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EU copyright reform: the case for a related right for press publishers

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The following is a lightly edited transcript of a public lecture **'EU copyright reform: the case for a related right for press publishers'** given by Professor Thomas Höppner, Partner at Hausfeld, Berlin; Professor of Civil Law, Business Law and Intellectual Property Law, Wildau Technical University of Applied Sciences; and Visiting Professor at University of Strathclyde. This lecture was delivered as part of the CREATe Public Lecture Series on 16 February 2017 at the University of Glasgow.

Abstract:

On September 14th 2016, the European Commission presented a package of proposed copyright reforms under the banner of promoting a Digital Single Market (DSM). Amongst others, the proposal includes an exclusive right of press publishers for the digital publication of their press publications. The proposal has been criticised by academics arguing that the right lacked a justification and would interfere with the access to information. Picking up on this lecture against a publishers' right, Professor Höppner investigated the merits of such a right. To this end, the lecture attempted to outline the economic and technical background including the developments in the consumption of press publications since the current legislation came into force. The lecture then presented arguments in favour of the proposed right and examined the counter-arguments raised against it.

Introduction by Chair: Dr Sukhpreet Singh, Senior Lecturer and CREATe Programme Leader, School of Law, University of Glasgow:

Good evening. Welcome to the CREATe Public Lecture Series 2017. We're really privileged to have with us this evening Thomas Höppner, partner at Hausfield Global Litigation Solutions in Berlin and Professor of Civil, Business and IP Law at Wildau Technical University of Applied Sciences in Germany. Professor Doctor Höppner's practice covers a range of competition law matters, including areas such as media, telecomms and broadcasting. He has spearheaded complaints before the European Commission and competition claims before German courts. His recent work includes representing several complainants in investigations relating to Google and YouTube, at European and national levels, private enforcement of competition law claims to compulsory licenses as well as advising on regulatory reforms in the area of digital markets. Thomas is an author of 3 books on regulation of networks and closer to home, he is a visiting professor at the University of Strathclyde.

Professor Höppner will present his talk until about 6:30 and then there will be an opportunity to ask him some questions. Please note this lecture is being video recorded in its entirety and will be made available on CREATe.ac.uk shortly afterwards. If you feel the urge to tweet during this talk, please feel free to use the hashtag #publishersright. It's on the screen and the Twitter feed will hopefully pick it up.

The topic of this evening's talk is EU copyright reform, the case for a related right for press publishers. On September 14th 2016, the European Commission presented a package of proposed copyright reforms under the banner of promoting a digital single market. Amongst others the proposal includes an exclusive right for publishers for the digital publication of their press publications. After several failed attempts, particularly in Germany and Spain, to

secure remuneration for press publishers for the licensing of content by networks and search engines, the proposed EU Directive on Copyright in the Single Market would allow publishers to license or prohibit digital users of their press publications for a period of 20 years. These proposals are currently being discussed in the EU Parliament and the Council.

Academics who work in this area are arguing that aspects of this proposed EU Directive, particularly the press publishers' right, will be harmful for access to information and digital dissemination of news. Some have argued that the new right will not only fail to increase publisher revenues, but also decrease competition and innovation in the delivery of news and will limit access to information. This proposal has been labelled as anti-American, a Google tax, a jealousy tax, link tax and an innovation own goal, making it difficult for digital start-ups in Europe to compete.

In October 2016, Martin Kretschmer, Director of CREATe, gave a public lecture in this very room, where he investigated the digital single market, what does that mean in an interconnected world in which copyright still slices content by territory and where the balance between artists, innovators and users and investors still reflects an analogue world of linear exploitation. He also analysed whether the UK can become a digital island in light of Brexit.

A second public lecture offered in November 2016 by Raquel Xalabarder, Chair of Intellectual Property at the Open University of Catalonia in Spain, addressed the press publishers' right more specifically and she argued that this is not only in contravention of the provisions of the Magna Carta of copyright, the Berne Convention regarding copyright and use, but it also goes against accepted judicial doctrine that linking or pointing to something in the digital world is not communicating to the public and hence not within the ambit of copyright.

