Kluwer Copyright Blog

Press publishers' right: social media enter the stage

Ula Furgal (CREATe, University of Glasgow) · Thursday, November 4th, 2021

On 21st October 2021, Facebook announced that it has reached an agreement with APIG, an association of French press publishers, committing itself to the payment of licensing fees pursuant to the press publishers' right introduced by the 2019 Copyright Directive. According to Facebook's press release, the agreement "means that people on Facebook will be able to continue uploading and sharing news stories freely amongst their communities […]" (translated from French by DeepL). This statement might come as a surprise to those following the press publishers vs digital platforms saga in Europe, having in mind repeated assurances that the new right will have no impact on individual users' ability to share news content online.

From the outset, the discussion on the press publishers' right in Europe focused on the activities of certain types of online services, namely news aggregators and search engines (aka Google). Social media (aka Facebook) were not a part of the conversation. This has, however, noticeably changed during the implementation process.

Possibly inspired by the global regulatory developments, particularly the adoption of the News Media Bargaining Code in Australia, some of the Member States and press publishers have begun to treat the press publishers' right as a basis for negotiation with both Google and Facebook. Most notably, in Denmark, publishers' calls for payment resulted in a change of Facebook's policy in June 2021, with previews being shown only for those articles which are initially shared by their publishers. When announcing the change, Facebook noted that the sharing of news by individuals or publishers themselves does not result in an obligation to pay. Nonetheless, Facebook did strike a deal with French publishers only 4 months later.

This raises the question: does the press publishers' right apply to social media?

Information society service providers

The press publishers' right is a peculiar creature, as it covers only online uses by information society service providers (ISSPs). This limitation was not a part of the original proposal tabled in 2016, making its way to the final text of the Directive through European Commission and Parliament compromises. This change was to bring art. 15 provision in line with the declared aims of the regulatory intervention: strengthening the position of publishers towards services using their content, without impairing users' freedoms.

The Copyright Directive does not offer its own definition of an ISSP, referring instead to the one provided by Directive 2015/1535: it is a service normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. Recital 54 of the Copyright Directive points to news aggregators and media monitoring services as examples. In its decision in the VG Media/Google case, concerning the German predecessor of the EU press publishers' right, the Court of Justice confirmed that the definition also covers search engines. While social media were not explicitly singled out, they seem to comfortably fall within the ISSP definition. This by itself, however, is not sufficient for them to fall within the remit of the press publishers' right.

Do social media make content available?

Unlike news aggregators and search engines crawling the internet in search of new content, social media's content comes from their users. This is an important difference from the new right's perspective, providing publishers with the right of reproduction and the right of making available (arts 2 and 3(1) of the InfoSoc Directive). Whereas it is clear that news aggregators and search engines make content available, the same does not apply to social media.

The question of whether platforms make user-uploaded content available has been occupying both copyright scholars and the Court of Justice for years. Even though CJEU judgments in *Pirate Bay*, *Filmspeler* or *YouTube* envisage situations where a platform is liable for copyright-infringing content uploaded by its users, those scenarios are far removed from users sharing press publications on Facebook and similar platforms. Social media do not play an indispensable role, nor are news publications shared by users infringing. If a simple presumption that all content uploaded by its users is made available by a platform was justified, and shared news content was infringing, we might not have needed arts 15 and 17 in the first place.

On top of that, to further restrict the scope of the new right and confirm that only ISSPs' actions are covered, the EU legislator opted for an explicit exclusion of both acts of hyperlinking and private or non-commercial uses by individual users. The latter seems somewhat obsolete, but it proves useful when making an argument against inclusion of social media in the new right's scope due to the second exclusive right awarded to publishers: the right of reproduction, as well as making a connection between arts 15 and 17.

Reproduction right and art. 17 to the rescue?

With hyperlinks out of the picture, the right of reproduction plays the key role in determining the

scope of the press publishers' right (hence the evolution from "link tax" to "snippet tax"). Whenever a part of a press publication going beyond a "very short extract" is copied, the new right kicks in. This could be interpreted as the press publishers' right covering the previews of news content shared by social media users. However, I would argue against such a reading, as it effectively restricts users' freedoms.

Since art. 15 provides publishers with exclusive rights with respect to *online uses by information society service providers*, it is justifiable to limit the application of the right of reproduction to those acts of copying which facilitate online uses. Internal copies required to ensure the functioning of ISSPs are thus out of scope. Additionally, as the press publishers' right applies only to *uses by ISSPs* and *private and non-commercial uses by individual users* are excluded and remain subject to "the existing copyright rules in Union law" (recital 55), the purposive reading of those provisions requires further limitation of the right of reproduction, so that it does not capture copies made by ISSPs in order to facilitate users' sharing of press publications. A different reading would make the limitation of the press publishers' right to the ISSPs' uses meaningless.

The press publishers' last stand to bring social media within the art. 15 remit could be the infamous art. 17. As some of the ISSPs could be considered online content-sharing service providers (OCSSPs), one could argue that since press publications are "other protected subject matter" such ISSPs should be subject to the new set of obligations imposed by art. 17. However, art. 17(1) explicitly states that only rightsholders referred to in the InfoSoc Directive benefit from the new provision. This does not include press publishers. And even if we tried to argue that because press publishers are *provided with the rights specified in the InfoSoc Directive* they should benefit from art. 17 *per analogiam*, we hit the same purposive-reading wall as we did when considering the right of reproduction.

Misguided comparisons with Australia

While some publishers and Member States make comparisons between the EU press publishers' right and the Australian Bargaining Code when calling for licensing payments, those comparisons are rather misguided. The News Media Bargaining Code does not belong to the realm of copyright, or even intellectual property. It relies on its own concept of "making content available" which is different from the "making available to the public" known in copyright, and captures all situations when content has been "placed on" a service or linked. While the Code was designed with both Google and Facebook in mind, to date neither has been designated by the Australian government, which means they are not bound by its provisions.

Why has Facebook made the deal?

If it didn't have to, why has Facebook made the deal with French publishers? One possible answer is that it has followed Google's approach of bundling its new news product (Google News Showcase and Facebook News Tab respectively) with licence payments under the press publishers' right (see deals made by Google in Czechia or Italy), in order to deter future regulatory interventions explicitly requiring it to compensate press publishers. And it has secured content for the News Tab which is scheduled to launch in France in January 2022. Neither Facebook's nor Google's deals are public, which means we do not know how much money will be paid for new

news products and how much due to press publishers' right. However, the results of the Press Gazette investigation into Google's licensing deals show that European publishers, who enjoy the additional right, tend to be offered lower payments than Australian, hinting that the new right's effects are limited.

A deterrent to further regulation or not, Facebook deal could set a dangerous precedent. First, since Facebook offered to compensate publishers due to the press publishers' right, are other social media platforms expected to follow suit? And secondly, if press publishers are getting compensated for the news shared online, why shouldn't other rightsholders? Ultimately, it is unlikely that press publishers will secure satisfactory payments, and users will find themselves on a losing end.

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