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# Press Publisher Rights in the New Copyright in the Digital Single Market Draft Directive

Authors

**Raquel Xalabarder**
**Chair of Intellectual Property at the Universitat Oberta de Catalunya (UoC)**

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The following is a lightly edited transcript of the public lecture '**Press Publisher Rights in the New Copyright in the Digital Single Market Draft Directive**' given by Professor Raquel Xalabarder, Chair of Intellectual Property, Universitat Oberta de Catalunya, as part of the CREATe Public Lecture Series on 2 November 2016 at the University of Glasgow.

**Abstract:**

After several failed national attempts (notably in Germany and Spain) to secure remuneration for press publishers for the licensing of press contents by aggregation services and search engines, the proposed Directive on Copyright in the Digital Single Market grants press publishers an exclusive related right that would allow them to license (or prohibit) digital uses of their press publications for a period of 20 years. This proposal completely upsets the delicate (and necessary) balance between the protection of copyright and the non-protection of information. It is potentially contrary to international obligations (such as Art.10(1) of the Berne Convention that permits free press summaries) and inconsistent with CJEU doctrine concluding that linking to contents freely available online does not qualify as an act of communication to the public (*Svensson, Bestwater, C-More Entertainment, GS Media).* Because of the fundamental role that news and information play in a democratic society, and especially on the internet, any copyright rule affecting news must be carefully balanced. An exclusive right to control (authorize, prohibit or exclusively license) press contents online may have negative effects for competition in the market and for the development of the information society. As proposed, it also fails to achieve its (misguided) purpose to secure fair remuneration for the value of information, and will likely have detrimental effects for authors. If we want to "ensure quality journalism and citizen's access to information" a related right for press publishers is not the way to go!

**Chair: Dr Thomas Margoni, Senior Lecturer in Intellectual Property and Internet Law, CREATe, School of Law, University of Glasgow**

Welcome everyone. Thank you very much for coming to this third public lecture within the CREATe public lecture series. Welcome to our guest speaker, Professor Raquel Xalabarder, from the Open University of Catalonia, the Universitat Oberta de Catalunya.

This is the third lecture within the series. I recognise most of you, so thank you for your loyalty and for being here for the opening lecture given by Professor Martin Kretschmer on the copyright reform package proposed by the European Commission and what it will mean in the case of Brexit, and last week when we celebrated the Open Access Week and we had Timothy Vollmer and Gwen Franck talking about the role of Open Access in our society and the role played by Creative Commons in this movement.

So as an ideal completion of this analysis, today Raquel is going to illustrate in detail a part of the proposal of the European Commission, the new related right created to protect press publishers, to give publishers an added layer of protection.

Raquel, you are the perfect speaker for this topic, as in Spain you had in the recent past a similar proposal, so I'm pretty sure that you will illustrate the pros and the cons that this proposal had in Spain, how it developed, and how different (or not) it is from the European one. So without spending any more words, I give you the floor, and I thank you again for accepting our invitation.

**Raquel Xalabarder, Chair of Intellectual Property, Universitat Oberta de Catalunya:**

Thank you for inviting me, Martin, Thomas, it's a privilege to be here in this beautiful University. I'm going to talk to you about the press publishers. Specifically, the proposal that is coming from the Commission, and also what I call (I couldn't resist) the Spanish fiasco, and the German -not so much a fiasco- precedent, which didn't work, either. They are all

examples of what should be the road not to follow if the Commission wants to address this issue under copyright. The real question here is: should we solve the problem of press publishers losing money by means of copyright? Is that the way to go? That's the underlying question.

So, let's start with the problem. We all know there is a shift in the press markets from print to digital; newspapers that used to be printed and read and sold in single tangible units are now moving towards digital media, digital means of exploitation: open access over the internet and access-protected subscriptions. Together with this shift, newspapers are losing money. What we don't know is whether it's online platforms and aggregators and search engines that are responsible for the newspapers losing money. But these platforms are for sure the ones which are making money by offering services of searching and aggregating the content that the newspapers are publishing online, openly and for free.

So, basically, it's a matter of who gets the money and who pays for what. Should copyright be the solution for that? I'm very sceptical. I'll try to be objective, but I'm going to be forthcoming with you: I don't think copyright is the solution for this problem that we are facing. If it is a problem, at all! After all, markets come and go and evolve with time (and technology). In short, there are a lot of things that need to be taken into account -not only the fact that newspapers are losing money while online platforms are making money.