The same day this proposal was published in 2016, in a State of the Union address to create modern EU copyright rules for European culture to flourish and to circulate, President Juncker said I want journalists, publishers and authors to be paid fairly for their work, whether it is made in studios or living rooms, whether it is disseminated offline or online, whether it is published via copying machine or commercially hyperlinked on the web. The Vice President for the digital single market, Andrus Ansip, added for good measure, Europe's creative content should not be locked up, but it should be highly protected, in particular to improve the remuneration possibilities for our creators.

Our speaker today argues in favour of this economic and technological rationale, illuminating merits of a related right for press publishers in the proposed directive. For some of us in the audience, there is another question looming large, which is are there any lessons in this proposal for the post-Brexit UK copyright regime. May I welcome Professor Doctor Thomas Höppner.

Professor Thomas Höppner, Partner at Hausfeld, Berlin; Professor of Civil Law, Business Law and Intellectual Property Law, Wildau Technical University of Applied Sciences; and Visiting Professor at University of Strathclyde:

Thank you for the invitation to speak about the press publishers' right today. As you pointed out in your introduction, I'm not entirely partial because in my position as a lawyer in a law firm, I was acting against Google, therefore in a way I'm a bit more on the publishers' side than on Google's side. However, I try to reflect this by focusing on the reasons today that have basically nothing to do with Google, but are in favour of this publishers' right. I will try to keep Google out of the equation as far as that is possible.

What I want to talk about today, first I would like to give you a quick overview about

this proposed right, then I will focus on the reasons for its proposal, the justification for such right, technical, economic reasons, legal background a bit. Then I would also like to address some of the counter-arguments, the myths I call them. I happened to notice that in your introduction, it sounded as if there were just counter-arguments and no arguments in favour. We will see if that's really the case.

So how did it all start? In the year 2016, the European Commission in its impact assessment, the assessment of the digital market, came to the conclusion that the current press plurality, press diversity as we all cherish it and enjoy it, is under threat in the digital economy because there is some disparity between those that produce the content and those that use it. To address that, the European Commission suggested several measures, including a proposal for a new press publishers' right.

The proposal is rather straightforward, two articles from the existing directive, the InfoSoc Directive, shall be expanded to press publishers. The first is article 2 that concerns the reproduction right. This right is currently reserved to, inter alia, phonogram producers, broadcasters and music producers, which just like press publishers are engaging in the dissemination of works. So basically they are distributing works that are already copyright protected, let's say the script for a film or some text for music, but nevertheless article 2 protects their disseminator which is in this case the phonogram or the film producer. So in this respect, press publishers would fit in quite nicely in the already existing article 2 of the InfoSoc Directive because in a way press publishers are the only disseminators that are not currently enjoying this right.

The same is true for the second exclusive right that was suggested, which is the right to make press publications available to the public pursuant to Article 3 para. 2 InfoSoc-Directive. Here again, this right is currently enjoyed by similar media agents such as

broadcasters, film and music producers.

What is the definition then of the protected item, the press publication? Currently it is rather wordy. A press publication means a fixation of a collection of literary works of a journalistic nature which may also comprise other works or subject matter and constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or journal or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of the service provider. So a rather complex definition there but probably we can see that it aims at specifying in particular who should be granted this right and who should not be granted this right. In a way it is rather narrow because to fulfil these specifics, you have to fulfil quite a few requirements.

So what is the justification for that right? Basically it's a combination of technical and economic reasons. Technical reasons, some 20 years ago when the current InfoSoc Directive was drafted, no one really thought of the consequences that digitalisation may have on the copying of press publications. The only risk that was seen was the copying of films and music and that's why the InfoSoc Directive was drafted to protect film producers and music producers. Nowadays of course it's a bit different because and contrary to 20 years ago, it is very simple now to copy and distribute newspapers and magazines globally in the blink of an eye. So the risk is the same as for film and music due to digitalisation and one asks oneself why is this right then not also awarded to press publications.

