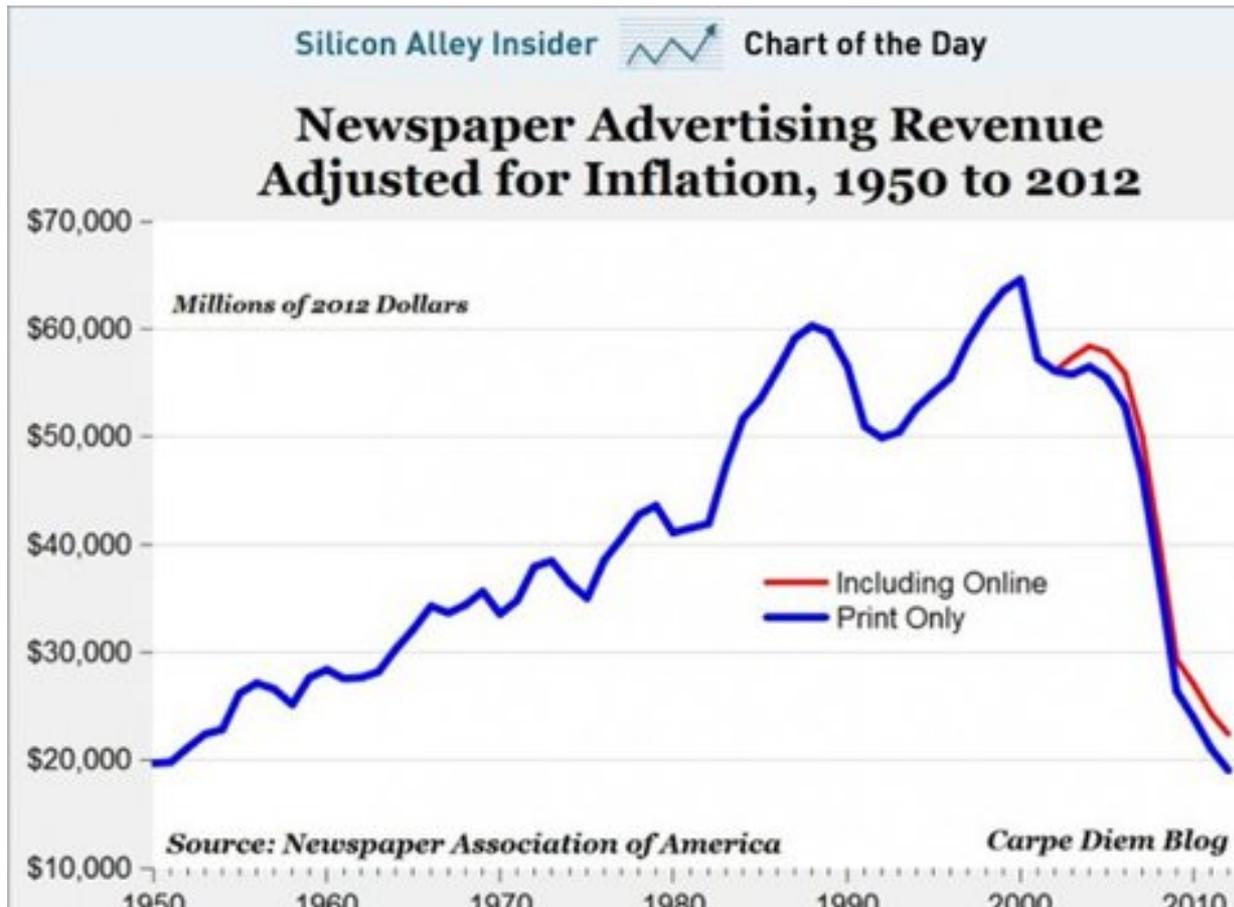
This article analyzes recent research on the newspaper crisis. It discusses how authors have examined the sources, manifestations, and implications of this crisis, and the proposals to resolve it. In addition, the essay critically examines this body of work by assessing the main spatial and temporal contexts that researchers have studied, the theories and methods that authors employ, and the analytical tropes they have deployed to make sense of the crisis. Building on this assessment of existing research, the article outlines an agenda for future work that fosters an analysis of the process, history, comparative development, and manifold implications of this crisis, and advances various empirical strategies to examine some of its most under-theorized dimensions.



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- Incentive arguments: the need to create an incentive to produce a social good, which would otherwise be under supplied
- Other rationales
  - Natural rights (ownership and right to exploit)
  - Equality of treatment
  - Reward (just recompense)
  - Neoliberal economics

# Incentive arguments



Review article



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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)

# Equality of treatment?

- *Hewlett-Packard v Reprobel* Case C-572/13 (2015)
- Related Rights Directive (Codified): Directive 2006/115/EC (also called the Rental and Lending Rights Directive).
  - Rightsholders
    - Broadcasters
    - Phonogram producers
  - Protected acts
    - Reproduction, distribution, communication to the public (making available to the public)?

# Doctrinal analysis of a new law

# Doctrinal evaluation

- Doctrinal difficulties
  - Berne Convention
  - Information Society Directive compliance
  - Fundamental Rights of EU
  - WTO law

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

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

# Other considerations

- Law has not (so far) had the anticipated result.
  - Competition law issues
  - News fungible
- Keeping pace with change will be tricky
  - News robots
  - Social media as a route to news
- We need to focus on what we need to protect
  - the plural supply of news, not the existence of commercial entities *per se*.

# Conference 23<sup>rd</sup> April IViR, University of Amsterdam