This shift from printed newspapers to digital is, of course, bringing wider access to the newspapers by means of aggregators, search engines and social media. On the other hand, newspapers are losing revenues because advertising doesn't take place on the printed newspaper. Advertising, and the money that flows from selling advertising spots, is being controlled by these platforms. Advertisers go to the platforms, they don't go to the newspapers. That is a big part of the problem.

So, the revenues of the press publishing sector are declining. And the EU Commission has been asked to do something (lobbies are strong!). It's understandable, newspapers want to keep doing journalism, and journalism doesn't come for free, so it's a fair claim.

The impact assessment that came with the proposed directive on copyright for the digital single market portrays it as a problem and that's why I have chosen the word here. It says: the shift from print to digital has enlarged the audience of newspapers … but made the exploitation and enforcement of their rights increasingly difficult. Let me stop at the first part of the sentence, because very often the newspapers were saying "no, aggregators, search engines… they don't bring me any more readers." At least, no one contests that anymore. As to the second part: "Exploitation and enforcement of the rights in publications are increasingly difficult" … I guess this depends on who you ask? In addition, and that's a separate issue, publishers of all kinds, not only press publishers, "face difficulties as regards compensation for uses under the exceptions." That's very misleading; it basically comes from the *Reprobel* decision by the CJEU (we will see what it is). So, here we can already see a first problem: press publishers on one side, general publishers (including press publishers) on the other.

Numbers! There are a few numbers gathered in the impact assessment. Depending on the study you read, these numbers may be different. For instance, from 2010 to 2014 print circulation has declined 17%. Almost among the same period of time, digital access has been growing: 42% of the population is now reading news online (according to this impact assessment). In 2016, 57% of online users access newspapers through social media, news aggregators and search engines… that's a lot, that's more than half online users! Another study, for about the same period, even makes it bigger: 66% of people that access newspapers through social media, news aggregators and search engines. And here is the very disturbing figure: 47% only browse and read the headlines and the extracts, the "snippets". They don't follow the link and go to the newspaper website. That 47% is the one that hurts,

because when the newspaper is advertising, it doesn't count the clicks, these readers don't count for newspaper advertising. So, altogether, newspapers lost a net revenue of 13% for more or less the same period. That's for press publishers, the models are changing, the money's being allocated somewhere else.

For the other publishers … remember that the explanation was basically that they don't get compensation from exceptions and limitations. This results directly from the *Reprobel* case that the Court of Justice for the European Union decided a couple of years ago, holding that publishers were not to be considered rightholders under the EU *acquis*, since they are not listed in any directive as having a related right (granted by law). It is true, any rights the publishers get are only by transfer or assignment from the authors.

We have seen the two problems, now let's see the solutions the directive is proposing for these problems. Title IV, Chapter I, under the title "Measures to achieve a well-functioning marketplace for copyright - rights in publications. There's one article for press publishers, there's one article for publishers in general. Article 11: a related right for digital uses for press publishers, for 20 years. It's a related right, a full bodied exclusive right, it's not an ancillary right. It's not a compensation, it's an exclusive right and it's compulsory: member states "shall" provide.

For the other publishers in general, Article 12 is proposing that all publishers will have a claim to share any compensation that the author receives for any exceptions and limitations under national laws. This would cover private copying, reprography (where existing), maybe the rental remuneration right (it's questionable but maybe). Notice that this right is only optional: member states "*may*" provide. Each national legislator could decide whether to split the remuneration or not and how to split it, because there's nothing in the proposed directive as to how the sharing will be done: 50:50, 40:60, 10:90? It doesn't say. So we cannot expect much harmonisation in that sense. The rationale behind this Article is that the publishers

make an investment; when the work is being used under the umbrella of an exception or limitation (which means that the publisher is not going to be authorising that use), then the publisher is also losing money or being deprived of revenues which deserve compensation.

But notice that these two proposals are very different animals, one is a related right, the other one is a share in the author's compensation: whenever the author gets any money out of an exception or a limitation the publisher may be entitled, if the national legislator decides so, to share that revenue. We are not going to devote much time to this last one but the trick here is that it only talks about exceptions and limitations and in many countries authors are also entitled to compensation through what's called "remuneration rights" or "simple" remuneration rights. That's why I was referring to the remuneration for rental right. Will publishers also have a right to share these remunerations? It would make no sense, since often these remuneration rights are precisely set against the transfer of the exploitation rights to producer/publisher.