Unfortunately, there are not just technical tools to easily copy and distribute press publishers' content, there are also very strong economic incentives to do so. Ultimately you could even say that the incentive to copy press publications is inherent in the internet. This becomes apparent if you look at the basic business models of the internet. The most basic

business model is the advertised based model where you have a website on which you put some attractive content, like a movie, a photo, music or text, in order to attract consumers and to attract them you usually give this content to them for free, with the entire purpose of selling this attention of consumers to advertisers who pay for the whole platform. You will all be familiar with examples of that. Let's think of Amazon or Netflix for films, who of course produce their own content. Other platforms however focus more on content that they find online or that users upload. If you think of YouTube for instance, or Flickr or Google Images, they don't produce own content. They basically crawl the internet for content or they let users upload that content to attract other consumers and then advertisers. The success of this business model, again which is at the core of the internet economy, depends on gathering and make available as much attractive content as possible, because the economics are rather simple. The more attractive content you can present to consumers, the more attractive this platform is to consumers. So more consumers will come to your site and the more consumers you gather on your site, the more advertisers will come and the more they are willing to pay for being on your website. So the economic incentive for ad-financed websites to look out for content elsewhere that they can put on their website is there and you can't ignore it.

Unfortunately for press publishers, this business model hasn't stopped short of their content, given that press publications are also very attractive. So the corresponding business model came up which is the news aggregation. News aggregators basically gather the content from press publications on their website, make them available to readers, try to attract those readers to then sell this audience to advertisers. These aggregators do not produce the content themselves. They just gather it and make it available. But of course they do compete with those press publishers for the same advertisers because it's the same online advertising

market where they all try to get their best deal. This is basically the economic background. Press publishers are feeling that if these aggregators are just trying to do the same as what publishers do, which is to inform users, but they take their content for free, something is wrong and something has to be done.

Let me give you some examples. This is a typical aggregator and as many others tries to convey the most important message with a catchy headline, which is of course copied from the original article and it tries to catch the attention of the user. If you then press on one of those snippets, in many cases a longer text will come up and then the user is invited to comment on it or to rate this article. So the whole purpose of this aggregation is to make readers engage with the website and make them stay and digest the content and the information right there so that advertisers can be attracted which then pay for the whole package.

Another example, Feedly is based on the same structure. Again you've got short snippets with the most important information copied from the original articles. Itis all structured according to some subjects that either the aggregator determines or that you as a user can determine according to your own interests, so it's pretty much designed to look like a normal journal. It often takes the same topics as the traditional journals would use.

Google News you know, of course, is another example. We don't find any advertisement on Google News. However, Google News is a platform that attracts users to then feed them back to the general search service where search queries are entered and then advertisement can be displayed.

Another example here, again trying to make all the information available in a short paragraph to attract users and convey the relevant information.

Considering the structured way aggregators present news, it comes as no surprise that

the European Commission found out that nearly half of consumers that use those websites and services do not click any further. That means 47% of users who go to these aggregators merely read through headlines and through the extracts and that's enough for them. They've found what they wanted to find. The reason for that is the way we consume news today. Mainly we just want to know what's going on. We want to make sure we are not missing anything, we are not missing the earthquake that's happening, some big revolution that's going on. We just want to make sure we are on track, but for that it is sufficient to flick through the headlines and the main extracts that summarise the news. We don't have to read all the lengthy articles. We may click on a few that are really of interest to us, but to get an overview of what is currently happening, these extracts will be enough.

Now coming back to this figure, if half of the users of such aggregators do not click through to the press publisher's website but actually stay on the aggregator's site, it is rather clear to me that this is not some sort of symbiosis, where the aggregator and the press publisher both benefit equally or a complementary service where both benefit from it, or someone even suggested a win-win situation. There is no winning for the press publication if the aggregator is taking away half of its audience. But we come back to that later.

While this is already happening, we should also see what the future may have ahead of us and there's a quote from Google's chairman, I have to come back to Google unfortunately at this point. Quite recent, 2014, and he basically says well, the best search result would actually be if we give the information right away. Let me read this out for you. "Speed and simplicity really matter. It's why the best answer is quite literally the answer. If you ask how do I get to Hamburg by train, you want the railway timetable right there on the screen, no extra effort required. That is what Google provides. Google Berlin weather and you will no longer get 10 links that you need to dig through; instead you will get the weather forecast for

the next few days at the top, saving you time and effort. Google bratwurst and at the top will be images, nutrition facts and the web page with the recipe. Another example, stand next to a historic monument and ask how high is the grand arcade and you will get your answer right there on your screen. The goal of a search engine is to deliver relevant results to the user as quickly as possible. Put simply, we create a search for users, not websites."

