Press publisher rights in the proposed Directive on Copyright in the Digital Single Market

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The “problem”

- **Shift from print newspapers to digital**

→ Wider audiences for newspapers (search engines and aggregators enlarge access)

→ Declining revenues in press publishing sector (advertising channels controlled by platforms)

- **EU Commission's IMPACT ASSESSMENT on the modernisation of EU copyright rules** // Public consultation

5.3.1. What is the problem and why is it a problem?

*The **shift from print to digital** has enlarged the audience of newspapers, magazines and other publications but made the exploitation and enforcement of the rights in publications increasingly difficult. In addition, **publishers** face difficulties as regards compensation for uses under exceptions.*

Press publishers

2010-2014: Print circulation declining (17%)

2011-2015: Digital access growing (42% news online)

In 2016: 57% of online users access through

- social media (22%)
- news aggregators (14%)
- search engines (21%)

Another study: 66% (47% only browse and read snippets, do not visit newspaper website)

2010-2014: newspapers net revenue loss of -13%

Other publishers: hot to get compensation from E&L?

(after *REPROBEL* CJEU)

Proposed Directive

Recitals 31 to 36 / Title IV –Measures to achieve a well-functioning marketplace for Copyright / Chapter 1 – Rights in publications

Art.11: A related right for “digital uses” for press publishers

- For 20 years
- Compulsory (“MS shall provide”)

Art.12: A claim for ALL publishers (as assignees of authors’ copyright) to share compensation under E&L

- Optional (“MS may provide”)
- “a share of such compensation” … as decided by each MS! (no harmonization)

Recital 36: “… **publishers make an investment** with a view to the exploitation of the works contained in their publications and may in some instances be **deprived of revenues where such works are used under exceptions or limitations** such as the ones for private copying and reprography”

Art.11: A RR for “digital uses” for press publishers

- Recital 31: “*A free and pluralist press is essential* ***to ensure quality journalism and citizens' access to information.*** *It provides a fundamental contribution to public debate and* ***the proper functioning of a democratic society***”
- Recital 32: “ *The* ***organisational and financial contribution of publishers*** *in producing press publications needs to be recognised and further encouraged* ***to ensure the sustainability*** *of the publishing industry*.” // Comparison with other RR owners (producers)?

Impact Assessment :

- Strengthen the press publishers’ bargaining position (vis-à-vis platforms)
- Facilitate licensing (clear legal framework)
- Facilitate fighting online infringements
- Help the development of new business models (for the benefit of consumers)

→ Is a RR going to lead to different results than as © assignees ?

Article 11 Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in **Article 2 (REPRODUCTION)** and **Article 3(2) (MAKING AVAILABLE TO THE PUBLIC)** of Directive 2001/29/EC **for the digital use of their press publications**.
2. The rights referred to in paragraph 1 shall **leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders**, in respect of the **works and other subject-matter incorporated in a press publication**. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of **their right to exploit their works and other subject-matter independently from the press publication** in which they are incorporated.
3. Articles 5 to 8 **(EXCEPTIONS AND LIMITATIONS)** of Directive 2001/29/EC and Directive 2012/28/EU shall apply ***mutatis mutandis*** in respect of the rights referred to in paragraph 1.
4. The rights referred to in paragraph 1 shall expire **20 years after the publication** of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

The proposal is based on two (wrong) premises

1.- Search engines and aggregators are involved in acts of copyright exploitation

Recital 31: "In the transition from print to digital, publishers of press publications are facing problems in licensing the online use of their publications and recouping their investments."

Recital 33: "This protection does not extend to acts of hyperlinking which do not constitute communication to the public"

→The Commission is accepting (codifying) *Svensson, Bestwater*

→ NO need for reference to COM.PUBL., since only MATP is granted!

→ But… if hyperlinking is not a COM.PUBL. (namely, a MATP) for copyright purposes, it cannot be a MAOL for RR purposes (recital 34: same scope)

So … if hyperlinking to a freely available press publications/works is not an act of MATP (neither for press publishers, nor for press authors) … then, what does the new RR cover?

what does the new RR cover?

- **what about reproduction and "MATP" of snippets?**
- ✓ Is the reproduction/MATP **implicitly included** with the (non) MATP of whole linked work?
- ✓ Is reproduction of snippets **a temporary copy**? (Art.5.1 InfoSoc)
  - ❖ Search engines : ok
  - ❖ Aggregators : ? (not mere intermediary, but provider)
  - → Meaning of "no independent economic significance" ?
- ✓ Is reproduction / MATP of snippets **a quotation**?
  - ❖ Art.10(1) BC : mandatory / "revue de presse"
- **what about non-linking-related activities … such as scanning, storing, indexing, text and data mining?**

Infopaq rulings (CJEU) // Licensing of news monitoring services: under copyright + RR licenses (higher fees?)

2.- The RR will not affect authors' rights of works incorporated in press publication

Recital 35: "The protection granted to publishers of press publications under this Directive **should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein**, … This is **without prejudice to contractual arrangements concluded** between the publishers of press publications, on the one side, and authors and other rightholders, on the other side."

Public Consultation: journalists and photographers fear it would weaken their bargaining position (vis-à-vis publishers) and make independent exploitation more difficult.

IMPACT ASSESSMENT (p.169):

In summary, the main impacts of ***this option would affect those online services providers which are not concluding licences for the reuse of publishers' content today when they should in principle do so, pursuant to copyright law.*** *Therefore, neither the services which today have agreements with publishers nor new entrants in this market would be negatively affected in terms of additional costs or fees.*

… service providers would have in any event to seek authorisation for the use of press content even after the expiry of the publishers' right because they would still need to clear – ***as it is already the case today –*** *the rights of the authors in press publications (which have a longer term of protection: i.e. life of the author plus 70 years).*

Is it the case today? I don't think so!

