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This blog looks at Article 15 of the Directive on Copyright in the Single Digital Market (CDSM Directive), the press publishers’ right.

Article 15, as regular readers of this blog will recall from this, and this, and this, and this post, creates a right ancillary to copyright that benefits some publishers. It is triggered when some agents perform some online acts in respect of some specific content: in brief, online reproduction and making available news content produced by news publishers by commercial Internet concerns.

The blog comes in two parts. Part 1 evaluates some of the reasons set out in the recitals for the passing of this provision, relevant not only to understand and thereby interpret the EU Directive, but also because of on-going discussions outside the EU about legal interventions intended to bring about a similar effect (for example, the UK and the USA, here, here and here). Part 2 considers what content the article catches (here).

Why?
In 2006, (which in terms of the Internet is equivalent to the times when dinosaurs stalked the Earth), the big – but not quite yet dominant – search engine company Google negotiated a deal with the hundred-year-old American news wire service, Associated Press. The parties agreed, in the words of a contemporary Reuters report, ‘to pay AP for use of its news’. A few months afterwards Google also struck a similar deal with the French news wire service AFP. Spin forward three years to the summer of 2010, (about the time that – to continue the metaphor – in Internet time mammals began to come down from the trees) and Google re-negotiated the deal with AP. No one at the time would explain the terms of the deal, and Google said it didn’t need to licence AP’s product as it was covered by Fair Use. (Google’s anticipated defence in respect of European exceptions and limitations was less clear.) But what is known is that Google did a deal to compensate some of the entities that produce news for presenting product derived from them on the Google’s users’ screens.

These facts are as good as any as a background to understand Article 15 of the (Directive on Copyright in the Single Digital Market (CDSM Directive) passed in 2019 – though, it’s worth saying in passing that 2006 is a slightly arbitrary place to start when looking for context. Will Slauter’s admirable book Who Owns the News takes us back to Henry VIII’s edicts about prior licensing for published material in the early 16th century. The word limit of the Kluwer blog forces this writer to start somewhat later.

The 2006 and 2010 licencing agreements provide one rationale for the press publishers’ right because, from the point of view of news publishers, they demonstrated that Google was prepared to licence news from AP and AFP. If it was prepared to licence news from publishers in these situations, why not in other times? The company was also under pressure to pay for its use of news by a string of court decisions in various jurisdictions – see here, and at least in part here, here, and here (although it must be said that it benefitted from others here and here. And there were similar laws mooted in Italy and France that didn’t pass. For a contemporary analysis of those in Belgium, Germany and Denmark, see here.). Similarly, why should other online agents not also pay for the news they served up to their customers’ screens?

‘Money’ is not a bad guess at what the publishers consider to be the answer of Google – and indeed others, like Facebook to this question of ‘why not?’. These licencing agreements seemed to provide powerful support for the principle of ‘use news, pay for news’. No doubt, the information technology companies would demur. But if the principle of paying for online reproduction of news content had been established, the news publishers might now reasonably ask what’s wrong in enshrining it in law? That law is now Article 15 of the CDSM.

**Why not?**

There are many other answers to the question of ‘why not?’. A first emerges from considering the recitals to the Directive, which provide the official account of the
rationale behind the provision. Recital 54 talks about news being a valuable commodity in a democracy, and that commercial publishers of news are facing revenue difficulties in an online world. Recital 55 deduces from this the need to provide EU-harmonised legal protection, targeted at the online uses of news by information society service providers.

One criticism of the case set out in these recitals is that the directive is being used to attempt to roll back the evolution of business models.

The commercial news industry has been a robust way of generating profit since at least the early 18\textsuperscript{th} century, when news publishers were the new kids on the block. Their model is a two-ended market. News publishers sell information to interested parties, and the attention of those interested parties to advertisers. In the words of an 18\textsuperscript{th} century pamphlet \textit{The Case of the Coffee-Men of London and Westminster}

They are paid on both Hands; paid by the \textit{Advertisers} for taking in \textit{Advertisements}; and paid by the Coffee-Men for delivering them out: Which (to make use of a homely Comparison) is to have a good Dinner every Day, and to be paid for Eating it. \textit{Here’s Luck, My Lads!} Never was there so fortunate a Business.

This pamphlet was a cry of pain from an industry that the commercial news industry was out-competing: coffee houses.

To some extent, the arguments found in recitals 54 and 55 were prefigured in that 18\textsuperscript{th} century pamphlet, though the position of commercial news publishers has changed. Today, they are not out-competing, they are being out-competed. The anonymous author of \textit{The Case of the Coffee-Men of London and Westminster}, were he alive today, might well see a palpable irony in news publishers’ arguments for Article 15. Many giant Internet companies are much more efficient than commercial news publishers in the market for attention. These information society providers are the new kids on the block. They offer more interesting and relevant information to the public than news publishers, and thereby gather attention in larger numbers and in more exquisite detail to sell to advertisers than can purveyors of news. The new players are so effective that they no longer need to charge customers for the information itself. The 18\textsuperscript{th} century two-ended market has, it seems, come to an end, and is sustainable as a single-ended market. This, say critics, is a classic case of creative destruction. Such an evolution of business should not be impeded, and Article 15 is an impediment. The mammals, after all, out-evolved the dinosaurs.