This is only the text of the directive as proposed by the Commission; we'll see what happens when it goes to Parliament and how it ends.

So, let's go back to the related right for digital uses for press publishers (Art.11). Why do we need this? Recitals 31 and 32 give us very good clues of what's at stake here. Recital 31 says: a free and pluralist press is essential to ensure the quality of journalism and the citizens' access to information. It's quite curious that precisely the fundamental right to access the information is being used by the Commission to justify that the publishers need a related right, an exclusive right. The fundamental right to information could easily justify that aggregators and search engines should be free from any licence and should not be paying any copyright fees. In fact, this is the fundamental right that has always justified the exception of press summaries and reviews under Art.10.1 Berne Convention. We could say, then, that the fundamental right of access to information cuts both ways.

Recital 32 says that the organisational and financial contribution of publishers needs to be recognised and rewarded so that the sustainability of the industry can be ensured. This is when the Commission tries to make an analogy with other related right owners, the producers basically. Of course, the investment and the organisational and financial contribution that a producer of a phonogram or the producer of an audio-visual recording makes, is very different from the one that a publisher is making, even a news publisher. In very many cases, either through employment contracts, collective work structures or works made for hire, the press publishers already own all the authors' copyright from the very beginning. So, the contexts are very different.

The Impact Assessment gives other clues, perhaps less elegant, more down-to-earth, and it's also good to look at them. Basically, it says that we need to strengthen the press publishers' bargaining position in front of the online platforms. Yes, that's what it's all about! If I have an exclusive right I sit at the top of the table, an exclusive right that allows me to authorise or prohibit aggregation and linking: to authorize or prohibit that my press works are aggregated or searched. An exclusive right, to authorise and prohibit, gives me a strong bargaining position when I sit at the table. Quite different from the position they have now which is basically my content is out there already, you are the platforms (in charge of users and advertising revenues), you set the terms and the price. Of course, Google is the big player, but there are other search engines and aggregation services that will be affected by this measure. Google is in a position to decide how much they are paying for a click or how to split the advertising revenues with publishers. The platforms decide these issues. Press publishers assume that a new related right will reverse this trend.

Another reason used in the Impact Assessment is to facilitate licensing and fighting online infringement. A new related right will not "facilitate" licensing but, instead, will make it necessary! And I don't know how a related right is going to facilitate fighting online

infringement? And help the development of new business models? An exclusive right is not going to help the development of new business models! The development of new business models is going to be enhanced if there's no licences they need to seek or payments they need to do.

Anyway, the bottom line and the big criticism that one could make is if the publishers have until now been the assignees, the transferees, of the authors' exclusive rights, they already have an exclusive right to bargain with the online platforms. Why another layer of exclusive rights is going to help them? How is it going to make things different at all? And as you'll see, this proposal says that it doesn't affect copyright, it doesn't affect authors' rights. Well, I do not agree with this statement. The proposal of a new related right for press publishers does affect authors' rights and you will see why.

This is the text of the proposal. I've highlighted in red the things that I would like to mention. What is being granted to the press publishers is the exclusive right of reproduction and the exclusive right of making available to the public. Nothing is said about the communication to the public because only authors get the right of communication to the public which includes the making available to the public; under the framework of the Information Society Directive, related right owners only get the right of making available to the public (online).

The exclusive rights are only granted for the digital use of their press publications, not for other non-digital uses. In short, it's an exclusive right consisting of two rights limited to digital means. And Recital 34 (I think) further says that the reproduction and the making available to the public is going to be read *exactly with the same scope that these rights have been granted to the authors* by the Information Society Directive, Article 2 and Article 3. So, we're not giving press publishers more or less than authors have under these two rights (for

digital means), but exactly the same. This is important because if linking to lawfully available contents online is not an act of communication to the public under copyright, then this decision also applies to the scope of this related right.

Let me jump to Art.11.3: these rights are going to be subject to the same exceptions and limitations that are being applied to copyright, to the authors' rights; so far so good: same scope of rights, same scope of exceptions and limitations. But then it says, the related right is granted for 20 years after publication! We're talking about news here! Digital use of news, only! 20 years! And let me go back to the second paragraph: the rights referred to in the above paragraph "leaves intact and shall in no way affect any rights provided for in Union law to authors", and this new related right "cannot deprive authors of the contributions which are incorporated in the press publication in the newspaper to be able to exploit their contribution independently". As I said, this is wishful thinking or, worse, a lie! We'll go back to it.

