



COPYRIGHT for CREATIVITY
A Declaration for Europe

ANALYSIS OF THE DIRECTIVE ON COPYRIGHT IN THE DSM [2016/0280(COD)]

ARTICLE 11

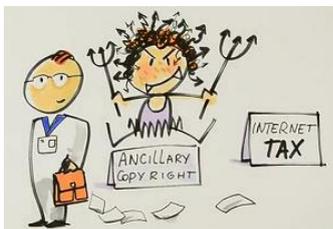
PROTECTION OF PRESS PUBLICATIONS CONCERNING DIGITAL USES (‘ANCILLARY COPYRIGHT’)

ANALYSIS: ARTICLE 11 – PROTECTION OF PRESS PUBLICATIONS CONCERNING DIGITAL USES

WHAT’S IT ABOUT?

Issue: This article introduces a new pan-European copyright for press publications that is sometimes referred to as ‘ancillary copyright’ or ‘Leistungsschutzrecht’, in reference to similar rights introduced under German and Spanish law (although those rights are more limited both in scope and in terms of the lengths of protection than the European Commission’s proposal).

Scope: The proposed ancillary copyright applies to ‘press publications’, a concept which covers not only news articles but anything that was published in the press. This includes any types of magazines, including special interest publications, such as car or porn magazines. Recital 33 specifies that ‘periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive’. Moreover, the provision applies to ‘digital uses’, which can cover activities that are both online or offline, such as linking but also scanning.



Linking: Recital 33 implies that this provision applies to links, as it specifies that the protection provided to press publications ‘does not extend to acts of hyperlinking which do not constitute communication to the public’ (implying a contrario it applies to links that do constitute such a communication).

Duration and timing of application: This provision is intended to ‘protect’ press publications for 20 years (from the 1st of January following the year of publication) and is retroactive (see Article 18.2).

What is protected? According to Article 2(4) the publishers’ right is based on definition of press publication as a collection of works. This definition makes it unclear whether a single article is covered as part of the collection or if it is the choice and arrangement that is protected here, similarly to the distinction between the protection of records in a database and the various rights invested in the database itself.

WILL THE EC’S PROPOSAL FIX THE ISSUE?

Will the EC’s Proposal Fix the Issue? No, because:

- 1) **The European Commission proposes a solution that does not properly address the problem of revenue loss of publishers, while limiting users’ access to information.** The publishers claim that they lose revenue because readers read the snippets and do not follow through to the original content. The challenges for modern news media are too complex to solve with a simple transfer of revenue from one industry to another, and need to be addressed with policies that do not affect users.
- 2) When looking beyond the political solution, **the legal wording is at best confusing** (and at worst wrong from a legal point of view).



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WHAT SHOULD THE EU DO TO FIX THE ISSUE?

- Delete Article 11, as well as Article 2(4) and Recitals 31 to 35.
- Render the ancillary copyrights put in place in Germany and Spain illegal.
- As regards the side issue of enforcement difficulties in case of infringements that are already covered by the copyright rules (e.g. scraping), extending the presumption of authorship or ownership that already exists under Article 5 of the Enforcement Directive ([2004/48/EC](#)) would probably be the most efficient path. The legal effect of Article 5 is that the general rule about the burden of proof concerning the rights ownership is reversed. The person who is named as the rights owner is presumed to be entitled to enforce the rights. Anybody who wants to contest the presumption can rebut it by proving the contrary. The addition for example of the following language to Article 5(b) of the Enforcement Directive could therefore be envisaged:



“For the purposes of applying the measures, procedures and remedies provided for in this Directive,(a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his/her name to appear on the work in the usual manner; (b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter **and press publishers with regard to their licensed works or other subject matter.**” [Our addition in bold]

WHO'S AFFECTED?

