Kluwer Copyright Blog

EU competence to create a neighbouring right for publishers? The small pieces make up the big picture

Ana Ramalho (Maastricht University) · Monday, September 5th, 2016

Earlier this year, the Commission launched a public consultation on the role of publishers in the copyright value chain. The consultation sought to gather views on a number of issues, namely the impact of granting an EU neighbouring right to publishers and whether the need for EU intervention is different in the press sector vis-à-vis other sectors of the publishing industry. Recently leaked documents (including a draft Directive) confirmed that the EU intends to introduce a right for news publishers.

Independently of the merits or demerits of introducing such a right, another discussion is, in this blogger's opinion, crucial: does the EU have the necessary powers to do so?

A comprehensive assessment of the EU competence to legislate on this topic requires a step-by-step approach: first, a competence norm must empower the EU to enact legislation on the subject. Second, the measure must go through certain procedural checks, which take the form of subsidiarity and proportionality assessments.

Step 1

With regard to competence norms, out of the possible sources of competence, two main legal bases could be used for creating a neighbouring right for publishers: Article 114 TFEU and Article 118 TFEU. Under Article 114 TFEU the EU legislator may adopt measures for the harmonisation of national laws, while Article 118 allows for the creation of pan-European intellectual property rights (thus implying unification, rather than harmonisation). Both legal bases require the EU legislative measure to address the establishment or functioning of the internal market. In other words, there must be a demonstrable internal market need.

It is necessary, therefore, to define "internal market need", as the concept can serve as a benchmark to assess the legitimacy of EU action in a given field. The definition of internal market need is found in CJEU case law. An internal market need worthy of EU intervention must comply with certain requirements or benchmarks: first, obstacles to cross-border trade must be in place or likely to occur, or there must be an appreciable distortion to competition; second, the EU legislative measure must be designed to

prevent such obstacles or distortion (Case C-376/98 *Tobacco Advertising*; joined cases C-465/00, C-138 and 139/01 *Österreichischer Rundfunk*; case C-380/03 *Tobacco Advertising II*; Case C-436/03 *Parliament v Council* ;case C-217/*04 United Kingdom v. Parliament*)

There will be obstacles in place where different national laws provide for different levels of protection; and where cross border trade represents a relatively large part of the market concerned. Obstacles are likely to occur where Member States have taken, or are about to take, legislative measures providing for different levels of protection (Case C-210/03 *Swedish Match*).

A distortion to competition will be appreciable where national legislative differences giving rise to different obligations for economic operators throughout the EU have significant economic implications (such as substantial investments or relocation of services, as held in case C-301/06 *Data Retention* and case C-376/98 *Tobacco Advertising*, respectively); and where the subject matter is of frequent occurrence (such as, e.g., the emergence of non-material damages in the field of package holidays, as decided by the CJEU in case C-168/00 *Simone Leitner*).

The EU legislative measure must be intended to prevent obstacles to trade or appreciable distortions in competition (depending on the case), i.e., it must be targeted at the improvement of the conditions for the establishment and functioning of the internal market.

Based on these benchmarks, the following assessment was performed for the introduction of a neighbouring right for publishers (including news publishers):

There is no obstacle to cross-border trade. To date, two EU countries (Germany and Spain) have carried out legislative initiatives favouring news publishers (in the case of Germany) , or publishers of periodic publications aimed at informing, creating public opinion or entertaining (in the case of Spain). In both cases, the introduction of a right was ineffective. The German and Spanish laws did not generate revenue for the publishers they sought to protect, making the legislative intervention moot. Therefore, the obstacle to trade that could in theory result from a territorial right existing in two Member States becomes illusory, as in both cases the right is deprived of its subject matter (i.e., protecting and ensuring compensation for publishers).

Cross-border trade in publications does not represent a large part of the publishing market, since the latter is language-based, and naturally split along national borders. The use of many languages makes it hard to market products – books, newspapers and magazines – across Europe. This is especially true for news publishers; despite globalisation, it is expected that in the majority of Member States the largest part of the market is occupied by national news outlets. As a result of these inherent limitations of the publishing market, cross-border trade of the relevant products represents a negligible part of the publishing market. This is particularly so for the news publishing market, where cross-border trade of newspapers (either online or offline) does not have substantial weight in the market for news publishing.

It is also unlikely that an obstacle will arise in the future. In light of the failed

experiences of Germany and Spain, other EU Member States will most likely refrain from taking similar initiatives. The chilling effect was already felt in Austria, where the adoption of a neighbouring right for news publishers was postponed and did not make it into the final law. Parliamentary interventions show that, while the need to notify the EU Commission of the new right was a central reason for this postponement, the negative outcomes in Germany and Spain did not go unnoticed either. In addition, in other countries, including Belgium, France and Italy, non-legislative solutions were agreed between the different stakeholders, making it unlikely that such agreements will be supplemented by legislation.

No appreciable distortion to competition exists either. Publishers established in Member States that provide for a right for publishers could in theory be at an advantage due to profit increase. However, the fact that aggregators can freely market their services in all Member States except Spain and Germany does not have significant economic implications – these were curtailed by the withdrawal of several aggregators from the market in the case of Spain and by the grant of gratis licences in the case of Germany. Indeed, any advantage of Spanish and German publishers vis-à-vis publishers in other Member States was diluted by the fact that in practice the rights did not have the effect sought. Even if the legislative initiatives of Germany and Spain had been successful – the publishers in those Member States being thus, in theory, at an advantage – cross-border trade of the relevant product(s) is not a frequent occurrence, as the market is mainly national. Any potential distortion is therefore not appreciable.