And yet, is it? Supporters of this case for Article 15 point out that it’s all very well to be in favour of creative destruction, but only if there’s a realistic expectation that the destruction is indeed creative. And in the present case, the evidence that the destruction of the business model of the commercial news industry will create something of equal or greater benefit to society is mixed, to say the least. Sure, it will be creative for the giant Internet platforms and their shareholders, but their interest isn’t the same as that of society.

And they haven’t covered themselves in glory in recent times, in terms of putting the
public interest in the free flow of democratically salient information above their desire for profit. Far from it. Most significantly, they do not actively investigate, collect, assess and curate information, which are the key tasks of a news publisher. Rather, they scrape what they can find, after others have done these (expensive) tasks. Given that, isn’t Article 15 a worthwhile addition to the EU’s statute book?

Still no.

Well, yes and no. Yes, it’s true, there is a point about being sceptical of the motivations of the giant Internet information companies. They haven’t designed their algorithms to serve the public good, and they are not primarily motivated by the public interest. They emphasise those occasions where their interests and the public interests are aligned, in what amounts to a ‘tail-coating’ argument, but these are contingent and passing. Their business model depends on selling aggregated attention, and shock and horror garners attention much more effectively than nuance and negotiation. The criticism is that they – on balance, frequently – err on the side of pimping scandal.

All that may well sound to some ears like a somewhat familiar tactic: have news publishers not employed a similar technique on occasion? And themselves used – and arguably are now also using – tail-coating arguments to seek advantage? For these reasons and others, it is difficult to see this argument as sufficient to pass a copyright-related law to support commercial news.

But perhaps yes, if...

The better way of addressing the concerns laid out in recitals 54 and 55 is more complicated. It starts with assessing where we are in terms of how the information flow has evolved historically, and in particular what are people’s expectations of truth, reliability, honesty, force, persuasiveness and so on, and how well or ill these have been met. We then should ask, bearing in mind that, what interventions best serve a functioning democracy?

It’s worth, in answering this, concentrating on addressing the problem with a full set of regulations, which includes – and here’s the key point – imposing liabilities on the press as well as affording them privileges. These might amount to content-based regulations of the sort commonly imposed on broadcast journalism in many countries, or strengthened media consolidation rules, in addition to sectoral regulations aimed at helping business models. This proposal might raise eyebrows, as in some countries it’s historically been difficult to assert that the press indeed enjoys special privileges under the law. But the writer has argued elsewhere that they do, and that the argument for these privileges has historically supported the case that they should be
balanced by special liabilities. If this is right, it crosses no Rubicon to extend these now. Indeed, one can see already such balancing of rights and obligations on the EU’s statute book in the Audio Visual Media Services Directive (AVMSD). In short, any intervention to deal with the press’ business model should balance these by imposing new obligations too, aimed at serving the public interest identified in recital 54.

It hasn’t ended here

The argument continues, and won’t be resolved in this blog. Moreover, this isn’t the sole contentious area. Beyond this critique of recitals 54 and 55, there are other answers to the question of ‘why not?’. I have previously set out some of these; and others more scholarly, persuasive and articulate than I could hope to be set out others. Conversely, there are other arguments in its favour. For a few brief examples, see this 2009 German article by Prof Dr Jan Hegemann, and – indeed – Laurence Kaye’s dissenting comment on this Kluwer blog criticising the proposed law.

These aren’t moot, academic points, as this area remains contested. Moreover, the passing of Article 15 has invigorated arguments for similar laws and rules elsewhere. It provided a precedent for the recent Australian News Media Bargaining Code, discussed here. And while the UK is not implementing the CDSM Directive, as there is talk of legal interventions of similar effect afoot in that country as well.

What ‘whys’ were, and what ‘whys’ were not.

One important point, though, to take forward into these current and future questions of the policy, principles, rationales and argument behind a news publishers’ right, relates to the conduct of the news publishers in lobbying for the passing of Article 15. They countered the arguments of principle and other similar responses in a remarkably effective way – too effective, perhaps. There were cogent arguments against Article 15, yet the news publishers frequently played the player not the ball in countering them. The powerful interests of news publishers invoked the powerful interests of big tech companies as a way of pursuing their own powerful interests. They undermined independent voices, impugning their independence, and portraying them as Google stooges.

This may be read as sour grapes, given the writer’s work in attempting to resist the press publishers’ right. But the Corporate Europe Observatory has studied the passing of Article 15 as a case study in covert lobbying by news publishers. They were unimpressed. They came to the conclusion that:

Lumping in big industry players like Google with every other critical voice, such as NGOs and activists, and then tarnishing them both, was a successful strategy in this
debate. Using this approach, all criticism, regardless of where it came from or what it focused on, could simply be dismissed.

Whatever one’s view of the merits of Article 15, this was, to say the least, unwelcome. It should be avoided in future.


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