As I see it, this provision is based on two false premises, wrong premises. One, that search engines and aggregators are involved in acts of copyright exploitation. The second, that nothing in the new related right of press publishers is going to affect the authors' copyright, and that the scope is going to be the same.

Recital 33 states that since the scope is the same, the related right granted to press publishers will not extend to acts of hyperlinking which do not constitute communication to the public. If the CJEU has been concluding in *Svensson* and the like (*Bestwater, C-More Entertainment, GS Media*) that linking to freely available lawful content online is not an act of communication to the public then the related right of making available to the public that we are granting to the press publishers will not be more than the right granted to the authors. That makes sense.

So, it looks like the Commission is sort of accepting (codifying) what the European Court of Justice has been ruling: confirming that linking to open contents is not an act of exploitation. However, some commentators have already pointed out a major discrepancy: Recital 33 is talking about communication to the public, while the related right for press publishers only deals with the making available to the public, not the communication to the public. Is that a mistake? I don't think so. On the contrary, I think it is wonderful that this recital is referring to the communication to the public, because making available to the public has never been definitely assessed by the CJEU. The CJEU has always addressed linking within the realm of authors' rights and the right of communication to the public -which includes making available. In short, what's important here is the definition of communication to the public, so it is absolutely necessary that Recital 33 refers to it. If linking is not a communication to the public for authors, linking is not going to be a communication to the public for press publishers, either. This is in theory… because I don't think that's what the proposal intends to do.

So then, if linking is excluded, and we're talking about digital uses for press publishers, and all the recitals explain that what we want is to make aggregators and search engines and social media pay … then: what is included in this new related right for press? It's like an oxymoron! What does it cover, if linking is not covered? I can think of two activities that may be affected: the use of snippets and any other non-linking-related (digital) uses.

Let's start with an issue that has never been triggered by *Svensson* and so on: the reproduction and the making available to the public of the "snippets". We always talk about whether linking is an act of communication to the public of the work that is being linked, but we're never looking into the exploitation of the small fragments that are being used to show as the listed search results or as the header/pointer for the link to be activated. We could say that this is implicitly included within the scope of the linking: if the major issue (hyperlinking

to the whole work) is not a communication to the public, then the minor use (showing the headline enabling the link) is not, either. That would make sense of course; it's the easy way out. But, in fact, these "minor uses" might be exempted in its own right: what about the temporary copies limitation (Art.5.1 InfoSoc Directive), covering reproductions only, not the making available to the public? This limitation could work for search engines: it can be argued that the copies that search engines make when showing the results that some user has been looking for are temporary copies. In fact the Spanish Supreme Court, in a very interesting ruling decided that copies shown by the Google search engine could be excluded as a temporary copy: the reproduction is being done on behalf, at the petition of the user to enable a transmission between a recipient and a transmitter; and the reproduction disappears immediately (or shortly) after the user leaves the search site.

Plus, remember the *Infopaq* cases? The first one said that the temporary copy limitation requires that the copy is automatically deleted without any human intervention (then this was softened by the second ruling); and remember *Infopaq* was about scanning printed press articles and turning them into digital text files that could be searched! Even under the *Infopaq* requirements, it's very easy to say that what search engines do is exempted as temporary copying. If so, search engines would not be affected by the new related right we are granting to the press publishers.

Instead what the aggregators do is a bit different, it would be more difficult to qualify their copying as a temporary copy, since they choose, they decide, they make some editorial choices as to where to put the information, etc. In either case (search engines or aggregators), this limitation would only exempt the copies done, but not the acts of "showing" the snippets to the public.

Furthermore, if (according to Art.11(3)) the exceptions are going to be applied also to the new press publisher right, then what will be the meaning of "no independent economic significance"? Would it be the same when dealing with authors' rights and with press publishers?

One last possibility to exclude or to exempt the reproductions of snippets and making available to the public (done by search engines and aggregators) is to consider these quotations. After all, this is the biggest and most forgotten exceptions: Article 10(1) of the Berne Convention conveys a mandatory exception of quotation that expressly says that press summaries/reviews (in French, *revue de presse*) will be considered quotations. Even Professor Ricketson, who knows the Berne Convention better than anybody else, has said that what news search engines do, and what many aggregators do, is basically *a revue de presse*.