Citizens: This provision applies regardless of whom makes the 'digital use' of a press publication, so basically anyone posting excerpts of press publications (for example on a blog) could be faced with licencing and possibly payment to right holders claims. It is not even clear how this provision interacts with the quotation exception (the only internationally mandatory exception) and, at any rate, many Member States have very restrictive applications of such a quotation exception. Moreover, if to avoid costs, news aggregators decide to only aggregate articles from the big publications and to ignore smaller ones, citizens will be less likely to find these smaller ones (if they survive), this to the detriment of media pluralism. What the ancillary right does is to make it harder to link, share news content, and so it makes it harder for news to be found online. It's especially harder to find more diverse sources of news, and it's harder to be found for citizens blogging or running an online news website. Moreover, this new copyright harms the ability to access information – whether in a library card, via a general search engine or the search engine of an open-science publication, or even a table of contents. It also ignores the principle that news, facts, and ideas are not protected by copyright.



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WHO'S AFFECTED? (CONTINUED)

Businesses: If your app or programme uses content from the Internet, then you may be in trouble. Same thing if you use news content, or index content from the web. 'Ancillary' rights for publishers make it harder for apps and websites to index content and build tools to share such content. Start-ups have for example already shut down entirely or have shut down products and invested elsewhere for fear of legal dispute with collecting societies; others have seen their funding dry up as investors walked away from the legal risk. Moreover, as the European Commission's proposed provision applies to much more than what was done in Germany and Spain ('digital uses') it is unclear how far reaching it will be. It is worth remembering that Twitter styles itself as a 'micro-blogging platform' and many of its specialised topic feeds could well fall under this new right. The same could be said about other social media platforms such as Facebook, where linking to an article automatically creates a 'snippet'. More generally, even if it does not generate expected income, a new neighbouring right for publishers means adding an extra layer of rights clearances to any project.

Journalists: This right does nothing for journalists as it is not aimed at them. Quite the opposite, its aim is in part to allow publishers to get a larger share of the copyright income they share with journalists and have even more control over journalists' content. If a journalist publishes in a newspaper, magazine, etc., the publisher will have a new, additional right, on top of the journalist's copyright, on what he writes. Though there is a form of safeguard in Article 11(2), namely that:

"Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated"

However, it remains unclear at this stage how this will be interpreted in practice.

Press Publishers: The creation of this right tends to hurt particularly smaller providers of news who don't have a strong brand and are using the Internet to make a name for themselves and find new readers. If a service facilitating access to aggregated news content needs to pay for linking, it may decide some links or news outlets will simply not be included in their service to avoid the costs. As a result, a lot of information will not be accessible to users through online search, for example. Experience from Spain shows that smaller publishers will suffer most. The news will come exclusively from big publishers and companies who have enough negotiating power to contract the flow of the snippet levy revenues.

Javier Sardá, Founder of NewsletterBreeze, [said](#):

"we lost 3/4th of the customers we had gained during the preceding few months. None of the customers who were testing the service became customers. They were afraid of being charged a tax of an unknown quantity. From one day to the next, our promising future, turned really dark."

Ricardo Galli, co-founder of Spanish start-up Meneame, [said](#):

"The law [in Spain] codifies an extractive cartel, penalises innovation, the roll out of new digital products, harms the smaller media that depend mainly on social networks for their dissemination and their growth, and puts companies like Meneame in a situation of economic uncertainty."



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WHAT’S AT STAKE?

Objective: Some (news) publishers want to clarify that linking requires their consent and/or that they should be paid when someone links to their content under certain circumstances. They have sued to ask that browsing their content on the internet requires their permission; that linking is unlawful; and argue that the European courts’ decision that linking to content on the Internet required permission needs ‘clarification’. They also argue that they need a new right to collect their share of ‘reprography’ income (money charged by copyright collecting societies for printers, copy machines, etc.), after the European courts decided that money should go to authors, not to them. **Several news publishers disagree with this approach** ([here](#), [here](#) and [here](#)) – **but have not been heard.**

Impact on authors’ copyright: The Directive claims that the new right for publishers will not affect authors, by making clear that it in no way changes existing copyright and even explicitly saying in Recital 35 and Article 11(2) that it cannot be invoked against the authors or other rightsholders who can exploit their work independently. It is however unclear how this will work in practice as many different situations can arise: in many cases, journalists will have assigned their copyright to the publishers, but in some cases they will retain their ownership, while yet in other cases there could be complex syndication deals in place.

