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The Link Wars Rage on: France and Germany Consider Exclusive Right over Snippets

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The link wars have once again broken out in Europe. In August, the German cabinet gave its backing to a draft law allowing news publishers to collect compensation for the republication of headlines and the introductory sentences of articles by aggregators and search engines. Under the proposal, which would protect content for one year, news publishers would be able to license out snippeting rights for a royalty and start proceedings against those found to infringe their newfound neighbouring right. They would of course also be able to grant permission to reproduce to the relevant intermediaries for free. Initial suggestions that bloggers should also be required to pay in order to quote articles have been put aside; according to the current formulation of the draft law, material quoted by humans for commentary and analysis, as opposed to that automatically selected by a computer, may be copied freely. Links entirely unaccompanied by reproduced text would also be unaffected by the proposal, their publication remaining fully legal.

The draft law still has to pass through Parliament, which could take up to a year. Google has criticized the proposal, talking of a "dark day" for the internet in Europe and called on German MPs to block its adoption. Uncertainty hangs over the draft, as nobody seems particularly pleased with it under its present configuration. Mathias Schindler of Wikimedia Deutschland suggests that "From this point on, anything is possible, including sending the bill back or shelving it. I wouldn't be surprised that as a result of lobbying and campaigning by different parties this bill ends up dead on arrival."

Following the German lead, French publishing associations are now also pushing for the introduction of a similar right in France, obliging content aggregators to obtain a license for the indexing of press-provided material and thus share revenue earned from advertising displayed alongside news items. Guillaume Frappat, head of economic and digital affairs for the French national magazine publishers' society SEPM, stated that SEPM "don't want to break the balance between copyright and innovation", but that it is necessary to understand that the main driver behind traffic is content. “Google has developed on our content” said Corinne Denis, President of online content publishers group GESTE, “and if they have kept their promise to never sell advertising on Google News, by including the news on their search engine, they have cleverly avoided the obstacle”. French Culture Minister Aurelie Filippetti is also in favour of the idea, describing it as extremely pertinent: “It is natural that search engines should contribute to the financing of the real added value produced by the papers”, the minister said. “The editorial work is done by the press, not by these platforms which nevertheless in this way accrue considerable commercial profit.”

Although faring better than their US counterparts, print newspapers and magazines in Europe have seen their circulation fall steadily over the past decade due to the availability of free news sources on the internet, while publishers are grappling for ways to monetise the online side of their businesses. But the proposed solution is rather perplexing. Observes Forbes, “OK, sure, headlines are copyright just like any other form of writing, but complaining because people put your headlines in front of potential readers just does sound most strange.” The civil rights advocacy group EDRI has refuted the reasoning behind the proposals suggesting that by “the same logic, concert venues could ban taxi drivers from taking people to their concerts, unless they pay ‘compensation’ to the venue for bringing customers to their doors.” Commentators further observe that in actual fact Google makes only marginal profit from the newspapers’ work: Google News does not carry advertising, while news is an unprofitable search term. Mike Masnick of Techdirt explains that “it’s all too common for certain players in a market to assume that they should accrue money for anyone and everyone who benefits from their work. But that is not only impossible, it would actually massively limit growth.”

National attempts to leash Google to news content providers have arguably been fuelled by the case law of the European Court of Justice. In 2009, in the much-criticized Infopaq I case, the Court decided that snippets of 11 words may, depending on national law, be entitled to copyright protection under the European directives if they can be found to constitute an expression of the intellectual creation of their author. Accordingly, *originality* and not *substantiality* is the test that determines the copyright status of extracted parts of a work. In the 2012 sequel Infopaq II, the Court further noted that the transient copying exception to copyright enshrined in Article 5(1) of the Copyright Directive only applies if the act of temporary reproduction does not enable the generation of an additional profit beyond that derived from the lawful use of the protected work and does not lead to a modification of the work – under this interpretation the reproduction of news snippets by an automated process would not qualify as a protected use.

Search giant Google published a note last week warning against the adoption of the contemplated measures. According to Google, the publishers’ plans would in effect outlaw free online indexing, thus limiting access to information and imposing a chilling effect on innovation. Google warned that such a move would threaten its very existence and would therefore force it, not to pay compensation, but to stop indexing French websites. As the search engine observed, that would negatively impact the newspaper publishers, by depleting the traffic sent their way by the search engine, as well as diminishing the visibility of French content and the French language, which would lose out in comparison to English sources. Google’s stance has antagonised the French government, with Ms Filippetti warning that “You don’t deal with a democratically-elected government with threats.”

The French and German initiatives come just over a year since Belgian newspapers capitulated in the famous Copiepresse case. Copiepresse, a Belgian newspaper copyright management agency, claimed that Google had violated copyright law in posting links to and abstracts of articles of Belgian newspapers without permission on its Google News service and that, as a result, the newspapers were losing online subscriptions and advertising revenue. In May 2011 the Belgian Court of Appeals upheld the Court of First Instance injunction and ordered Google to withdraw the contested content from all its services upon pain of a fine of non-performance. This Google proceeded to do, removing the papers represented by Copiepresse from its search index and accordingly depriving them of any click-through traffic. The Belgian newspapers quickly underwent a change of heart, with LaLibre.be, one of Copiepresse's flagship papers, lamenting Google's decision to comply with the court order and exclude the Belgian papers from its search results as "brutal". Copiepresse eventually backed down in July 2011 and Google, after being reassured that penalties would not be forthcoming, resumed indexing their articles.

Along a similar vein, in 2011, the English Court of Appeal in Meltwater found that Meltwater News, an electronic media monitoring service, could be implicating its subscribers in copyright infringement by distributing reports that included the headline, opening text and extracts from claimant Newspaper Licensing Agency (NLA)'s articles. Businesses that access press-monitoring services without a special web end-user licence may thus be in breach of publishers' content, notwithstanding any licence held by the press-monitoring agency.

Newspapers of course also have the technical possibility of de-indexing themselves from search engines, if they so choose. However, as Google points out in its aforementioned note, this would be a disadvantageous move: in 2010 British daily the Times decided to lock its content behind a paywall, blocking even headlines from appearing among Google search results. At the time, Times editor James Harding explained that the paper was "worried that viral capability wipes us out and actually what's much more important to us is that we create a sustainable economics for the future of journalism online". He claimed that "we live in such an interconnected world that the amplifier effect of the modern media is such that no good story, no interesting piece of commentary is going to be lost – in fact quite the opposite." The plan was eventually revoked in September 2012 when the newspaper decided to make headlines and limited content available again on Google search, having established that, without providing free access to at least some content, it had difficulty maintaining a growth rate in new paid-for digital subscribers.

By contrast, the New York Times seem, at least for the time being, to have found a golden medium in a so-called "soft paywall", which allows users to view a maximum of 10 articles per month. The NYT's metered paywall is also "porous", as it allows access through links and search engines. This system is intended to retain traffic and visibility among light users, while requiring subscription for regular readers. Google has re-affirmed its willingness to collaborate with newspapers in the development of such of viable business models well-suited to the digital environment: "We have always been and remain committed to collaborate with French publishers associations as they experiment and develop sustainable economic models on the Internet," the search engine states on its European policy blog.

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