So regardless of linking (linking is out of the picture already), the snippets done and used by search engines and aggregators and by everybody who posts a link online, reproducing part of the headline or part of the linked work, could also be excluded under any of these exceptions.

What about non-linking related digital uses? For instance, scanning, indexing, text and data mining… Is this going to be included in the new related right of press publishers? Absolutely! And since they are hardly covered by any exception these uses will constitute the "core" of this new right. That is, we're granting a press publisher right thinking of aggregators and search engines, but once we have excluded linking and snippets as quotations to enable the linking, we're left with basically the kind of activity that is not going to be done by search engines and aggregators! This is the kind of activity that's being done by news monitoring services, by libraries and by universities and researchers when they want to do text and data mining. So, if this is the kind of activity targeted with this new related right, we are mistaking its goal. If we want to enable press publishers to licence their related right in

front of social media, aggregators and search engines, we're doing it wrong since the new related right has the same scope (of reproduction and making available to the public rights) granted to authors.

The second premise that I say it is wrong is the statement that the new related right will not affect the authors' rights of works incorporated in the press publication. Look at Recital 35… the same that Article 11(2) says: it's the same provision. However, Recital 35 says (I have underlined it): "this is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and the authors and other rightholders, on the other side." So, basically, it's giving with one hand what it's taking away with the other. Let's say the news article or the photographs (works or "mere" photographs) … All reporters, all journalists from the very minute they create the work or that the work is accepted for publication in the press and newspaper, magazine or journal, they transfer all the rights to the publisher. So, it's hardly ever that journalists and photographers get to do an independent exploitation of their works at all (at least, one that matters in press markets). Fancy words at the beginning, but then if you're saving the contracts of course nothing changes.

When the Commission was already toying with this idea, they did a public consultation regarding the related right for press publisher and the panorama exception, (the beautiful panorama exception that had us entertained back then …). In that public consultation, journalists and photographers already expressed their concern that by granting publishers, press publishers, a related right, the independent exploitation of their contributions (that, in principle, they have) would be even more difficult to exercise. I believe them. We have the experience of authors of audio-visual works and producers of audio-visual recordings, music composers and producers of phonograms… The minute that you accumulate two exclusive rights, one gives way: and it's usually the right of the author that gives way. In order for the

producer to truly exploit its related right in the phonogram or in the audio-visual production, he needs to acquire all the exploitation rights of the authors (of the audio-visual work or the musical work) incorporated in it. And the related right helps him achieve so!

So, basically, journalists and photographers already fear that, despite the beautiful words that the Commission is saying (we're not going to touch the authors' rights at all) granting publishers a related right is *de facto* going to devalue their copyrights.

I know that the Impact Assessment doesn't have any legal value, but it is a precious source of information about what is behind it. Look at page 169. In summary, it shows that the main impact of this option (the introduction of a related right) "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."

What "today" and what "in principle" are they talking about? We've been discussing whether linking is an act of exploitation or not, whether a licence is needed for linking and for what news aggregators and search engines are doing. The European Court of Justice (and national rulings in the European states) are saying No: linking (to lawfully available contents) is not an act of exploitation, no licence is needed for it. But, here, the Commission is saying precisely the opposite: that today "in principle," according to copyright law, linking should be subject to a license! Furthermore, the Commission goes on saying that "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 (they claim) already the case today- the rights of the authors in press publications."

So, let's be honest: we are not only granting a new related right to the press publisher, we're stating that regardless of the European Court of Justice rulings, search engines, news aggregators, and anyone in social media making a link to available contents should acquire a

copyright licence and a related right licence to link to that contents. Well, don't tell me that we're not changing copyright rules (of authors'). We're clearly saying that news aggregators, search engines, social media... linking to news content should be licensed.

So, I'm very sceptical about this proposal. I have some more comments (of a normative kind) to add at the end if I have time because I'm already going very late!

