

Position paper: New Rights for Press Publishers

Copyright already provides rightsholders with a broad range of protections over their creative works, typically lasting for the life of the author plus 70 years. However, the European Commission has proposed new rights in publications available to press publishers for control over the digital use of their content. This new right has been called many things, including a publisher's right, ancillary copyright, link tax, Google tax.

The Commission's proposal to introduce a right for press publishers falls outside the EU mandate to establish a Digital Single Market. The case for EU intervention is weak, as it does not meet the requirements of subsidiarity and proportionality. If adopted, the new right for press publishers will decrease competition and innovation in the delivery of news, limit access to information, and create widespread negative repercussions for related stakeholders.

What is proposed in the Directive?

In article 11 of the Proposal for a Directive on Copyright in the Digital Single Market¹, the European Commission proposes to require that Member States “provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.” This means that press publishers would be granted control over the rights of reproduction and making available to the public of their digital publications. The Commission explains its approach with the goal of improving legal enforcement and providing new sources of revenues for publishers.

Only press publishers as defined as such by national legislation will be able to leverage the right. The right applies to online uses only, and expires 20 years after the publication of the press publication.

The problems with the proposal

1. Increased protection fails to increase publisher revenue

The Commission's impact assessment claims that in a digital, online environment it has become increasingly difficult for press publishers to exploit their works and enforce their rights online. However, the solution proposed has already been shown to be a failure in similar experiments in both Spain and Germany. After the ancillary copyright provision was adopted in Spain, Google shuttered its Google News operation there instead of paying fees to publishers, meaning that less traffic was directed to the publisher's content. In Germany, Yahoo and Deutsche Telekom immediately stopped linking to publishers who invoked the ancillary copyright, and then publishers granted Google a free license to include their content in the Google News product.

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>

An EU-wide press publishers right primarily will benefit sizable market players, like Google, who have a great deal of influence in obtaining favorable licensing agreements with large publishers, while small platforms will continue to lack resources to negotiate agreements, and pay for them. As a result only the market power of big players will increase.

2. Restricts access to information

Implementing a publisher's right at the EU level would have a strong negative impact on stakeholders including journalists, researchers, online service providers, and information seekers. A publisher's right could increase costs to educational institutions for licensing fees to access content aggregation sites and services, thus decreasing access for educators and researchers to these resources.

Users would encounter additional hurdles in finding the news and content they were looking for. In addition, these users would potentially face more constraints in quoting, linking to, aggregating, or otherwise finding and using works. Many users rely on curated news aggregators like Google News or even RSS readers or other apps that reproduce snippets of content from news articles. If an additional right for press publishers is enacted, these existing news products and services will likely be disrupted, their prices increased, or even discontinued altogether.

If a service facilitating access to aggregated news content needs to pay license fees for aggregating links and short snippets, it may decide to exclude some links, websites, or entire categories of news outlets from their service to avoid the costs. As a result, more information would become unavailable to users through online search, for example.

Finally, the Commission's proposal does not give proper consideration to the effects on hyperlinking. Recital 33 states that: "This protection does not extend to acts of hyperlinking which do not constitute communication to the public". This characterization does not align with the recent decision in *GS Media v. Sanoma* (C-160/15). In that case, the Court [held](#) that "linking to freely available material placed on the internet without consent of the rights holder(s) constitutes a communication to the public (and thus possibly copyright infringement) if the person placing those links knew this consent was not given." Therefore hyperlinking can be endangered by new rights for publishers if the Court decides that linking constitutes a communication to the public. Such right does not create a certain and stable legal framework.

3. Applies even if publishers don't want it

Creating a new publisher's right would be an unnecessary and often unwanted right that press publishers have to deal with. The demands for additional rights have been heard only from a relatively small number of traditional publishers—who by no means represent the wide variety of the publishing ecosystem. Business models among publishing entities vary a great deal, and there is an increasing number of publishers that publish without the expectation of having exclusive control over their publications (memes, viral content,

etc.). Depending on how additional rights will be implemented, creating new rights will make it harder for publishers to grow and develop innovative business models.

In addition, a publisher's right would run afoul of the intentions of creators who wish to share without additional strings attached because the right could be interpreted as unwaivable. For example, the Spanish ancillary right did not treat openly-licensed content differently from content published under the traditional (and automatic) "all rights reserved" scheme. Content publishers sharing under Creative Commons licenses would still be subject to the publisher's right.

4. Rights creep

A new right granted to press publishers could have a snowball effect that encourages other groups of rightsholders to argue they need additional rights too, above and beyond the extensive system of protection they enjoy under copyright. This exact line of reasoning has already been observed from some Scientific, Technical and Medical Publishers, who wish for the press publishers right to apply to their publications of scholarly materials, even though copyright already applies to the materials themselves.

Adopting additional rights on top of a copyright system that is fundamentally broken is neither contributing to the Commission's objective of modernizing the EU copyright framework nor adapting it to the challenges of a fast-evolving digital environment. Creating new rights (which are next to impossible to retract) is not a suitable method for managing the relationship between different market segments and the public. The (online) publishing sector is evolving at a rapid pace, and intervening in the relations with a static and blunt instrument would cause substantial collateral damage to education and access to knowledge.

4. Term of protection is much longer than necessary

The length of press publishers' right would be 20 years from publication, which is far longer than the reasonable commercial exploitability of almost all press publications. Most online press publications are attractive to their viewers for a relatively short period of time—possibly only weeks or months—not decades. Moreover, publishers would be granted the right retroactively, which would negatively affect existing websites and news aggregators.

Recommendations


The Commission's proposal to introduce a right for press publishers is poorly aligned to the objective of modernizing the EU copyright framework and adapting it to the challenges of a fast-evolving digital environment. In the light of the above we believe that

- **Article 11 ("Protection of press publications concerning digital uses") should be removed from the proposal.**

As a general rule, we advocate for the approach that de minimis use of copyrighted works should not be regulated; the sharing of snippets and thumbnails are examples of such a use. Press publishers claim they need better mechanisms to effectively bring enforcement actions against parties who engage in wholesale copying or scraping of their published content, and we acknowledge a need to improve their ability to do so. However, this challenge does not warrant the creation of a new right. Instead this problem can be addressed by observing a legal presumption that press publishers are entitled to enforce the rights over the works or other subject matter that are licensed to them. One way to do this would be by extending Art. 5 of the Enforcement Directive (2004/48/EC) to also apply to press publishers with regard to their licensed works or other subject matter.

Want to know more?

If you would like to know more about how copyright reform can facilitate research and innovation, please contact COMMUNIA at info@communia-association.org or visit our website <http://www.communia-association.org/>.

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