Side issue: Some press publishers have claimed they need this new neighbouring right to facilitate the enforcement of their rights against piracy by notably so-called ‘website scrapers’, that copy-paste the content of news articles on their website. It must be noted that this practice is illegal under current copyright law, but news publishers have had issues when going to court, as they have been asked to prove their legal entitlement in every single article, graphic or image to stop the infringement by such scrapers.

WHAT’S WRONG WITH THE EC’S JUSTIFICATION?

- The Centre for International Intellectual Property Studies ([CEIPI](#)) from the University of Strasbourg points out in its [Opinion](#) on the European Commission’s copyright reform proposal that:



“While the Impact Assessment accompanying the Directive Proposal concludes that the ‘introduction of a related right covering digital uses of press publications is not expected to generate higher licence fees for online service providers’, it fails to assess the impact of the Directive Proposal on authors. **As the “pie” does not get any bigger, the authors’ share will inevitably decrease.** Ultimately, this might undermine the overall functioning of the copyright system, especially because it should primarily secure fair remunerations to creators (rather than only compensate the investment of rightsholders), while at the same time providing access to users.”



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WHAT’S WRONG WITH THE EC’S JUSTIFICATION? (CONTINUED)



- The provision claims to be necessary because of the difficulties faced by publishers of press publications 'in licensing the online use of their publications and recouping their investments'. The European Commission has on multiple occasions specifically referred to the imbalance of negotiating powers that exists between press publishers and companies such as Google, with their Google news aggregator service.

Yet **press publishers have full control** in practice as regards the appearance of their publications in Google search, as the addition of a simple line of code (the so-called robot.txt file) to a press publication site will ensure that none of its content will be listed in a search engine (and hence on Google news, for example). But obviously press publications know this will remove one of the biggest sources of traffic to them and hence do not want that to happen. Which raises the question of who benefits from whom, especially when considering Google News does not comprise advertisements?

- **Not everything printed in a newspaper is automatically protected by copyright** in every Member State: for example, a short news item will not necessarily be considered as a copyrighted 'work'. Yet this provision would give a press publication right to this item that is not protected by 'normal' copyright.
- One of the recurring claims by the European Commission in general and Commissioner Oettinger in particular is that news aggregators, through the aggregation of snippets, take traffic away from press publishers. One of their key arguments is to quote a Eurobarometer [survey](#) on 'Internet users' preferences for accessing content online', which they [claim](#) shows that "47 percent of the users who read snippets DO NOT click through to the article".

The problem with this statement is that this conclusion cannot be driven from the Eurobarometer survey. The Commission refers to Question 17 of the survey which asks: "When you access the news via news aggregators, online social media or search engines, what do you most often do?" The participants were offered three options, but could only choose one:

- Browse and read the main news of the day, without clicking on links to access the whole articles. (47%)
- Click on available links to read the whole articles on their original webpage. (45%)
- You never access the news via news aggregators or online social media. (6%)

In other words, aside from the fact that multiple answers were prohibited, the participants were asked what they "most often do", not what they "DO" or "DO NOT". Moreover, most people would probably click on certain links and not on other, depending on the time they have and their interests. Finally, **the survey shows that a vast majority of the users actually access or have accessed news through news aggregators or online social media. This shows that these tools actually benefit publishers!**



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FURTHER READING

- Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg – [Opinion on Neighbouring Rights](#)