Let's now go into the two examples that illustrate that if the Commission wanted to do something, this was *not* the way to go. The German precedent, in 2013, did something far less … (how would I say it?), bold or "grandiose" than what the proposal is trying to do. Basically, they granted press publishers an exclusive right to make the press content, or parts of the press content, available to the public for commercial purposes only (notice that the European proposal doesn't say only for commercial purposes, it's for any purposes). There was an exception: that what's being used is only individual words or small text excerpts, "snippets" as we could call it. This right was granted for a term of a year and the author was entitled to share the remuneration (with the publisher). The German law was narrower, more concise, and even defended the protection of authors in practice; rather than just saying this doesn't affect authors' copyright, accepting that maybe it does and ensuring that authors will benefit from it too. It was something very constrained, very focused, and really thinking about news aggregation, not so much about search engines (here the exception?). Despite that, it failed.

What happened is that the law was passed and Google (yes, they are the ones that call the shots in the aggregation and search engine market) refused to negotiate any licence. This German right was called an "ancillary right", because it was not a full related right for 20 years; it was just for one year. It doesn't say that the search engines or the aggregators need to pay; it just says the press publishers have an exclusive right to licence.

Google refused to negotiate any licence and simply said: if you want to be indexed in my search engine, in my news aggregator website… opt in, let me know that you want to be listed, indexed. The main press publishers didn't "opt in" because they wanted to force Google into negotiating a licence and the access traffic to their websites went down. The minute they realised that by not being indexed in Google's search engines and news aggregators they were losing access to their websites, they granted Google a licence … for free. The right that has been granted by law is being exercised, so far so good, but not in the manner they were intending or hoping for.

On top of that, German press publishers went to Court and they claimed before the Competition Authority (and also as a regular claim) saying that Google was abusing its dominant position in the market and engaging in anti-competitive conduct. Both claims were denied and one of the courts even stated that Google's service was a win-win for all: It shares revenues, it enhances access to the websites of the newspapers and, most importantly, the payment of a licence (as intended) would upset this balance. Apparently, the transaction costs are now very high because any search engine, any news aggregator that wants to enter the market needs to acquire this licence from press publishers, (even though I think it's managed by a collecting society). You would have to pay for something that Google isn't paying for?

Let's now turn to the Spanish "fiasco". We do things differently in the south, sometimes things work out and sometimes they don't and this one didn't work. It was an improvisation! The night before the Government was approving the bill to amend the Copyright Act and introducing it to the Parliament, someone came up with the idea of adding this ancillary right. This provision had not been included in any of the drafts of the bill that had been circulating for over a year and that had been assessed by the different advisory

boards (as prescribed by law, any bill needs to undergo different assessments, before it is introduced in the Parliament).

It was also a case of bad timing. The day before its approval by the Government, the Court of Justice came up with the *Svensson* ruling! So, either the Government had not read the news that day or maybe they had but they thought "we're going to do it differently because we can". Bad timing! On top of that, the provision is clumsy, poorly drafted. We know what it wants to say but it doesn't say that. And despite everybody knew that it was a bad idea, no-one, no-one dared touch it: I guess no political party wanted to make the press angry. Hands up! Stay out of it! It's the government's problem, they put it in, let them deal with it.

So, what is the Spanish precedent? It's not an exclusive right, it's the opposite: it is a limitation. A limitation disguised as a quotation. I say "disguised" because it's included in the quotation limitation. The Spanish quotation limitation has three very different parts. One is the common quotations allowed for uses such as analysis and criticism. Press summaries and press reviews are also considered and allowed as a quotation. Then we have another layer which deals with "press clipping" services, news monitoring services: when done for commercial purposes through digital means, this activity is licensed by press-publishers. And then we have the new limitation for news aggregators and search engines.

It authorises the making available to the public (nothing is said about reproduction), by providers of aggregation services of news contents. That's the intention: news; but you'll see that the language used is very, very vague … This authorization is subject to an equitable compensation that is unwaivable and managed mandatorily by collecting societies. This is also disturbing for some newspapers because it means that maybe if they licensed (and bargained for) it alone they could be making more money than if they are only entitled to a flat compensation managed by a collecting society.

And then there is the second authorisation which applies for search engines, basically with the same contents (news), but this time for free. In short: two "statutory licences" or compulsory licences: a remunerated limitation for news aggregation collectively managed, and a free one for search engines.

Look at this! I am using colours to help with its reading. This is the best translation I could do of the text, trust me, it's not my fault as a translator, it's the original that it's difficult to understand. Look at the underlined parts, the making available to the public of non-significant fragments (of news) will not require authorisation; only the making available to the public of non-significant fragments … okay, what are we making available to the public when we link? If it is the work, then it's certainly not a non-significant fragment, and if only the non-significant fragments are going to be exempted under the limitation (while the significant fragments have to be licensed) then it doesn't make sense to set a remuneration.