Now, to get this straight, it's probably correct. Users would love this direct information, directly on the search results screen, but with this approach and with this thinking it is rather obvious that the next step would be to provide all the entire relevant information in the search engine's results page. You've seen beginnings of that already with longer extracts from Wikipedia, with images in full size, weather reports, cinema listings and so on. What would stop search engines from taking the most relevant paragraphs of every press article and also putting it directly in the search engine's results page. The fact that currently this is not happening doesn't mean that it couldn't in the future. The economic incentives are certainly there.

Against this background, what is the proposed publishers' right really all about? First and foremost, it creates an own right for the press publisher, own right meaning in contrast to the rights of the authors, like the journalists and photographers who enjoy a copyright protection for their works as well. The right is akin to the already existing rights of other media agents such as broadcasters, film and music producers, as I mentioned previously, and the right acknowledges the investments of press publishers that go beyond the individual contributions of the journalists and the photographers. In particular, it acknowledges the editorial responsibility of press publishers and that is something that, for instance, differentiates press publications from fake news. You won't find fake news on press publishers' sites simply because they have an editorial responsibility, which corresponds with

a legal responsibility, so they will be liable if they distribute fake news.

Who is the addressee? It is basically every commercial entity that is using press publications in an unauthorised way. Because of that it is false to say that the right is a "link tax" or even a "Google tax". Google is not the one that the proposal has in mind. It has everyone in mind that reproduces and distributes press publications and unfortunately, as you have seen earlier on, there are many other companies out there that base their business model on that.

It is also important to note that this right is not compulsory. That means you don't have to hand it over to a collecting society that then has no choice but to enforce the right. You can actually waive the right, which is important because it means that press publishers can ultimately decide which platform is in their favour, with which platform do I want to cooperate and allow them to use my press publications, and which I don't agree with. And to those I will say that they require my consent.

So why do press publishers need this own right? Why is it not sufficient that the journalists and the photographers have a copyright? The first reason is that many modern press publishers work with a large variety of freelancers and freelancers want to be free obviously to cooperate with many press publications and they are reluctant to grant exclusive licenses to the press publisher. The norm are non-exclusive licenses. But they are rather useless for press publishers when it comes to enforcing the rights of their journalists, because if another publication uses these articles, then the press publisher would have to show a complete chain of rights going back to every single journalist that has written an article in the paper to show that the publisher is also entitled now to enforce the journalist's right. This makes the whole process rather inefficient. In many cases, in several countries, after many years of litigation courts concluded that the publisher has failed to show a complete chain of

rights and that's why their lawsuit was dismissed. That is quite unfortunate because you can't really expect the journalist to fight the fights for its employer, the press publisher. So basically, the journalists' right will not stop anyone from copying press publications.

What about technical means? Another strong argument that aggregators repeatedly bring up is that publishers don't really need legal protection because they can use technical means to block crawler software used for search engines from taking content from your website. What they refer to in this respect is the so called Robots Exclusions Protocol with which websites can communicate with the search engine and tell it which web page it is allowed to index and which page the site does not want to be indexed. So the system is basically that: You programme a certain file on your website and that tells the search engine that it is free to index all my sub-pages or that it is not, for instance, because there is some confidential or private information on it. Thus, the website is telling the search engine "please do not index that web page". I would say, if this was a very sophisticated system, it would probably be good for everybody. It would be great if the website operator could actually communicate with those that crawl the content and distribute it. The operator could tell these distributors "well you have my content under this condition and you have to show it like this and like that", all these things that you would usually put into a license. Unfortunately, that's not how the system works today. Rather, it is very limited in the ways, what you can communicate to the search engine. One of the commands you can communicate is "no snippet", which instructs the search engine not to show any search results with a snippet for this page, but this is also basically it. You cannot instruct the search engine regarding the length of the search results or how the search results should be presented, on which page they can be presented and in which way it may not be displayed. This is just one of several issues with this standard.

Let me go through them one by one. The first general concern is that this Roberts exclusion protocol was really drafted between and agreed between search engines, basically the ones that have their own commercial interests in taking as much content as possible and leaving the content providers behind. It is rather obvious that if you have a cartel of those using third party content, that the outcome will not really be in favour of those being used.

Another weakness is that this protocol, this technology, is not binding. It was agreed between these search engines but there is no agency or anyone that could enforce it, so it's a rather weak tool and since only some search engines agreed to it, many others simply ignore it. Then it is also interpreted by search engines in various ways so to use this technology basically does not work.