There would be no improvement of the conditions in the internal market. Due to the lack of obstacles to trade or appreciable distortions to competition, a legislative measure creating a neighbouring right for publishers would not improve conditions in the internal market, as there are no internal market hurdles to solve.

On the contrary, in the case of either unification or harmonisation, extra rights would be added to the EU legal order, hindering cross-border trade in the sector. This is especially the case for rights such as copyright and neighbouring rights, whose clearance is made more difficult due to the fact that they are unregistered. Moreover, since a new right would constitute a new legal form, and given that there are no successful cases of similar rights that the neighbouring right for publishers could be built upon, the scope of the new right and its interplay with existing rights and limitations would most probably be unclear and subject to intensive litigation. Due to both the need for rights clearance and the legal uncertainty that ensues from introducing a new right, the requirement of contribution to building an internal market would thus not be fulfilled.

Table 1

Summary of assessment of “internal market need”

Benchmark	Questions to analyse	Sub-questions to analyse	Answer	Justification
Obstacle	Is there an obstacle?	Do laws provide for different levels of protection?	No	Only 2 Member States have a right for publishers, and in both cases the right is deprived of its subject-matter (protection of publishers)
		Is cross-border trade a relatively large part of the market concerned?	No	The publishing market (especially news) is language-based and split along national borders
	Is an obstacle likely to occur?	Have Member States taken or are they about to take divergent measures?	No	The failed experiences of Germany and Spain will have a chilling effect; non-legislative solutions have been agreed in some countries
Distortion to competition	Is the distortion appreciable?	Do national legislative differences giving rise to different obligations throughout the EU have significant economic implications?	No	Economic advantages of German and Spanish publishers have been diluted by the lack of effect of the right
		Is the subject matter of frequent occurrence?	No	The market is mainly national
Improvement of the conditions in the internal market	Is there an improvement of the conditions in the internal market?		No	An extra layer of rights would have to be cleared; a new right would give rise to legal uncertainty

Step 2

Following Article 5(1) TEU, the use of competence must be accompanied by subsidiarity and proportionality checks. Again, it is necessary to define the concepts of subsidiarity and proportionality so that proper benchmarks can be established.

Subsidiarity implies an examination of efficiency gains from EU action, considering all the goals of the measure (and not only internal market ones). The efficiency gains of EU action must clearly outweigh those resulting from Member States' action.

Proportionality requires the analysis of three factors: suitability (the measure must be appropriate to achieve its objective); necessity (the measure must be the least restrictive alternative from a range of equally effective options); and proportionality *sensu stricto* (which amounts to taking account of conflicting interests and considering the substantial negative impact on other operators).

Presumably, the objectives of the EU legislator in introducing a new right for publishers would amount to fostering internal market goals and protecting the publishing industry (or a particular branch thereof, such as news publishers). The question of internal market goals is unimportant – as argued above, no internal market goals are relevant in the cross-border trade of products or services that operate, in an overwhelming majority of cases, within national borders. The subsidiarity and

proportionality checks must thus be done against the objective of protecting the publishing industry. The assessment of subsidiarity and proportionality compliance was performed as displayed below:

Subsidiarity: The efficiency gains from EU action do not clearly outweigh those of Member States'. The EU legislator would probably not be better placed than national legislators to cater for the needs of national publishers (especially in the case of news publishers), given the strong link of the sector with national cultures and identities. In any case, agreements have been reached at Member State level between the different stakeholders, casting doubt on whether legislative intervention even at national level is at all necessary.

Proportionality: the measure is not suitable. The neighbouring right is unsuitable to achieve the goal of protecting the (news) publishing industry, as demonstrated by the failed national experiences of Germany and Spain.

Proportionality: the measure is not necessary. The neighbouring right is not the least restrictive alternative. Other actions, such as non-binding recommendations or fostering the dialogue between stakeholders at national level, could be both more effective and less restrictive.

Proportionality: the measure is not proportionate *sensu stricto*. The burden imposed on other operators (e.g. on news aggregators in the case of the news industry) could have a significant negative economic impact on that sector, with the result that the balance between different interests required by this factor would not be achieved.

Table 2: Summary of procedural checks

Benchmark	Questions to analyse	Answer	Justification
Subsidiarity	Do efficiency gains in EU action clearly outweigh Member States'?	No	The publishing sector has strong links with national cultures and identities
Proportionality	Is the measure suitable?	No	Evidence of failed national experiences
	Is the measure necessary?	No	There are less restrictive alternatives, such as recommendations or facilitating dialogue
	Is the measure proportionate *sensu stricto*?	No	Burden imposed on other operators can have a significant negative economic impact, disturbing the balance between different stakeholders

By failing to comply with the competence benchmarks of the first two steps of the competence test, the EU powers to introduce a neighbouring right for publishers (or for a specific branch of the publishing industry, such as news publishers) are limited. The characteristics of the publishing sector and of the status quo at Member State level do not lead to a need for EU intervention through legislative measures such as

directives or regulations, although non-binding recommendations or facilitating dialogue between stakeholders at national level could be adequate courses of action.

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