Even if you want to show some goodwill in the reading of this limitation and say: this limitation is not aimed at the linking, it only deals with showing the snippets (the fragments)... even then, the snippets that are being shown are far from non-significant – especially, from the user's perspective: it's significant because that's what he's looking for.

Now look at the blue part: providers of digital services of contents available in periodical publications or in periodically updated websites which have an informative purpose of creation of public opinion or of entertainment. This is not just "news", this is my cousin's Facebook page! Everybody does posts and links for entertainment or to generate public opinion.

Let's move on. Who gets the money? The publisher, go to the red part: The publisher or, as applicable, the right owners. What about the authors? Of course, the authors were not the ones pushing for this provision. It is an equitable compensation, not a remuneration, and the word does make a difference in Spain. Compensation is to compensate for a damage;

remuneration offers more leeway to decide about the price. It's unwaivable, but it doesn't say it's non-transferrable. And it's going to be effective only through collective management. It makes sense that it is subject to collective management because it's unwaivable, but was it necessary? Mandatory collective management is used when the authors individually are not going to be able to licence it. Here we're talking about press publishers, they licence news media monitoring services, they licence very many users, they could also licence this one if they wanted – there is no market failure.

And for whatever reason (look at the green part), photographs are excluded. In other words, documentaries and news recordings will be included because the provision refers to any contents (look at the blue part), but photographs are excluded. Don't ask me why.

It is a dangerous provision for what it says, but also for what it doesn't say. For instance, what happens with all the other linking done by non-news aggregation or search engines? You need a limitation (a statutory license) when there's an act of exploitation to be authorized; so, *a contrario*, it means that any other linking that is not covered by this limitation should be subject to a licence? But it is also dangerous for what it doesn't even imply. For instance, think of all the linking to unlawfully posted contents… it could work as a "laundering" machine (a laundering statutory limitation) because the limitation does not only authorize linking to lawfully posted contents.

I said it was a limitation "in disguise" because ultimately it will not favour users (perhaps it favours copyright owners?) and it is not justified by a fundamental right. It is a subsidy. One industry is being subsidized by another: these are the ones making money, these are the ones losing money, let's re-shuffle benefits a bit.

So, what happened in Spain? Nothing. We have had this provision in the law for two years and no-one is exercising it, no-one is licensing, and the press publishers are not pushing for it. The collecting society that should be licensing it (CEDRO) doesn't even have a license

in place for it. You go on their website, there are licences for "press-clipping" but no licence for the aggregation of news.

Google News closed in Spain a few weeks after the law was passed, but of course the Google search engine still exists and you can find news through the search engine, no need to go to the aggregation site; and the search engine is "licensed by law" for free, so far so good!

Of course, traffic to news websites has been affected; depending on which source, some say 14%, some say 3%, depending on which newspaper or who you ask (NERA reported a 30% decrease to some sites). The big press publishers were perhaps satisfied when Google in 2015 funded the "Digital News Initiative", not only in Spain but at the European scale. I guess they got some money out of it, and they were happy to drop it and not pursue the exercise of this limitation. I am only speculating!

Are these the right approaches? I was telling you at the beginning: I don't think it is. Why? Because an exclusive right is meant to maximize profit: it includes the possibility to grant exclusive licenses and to discriminate in terms of pricing. A related right for press-publishers to allow them to authorize or prohibit the news aggregation and searches runs the risk of licensing only the best positioned platforms … rather than all. In that sense, at least the Spanish provision was authorizing "all" news aggregators and engines (there was no room for exclusive licensing or discriminatory pricing)! And the German provision was only for 1 year! Another reason for being suspicious is that I am not convinced that a related right will achieve anything different from what a full copyright (the authors') has achieved so far. In my opinion, if we want to "ensure quality journalism and citizen's access to information" a related right for press publishers is not the way to go!

I'm going to stop now. Just let me throw out a few ideas. Maybe we can talk about them in the debate.

First, the linking nightmare, as I call it. A new related right will only bring more chaos to the existing one … We need clear concise copyright rules, we cannot start saying that an act of exploitation depends on whether it's an indispensable intervention that happens by using different technical means or not, and if they use the same technical means then we need a new public, and if the contents that's being linked is unlawful we need to look into the profit, the pursuit of profit by the one who's making the link or whether he should or should know, he knows or should know that the contents linked is infringing.