For background reading I have included some specifics, why these terms that you can use to instruct the search engine are insufficient but I don't want to go into further details here.

Another point in any case is because there are only very limited instructions, you cannot fine tune the communication. For instance, you cannot block Google News in a way that you do not appear on Google News while still being displayed in the news universals, the special boxes for news results with general search results. You also cannot block Google News but still appear in Google Alerts, or prevent the display of snippets but still allow instant previews and you cannot distinguish between Google's web search results and those search results presented on affiliates, partner sites that use Google's index. There are quite a few websites whose internal search is through Google but you cannot instruct them separately while you may actually like them. So this old technology unfortunately is not sophisticated enough.

Another big point is that Google itself is admitting that if you block content from your

website, instructing Google with a “no snippet “instructions for instance, Google will value that content less. It’s quite simple because search engines determine the value of a web page by the content they can find, if they don’t find any content, they cannot value it. So in from the search engine’s view, it’s an empty page and empty pages are less attractive than pages of their rival that allows Google to show the articles. So automatically, if you use these technologies, your web page will be downgraded because others who do not block the search engine will be ranked higher. Moreover, to quote an SEO expert, “if indexing of a considerable portion of the site is banned, this is likely to affect the non-banned part as well because spiders will come less frequently”. Thus, you are not just downgraded, crawlers will also come less frequently which is, of course, very detrimental for press publishers who depend on their news being up there in the search engines in a matter of minutes.

So let me then address some of those counter-arguments that have been mentioned in the beginning. The first myth, if you like, is that the right - and this has really been mentioned – would destroy the internet as it makes it illegal to link or share publications. There’s actually an anti-campaign that is called “Save the Link” and which is basically claiming that the publishers’ rights made it more difficult now to link to press publications. But that is not correct. The proposal makes it crystal clear that the link is safe. Recital 33 explains that the protection does not extend to acts of hyperlinking and it could not extend to acts of hyperlinking because, under the jurisdiction of the European Court of Justice, such hyperlinking does not constitute the making available because it’s not a communication to a “new” public. So the European Court of Justice has already clarified that mere links, including frames, so any linking technology, does not constitute making available to the public. Thus, it would not infringe the publisher’s right. Consequently, to say that links are now illegal is simply false. Therefore, it can also not be called a “link tax” because the link is

not protected.

The same is true for sharing. Some have argued the sharing of content will be more difficult for consumers and their freedom to express their views was limited. But if you look at it closer, that's also not correct. First of all, sharing technologies are most often based on framing or in-line linking. Again acts of hyperlinking which are excluded from the right. Secondly, sharing is carried out by consumers like you and me, the readers, where quite obviously the whole right is not designed to fight against readers. Press publishers have a commercial interest in actually engaging with their audience and letting their audience cooperate and react to them, share their information, forward it to friends, recommend it and so on and so forth. They have no interest in suing any individual user. Why would they do that? They want to broaden their audience, not restrict it.

So if those press publishers actually allow the sharing of an article, for instance by a sharing button on the bottom of an article, what does this constitute? An implied consent for the consumer to share this article. So even if sharing constituted a, communication to the public, it would not infringe the publisher's right.

What should not be forgotten, some say it makes it more difficult to share because you cannot take entire articles now and put them in your own blog or whatever you want to use it for. However, such copying is already prohibited today. Obviously because of articles being protected by copyright law, you cannot simply take large excerpts from the article and use it the way you want. That already infringes copyright law so the press publishers' right would not expand the existing protection in this respect.

Let's turn to the second counter-argument: the right would harm consumers as it makes it more difficult to access and disseminate content. This is close to the argument of Mr. Singh earlier on, that the right somehow limits the users' right to communicate freely and to express

their opinions. But what has to be kept in mind is that the information is entirely still out there. It's still freely accessible on the press publisher's website, in most cases for free. That's the whole point, making content available for free to consumers and it remains free on this website and none of that information, none of the facts provided, none of the ideas provided are protected. So everyone remains free to comment on these facts, to use these facts and so on and so forth. Only the manner in which this is communicated is limited because you cannot simply copy and paste the way this information is provided, but that is a normal approach under copyright law.