“Any economic input into the value chain of creative activities does not merit the grant of a property right. Also, a grant of a neighbouring right to one economic actor cannot be a reason for granting such right to another one. Moreover, the Directive Proposal does not follow any meaningful logic of investment reward, since it proposes to grant rights to any publication, even those that do not involve any substantive investment. For example, publication of any trivial information on a ‘news website’ will be sufficient for the grant of neighbouring rights;”

- COMMUNIA – [Commission’s Proposal on New Rights for Press Publishers: A Terrible Solution Good for No One](#)

“Creating new rights (which are next to impossible to retract) is not a suitable method for managing the relationship between different market segments and the public. The (online) publishing sector is evolving at a rapid pace, and intervening in the relations with a static and blunt instrument would cause substantial collateral damage to education and access to knowledge.”

- Copyright for Knowledge – [Response to the UK IPO’s call for views on the Proposal for a Directive on Copyright in the Digital Single Market](#)

“We have a specific concern that the publishers of scholarly and scientific journals may see the new right in Article 11 as the basis for a campaign for the same publication right to be extended to scholarly and scientific journals. We see this as a possible threat to the widely shared and accepted Open Access agenda to promote the availability of the results of publicly funded research in freely available web-based sources. If the publication right were to be extended, it would be a seriously retrogressive development, which would endanger the widely accepted policy of making the results of research as available as possible as promptly as possible for use by the wider research community throughout the EU.”

- Initiative against an Ancillary Copyright for Press Publishers (IGEL) – [Our Statement on the Commission's Proposal Regarding a European Ancillary Copyright for Press Publishers](#)

“A European approach to the AC [ancillary copyright] will not diminish the problems that arose in Germany and Spain, but will aggravate them. This is especially true in light of the fact that the Commission’s proposal lacks any safeguards, which were, for instance, foreseen in Germany for the avoidance of immense collateral damage. Additionally, the scope of its application and protection, and the extent of protection and duration of the European AC as put forward by the Commission go far beyond the role models of the ancillary copyright for press publishers in both Germany and Spain.”



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FURTHER READING (CONTINUED)

- Initiative against an Ancillary Copyright for Press Publishers (IGEL) – [Beware: The 'Neighbouring Right for Publishers' is an Ancillary Copyright on Steroids! - To the Potential Consequences of a General Neighbouring Right for Publishers](#)

“The negative effects on innovation, free online communication, linking, sharing and social networking would be far worse than those caused by the previous versions of ancillary rights.”

- Kluwer Copyright Blog – [A Neighbouring Right for Press Publishers – The Wrong Solution to a Serious Problem](#)

“The commercial viability of press publishers is a very important issue, that deserves serious attention and a willingness to investigate all possible solutions. However, by focusing the discussion, right at the outset, on a specific and probably irrelevant IP measure, the European Commission runs the risk of distracting minds from discovering and implementing new business models for the age of digital abundance, including accepting and embracing unbundling and new consumer preferences. Moreover, if a neighbouring right is ever implemented, it is likely to form an actual impediment to innovation on the part of both publishers and aggregation platforms, therefore actively harming publishers’ ability to find and monetise audiences for their products.”

- Open Rights Group (ORG) – [Submission to the IPO Call for Views: Modernising the European Copyright Framework](#)

“While we sympathise with the difficulties faced by news organisations, particularly in their reduced ability to sustain quality investigative journalism, we believe that creating a new neighbouring right would be negative and very likely would not solve the problems faced by media organisations. Indeed from the available evidence, the new right could well have the opposite effect and reduce media diversity by consolidating the position of large well known players while smaller publications lose alternative routes to reach new audiences.”

- Copyright for Creativity (C4C) – [Ancillary Copyright: Calling a Bad Idea by Another Name, Does Not Make it a Good Idea](#)

- Copyright for Creativity (C4C) – [EC Failed to #FixCopyright: Stop ‘RoboCopyright’ and Ancillary Copyright & Start to Focus on Users and Creators](#)