The EU legislator is "altering the scope of the right of making available to the public."

The German precedent

2013 Amendment / Art.87(f) to (h)

- *Press publishers*
- *An exclusive right to make the press product (or parts thereof)*
- *Available to the public for commercial purposes*
- *Unless this pertains to individual words or the smallest of text excerpts (snippets?)*
- *For the term of a year*
- *The author was entitled to an equitable share of the remuneration*

Google refused to negotiate / required opt-in → Traffic to sites fell and VG Media ended up licensing Google for free.

VG Media and Publishers sued Google for anti-competitive conduct and abuse of dominant position. Claims were denied:

-Google did not abuse its dominant market position

-The service provided (search engine) creates a win-win situation for all (google, publishers and users)

-Payment would alter this balance

Transactions costs (OPT-IN) are very high!

The Spanish fiasco

- **Unexpected →clumsy drafting**
  - not included in any of drafts to ammend © Act circulated by government (2013) → introduced on day of approval
  - not assessed by any advisory boards (as required by law);

    Only the Authority on Markets and Competition issued a second report to address this provision (PRO/CNMC/0002/14)

- **Bad timing →lack of legal grounds, contrary to EU law**
  - Bill approved the day after CJEU ruling on *Svensson!*
- **Yet, it went through Parliament untouched!**
  - Some petitions to delete, to ammend it →all rejected
  - It was passed by Parliament (nov.14), as introduced by Gov't (feb.14)

A limitation …"disguised" as a quotation

Authorizing the making available to the public

by providers of aggregation services

of (news) contents available online

subject to:

an equitable compensation

unwaiveable

and mandatorily managed by CMOs

Another for search engines – but for free

Art.32.2 - The **making available to the public** **by providers of digital services of contents aggregation** *of non-significant fragments of* **contents, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment**, **will not require any authorization**, without prejudice of the right of **the publisher or, as applicable, of other rights owners** to receive an **equitable compensation**. This right will be **unwaiveable** and will be **effective through the collective management** organizations of intellectual property rights. *In any case, the making available to the public of* ***photographic works or ordinary photographs*** *on periodical publications or on periodically updated websites will be subject to authorization.*

Art.32.2 - *Without prejudice to what has been established in the previous paragraph*, **the making available to the public by the providers of services which facilitate search instruments** *of isolated words included* in the **contents referred to in the previous paragraph** will not be subject to **neither authorization nor equitable compensation provided that** such making available to the public is done **without its own commercial purpose** and is **strictly circumscribed to what is indispensable** to offer the search results in reply of the search queries previously formulated by a user to the search engine and provided that the making available to the public **includes a link to the page of origin** of the contents.

Dangers

… What is says?

… What it does not say, but implies?

… What it does not even imply?

A limitation … "in disguise"

- **ancillary right *imposed* on press publishers**
- **for the benefit of © owners (not users)**
- **a hidden subsidy between businesses**

So… what happened?

Nothing! Life goes on as if …

Google closed googlenews.es (Dec.2014)

- News can be found elsewhere (search engine, news sites)
- Menéame still links to freely available contents (and news)

Minor effects on traffic to news websites (3%-9%)

No license is being managed (negotiated) by CEDRO (neither by other CMOs)

Press sites not using *robot exclusion protocols*

→ could they do so under the statutory limitation?

Digital News Initiative (funded by Google) 2015

Is the proposed RR the right approach?

Probably not!

- **An exclusive right is meant to maximize profit (risk of exclusive licensing to best positioned platforms, rather than to all)**
- **The proposed RR is "worse" than German and Spanish provisions:**
  - DE: a RR for 1 year (US' *hot news* doctrine?)
  - SP: a remunerated statutory limitation (no room for exclusive licensing)
- **Will a RR achieve something different than a ©?**
- **How can this RR "ensure quality journalism and citizens' access to information"…** and **the proper functioning of a democratic society" ?**

Some further thoughts…

1.- The linking nightmare …*by* CJEU!

Criticism of Svensson, Bestwater, GSMedia…

- **freely available contents: comunication + public / indispensable intervention by different means or new public**
- **Unlawful contents: knowingly + for profit**

Inconsistency with ISP safeharbors (for links and search engines) in national laws

We need clear, realiable laws, srict liability. Legal certainty

1.- The linking nightmare …*by* CJEU!

2.- The protection of news … a bit less

The thin line between data/information and protected expression

Art.2(8) BC / Art.2 WCT / Art.10(1) revue de presse

… in a manner compatible with “fair practice”

-share revenue from advertising / win-win situation?

-public interest / crucial role in InfoSoc

-if snippet is exempted as a quotation, linking to full work should not be an act of exploitation (no substitution/ more traffic)

1.- The linking nightmare …*by* CJEU!

2.- The protection of news … a bit less

3.- The value of information?

Microfor (FR-1983-1987): titles and short extracts reproduced for information furposes (no substitution)

Copiepresse (BE-2011): users obtain relevant information by browsing (substitution)

1.- The linking nightmare …*by* CJEU!

2.- The protection of news … a bit less

3.- The value of information?

4.- How far should © cover? … All?

Every use is an act of exploitation (even uses done by machines)?

Text and data mining?

1.- The linking nightmare …*by* CJEU!

2.- The protection of news … a bit less

3.- The value of information?

4.- How far should © cover? … All?

5.- Is a RR necessary at all?

© has not worked for authors / and publishers (same scope)

If different scope → it may cripple Access to information

No justification for it (DE and SP failed – not more “leverage”)

No market failure (aggregators are complementary / no substitution)

Other solutions: compulsory/statutory license (essential facilities) or unfair competition(unjust enrichment (“hot news doctrine” approach)