Kluwer Copyright Blog

Copyright reform: a new right for press publishers – to have or not to have?

Eugénie Coche (IViR) · Tuesday, March 13th, 2018

On 14 September 2016, a proposal for a Directive on Copyright in the Digital Single Market saw the light of day. The proposal is part of the EU copyright reform package, which has as its objective to modernise EU Copyright rules for the digital age, thereby attaining the objectives set out earlier in the Digital Single Market Strategy. Against this background, the proposal is the result of a strong desire to achieve four well-defined goals outlined by the Commission: ensuring wider access to content across the EU; adapting exceptions to digital and cross-border environments; achieving a well-functioning marketplace for copyright; and providing an effective and balanced enforcement system. Notwithstanding the Commission's quest to strike a fair balance with policy interests such as innovation, education and research, this new framework also seeks to ensure the continuity of a high level of protection for right holders. In this context, the proposed Directive provides for a new category of right holders, namely press publishers.

Under Article 11 of the proposal, press publishers are given the exclusive right of reproduction and making available to the public for the digital use of their press publications. The scope of protection of the right would be similar to that enjoyed by authors under Article 2 of the InfoSoc Directive and that granted to related right holders under Article 3(2) of the same instrument. This controversial new right has been referred to variously as an 'ancillary copyright', a 'link tax' or a 'Google tax'.

What would it mean in practice? News aggregators – such as Google news – wishing to link to publishers' content or to use snippets from journalistic online content would first have to conclude licences with press publishers. This new right would last for 20 years after publication and be subject to the existing exceptions and limitations in Article 5 of the InfoSoc Directive.

Having said this, curious readers might ask the question: *why such a new right?* The justifications for the right can be found in the explanatory memorandum and recitals 31 to 36 of the proposed Directive. According to these, recognising such a right for press publishers would enable them to obtain fair revenues for the value their press publications generate online. This is particularly important due to the economic struggles of publishers caused by the switch from print to digital press, and the related challenges they face in entering into licences with online services. Consequently, the argument goes, the sustainability of the press publications sector is at risk, threatening quality journalism, pluralism, and ultimately jeopardising citizens' access to information as well as public debate.

By introducing this new right, the legislator seeks to improve legal certainty and the bargaining position of press publishers. The right would facilitate online licensing of press publications and give press publishers an enforcement mechanism to obtain compensation in the case of unlawful online publication.

Despite its purported benefits, the proposed right has been met with fierce criticism, in some cases even voiced before the legislative proposal, as was the case in 2015 by members of the European Parliament.

Various objections have been raised. For instance, the European Copyright Society's opinion on the proposal advances several points of criticism. First, it points out the failure by the Commission to conduct an economic assessment and impact study on the proposal. As it turns out, it is more accurate to say that the Commission failed to publish such a study, namely a study conducted by its own research centre (JRC) containing empirical evidence against the adoption of the new right. Indeed, according to that report, the goal behind such a right would not be attained since 'the available empirical evidence shows that news aggregators have a positive impact on news publishers' advertising revenue *[which]* explains why publishers are eager to distribute their content through aggregators'.

A second criticism is that the proposed right would distort competition by favouring large online news providers with deep pockets, to the detriment of small European start-ups, which are financially unable to conclude enough licences for entrance into the market. In fact, the new right might actually lead to an inverse effect, as was shown in the case of Google News in Spain. When Spanish law was changed to include a comparable right, the news-linking service was terminated in Spain by Google. The ineffectiveness of such right at national level was again highlighted in a recent panel discussion between policy-makers and academics.

A further criticism is the likely otiose nature of the new right, as most press publishers obtain copyright protection based on licences or transfer of author's rights by journalists. Based on such a practical scheme, licensing arrangements are not *per se* needed. This was also made clear in an open letter to the European Parliament and the EU Council arguing that 'the proposal in effect establishes a double layering of rights for the same creation'.

That same open letter contains additional objections to the new right that are worth mentioning. Among them is the question of whether *the new right will lead to a change in consumer behaviour and to better media pluralism?* This need, it is noted, was mentioned by the JRC's unpublished study. On the topic of media pluralism, the study notes that 'evidence suggests that news aggregators promote diversity because they facilitate access to news across different sources'.

Building on these lines of criticism, yet another expert study, this time commissioned by the European Parliament, concludes against the adoption of the right and proposes instead its replacement 'with a presumption that press publishers are entitled to copyright/use rights in the contents of their publications'. This presumption would be in line with the Committee of Legal Affairs' opinion which supports the concept that press publishers should be able to sue in their own name against online infringement of works in their press publications. More drastically, the Committee on the Internal Market and Consumer protection proposed to solve the issue by amending the enforcement rules instead of the copyright rules. Yet another solution, proposed by the Committee on Culture and Education is to limit the new right to digital uses for commercial purposes.

In my opinion, the most adequate solution to address this issue would be adapting enforcement rules by inserting a legal presumption in favour of press publishers. Such a presumption would make sense since, in practice, press publishers are often assignees of the rights of authors in press publications. In light of this, the new right for press publishers should be removed from the proposal. Taking into account evidence from the Commission's unpublished report, as well as the German and Spanish experiences in this field, the adoption of the proposed right would not serve the intended goals and might even worsen the situation of press publishers. Moreover, as noted by the Rapporteur of the IMCO Committee: 'there is no guarantee provided that any rise in publisher remuneration would flow through to authors'. Consequently, such a right might affect – not protect – content creators, resulting in further decline in quality journalism. To sum up, what the EU should do in order to provide press publishers with the most forceful weapon is, as indicated by the word itself, improve *enforcement* rules.

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