Copyright is difficult, we don't need to make it more difficult. The internet is based on linking, so we need a clear rule for linking. Creating a related right that's aimed at licensing linking, even if it's only for news publisher or for press publications, it's still messing with a very sensitive and fundamental issue.

There will also be an inconsistency in very many countries which (despite the e-Commerce Directive being silent) have enacted a safe harbour for search engines and linking. This is the case of Spain: the online platform will not be responsible for the users' linking (or the search engine linking) to unlawful or infringing content. It makes no sense to have this safe harbour exempting for indirect liability and then charging them with a direct liability for linking because linking is an act of exploitation in itself. Maybe the Directive is also trying to change the e-commerce Directive rationales when saying (Article 13) that the platforms need to monitor content uploaded by users?

The second point I want to make is that we should always bear in mind that we're talking about news, and news have always had a very sensitive relation with copyright. For a long time, news was not even protected by copyright laws, and the Berne Convention is a good example. Article 2(8) in the Berne Convention states that member states are not obliged to protect news. Of course, this is read nowadays as meaning that information and data is no protected, but it is a good reminder that we should be very aware of over-protecting news.

Plus, Art.10(1) of the Berne Convention still allows for the making of press summaries and reviews… because ensuring access to news is more important than protecting copyright in it.

It's very difficult, I know, the line between information and news is very thin. When we look at the *Copiepresse* case that was decided in Belgium in 2011, dealing with Google's search engine and aggregation website, the Court said: look, people browse through the headlines and they don't read/access the linked contents… this proves that aggregation and search engines are substituting for accessing the news sites. People read the information through headlines and snippets, yes! But reading the information is not the same as exploiting the work! It is a difficult distinction, but copyright doesn't protect information (no matter how much it costs to produce it!). I know there is money being lost somewhere but we as copyright scholars need to care for copyright and preserve that the system makes sense.

An old French case, that seems to be forgotten nowadays, stroke the balance right. In the 1980s, the French Court de Cassation (in full) decided that the reproduction in a database of the headlines and the information from published news was exempted as a quotation because it was for informatory purposes. Indexing, listing, aggregating, listing the results of a search online … this is all listing for informatory purposes and using the title is not exploiting the work (despite some money being earned by the one providing this service).

And this leads me to the perennial question: how far should copyright go? Should it cover each and every use of a work? Well, if you look at the proposed directive it does seem to be answering YES. There's a limitation for text and data mining which presumes that there's an act of exploitation by converting words into zeros and ones and obtaining information from it. It is consistent with the broad definition of reproduction in Article 2 InfoSoc Directive, but I am not sure this is the right way to go.

And last, not least: is the related right really necessary at all? For years, press publishers have been derivative owners of the authors' exclusive rights. If a copyright has not sufficed to achieve what they aim at, how will a related right do differently? Furthermore, no evidence

has been produced that aggregators or search engines are the cause for newspapers losing money. It's a different service and different markets. Copyright is not the tool to protect existing markets.

Other solutions may apply. Imagine, for instance, that someday the newspapers decide that they are not going to be licensing anybody, search engines or aggregation services. The legislator would intervene and force them to license (as in the "essential facilities" model) so as to secure the fundamental right of access to information: news need to be aggregated, news need to be searched.

Or, the other way around, imagine that Google would not share advertising revenues with press publishers in a manner that is fair. Press publishers could claim that there is an unjust enrichment and sue Google for a tort of misappropriation. The American Supreme Court, at the beginning of last century, solved this problem with the "hot news doctrine": you are using the information published in the East coast newspapers, to publish your own news in the West coast … it's a matter of the value of information, not copyright.

It is fundamental to keep both issues separated: copyright and information. What this proposed directive is doing is mixing these two in a manner that's going to have more negative effects than positive effects, and it is very unlikely that the proposed related right is going to achieve its purpose. The examples of Spain and Germany, very different examples, both have failed. Let's not make an even bigger mistake! I'll leave it here.


RCUK Centre for Copyright and
New Business Models in the
Creative Economy

College of Social Sciences / School of Law
University of Glasgow
10 The Square
Glasgow G12 8QQ
Web: www.create.ac.uk