We should also not forget that it is always easy to say "well it makes it more difficult for consumers now to get access to these press publications", but this is always the case when it comes to copyright law. Of course, we would all be interested in enjoying lots of copies of every protected piece in the whole world, let's have museums everywhere, in every city, with large copies of all the greatest images and pictures and whatever is copyright protected so we can enjoy them wherever we go. However, it doesn't work like that, because, unfortunately, if you provide all the works for free to everyone everywhere in the world, then there are no incentives left to actually create these works. So the easier it is to simply copy works, the less incentives there are to create high quality works.

We should also have a look at the alternatives and I think that is a very crucial point to keep in mind. If the press publishers are not protected, they have only a limited amount of possible reactions and these alternatives will not leave the consumers better off. First alternative they have is to simply produce less quality content because it is commercially not attractive any more. Dissemination, distribution of content is much more lucrative. I exit this market of production of quality content. As a result, we all get less. Second alternative is to just put less digital content online. So publishers just keep printed press but don't enter the

digital markets. Again, we consumers would not be better off because it just means we have to buy newspapers while we actually enjoy reading our news online. The third possibility that we are already seeing now is that press publishers basically hide the valuable content behind paywalls, subscription models, so that users have to pay and they have to pay so much until the costs are amortised. So neither of these alternatives really leave the consumer better off than the proposal which basically just blocks certain platforms from copying content that press publishers have made available for free in the interests of consumers on their websites.

Finally, if we talk about any possible limitation of the freedom to express your views by sharing third party content, we should keep in mind that also this freedom as consumers may argue to have, is not unlimited and there is certainly a high public interest in protecting a diverse, high quality press. This public interest in turn is capable of justifying any small limitation and it couldn't be more than a small limitation of a freedom of information.

So next counter-argument: the right would harm journalists, some have argued, because journalists are increasingly dependent on maximum exposure. The argument is that we have got more and more freelancers and that freelancers are based on the engagement by many press publishers but to be engaged you have to create your own profile and to create your own profile you have to be exposed. You have to be on every platform; everyone has to know you.

To be honest, I find this a very bizarre argument, because ultimately the press publishers' right is about making the press more sustainable. It is in the interest of the entire press, including all its elements such as journalists. If the press has no money left to pay journalists, journalists don't benefit from visibility. Probably if you ask journalists what they would prefer, being well paid or being very visible but not paid, the answer is clear. So I don't see how a right that is supposed to secure the financials of your employer could in any

way make it harder for you as an employee. Plus, it is not true that journalists would get less of an exposure, because the overall consumption of news will not decline. It would be irrational to assume that you and me are reading less news just because the amount of platforms on which we can read them is somehow reduced and instead of having 20 aggregators where we can read these articles, we now only have let's say five. Of course we all continue to consume news and we will read just as much, so the journalists will get the same exposure, only on a different platform. So I don't find much in this argument at all.

Next argument that has been raised is that the proposed right could stifle innovation and harm start-ups. Of course that would be nothing that is of interest to press publishers. On the contrary, many of those press publishers have their own start-ups in the digital world and the last thing they would want to do is make it more difficult for their subsidiaries to compete online. But I don't see that this will actually happen because, first of all, the proposed right creates legal certainty. Currently, every start-up has to think and analyse whether its business model infringes the copyright of journalists and photographers. So the risk that press publishers or journalists and photographers come after them if they take too large articles is already there, but at the moment it is rather unclear what the limits are, whereas as a result of this new legislation, we would have more legal certainty and that is to the benefit of everyone, including start-ups. Plus, we shouldn't forget that press publishers are also companies, they are actually quite innovative. Who says they can't be just as innovative when it comes to the distribution of their own content as others. I think they would probably be better positioned to innovate here than outsiders.

In turn, companies that are basing their business model entirely on the use of third party content, well, I would say they act at their own risk. If you want to make money by taking someone else's content, I think it's rather obvious that there is always the risk that this

someone will stand up at one point and say “sorry, that’s not the deal, you simply can’t do that”. If you ask start-ups what they would value most in their own company, it is probably their own software and their software is, of course, copyright protected. They would certainly also shout out loudly if you now say “well your business model is great but your software is now available to everyone else”. So I think there is a bit of a misunderstanding which start-ups need to be protected and what the actual risks for them are.

Moreover, what we need is innovation and investment across the entire value chain of the creation and distribution of content and not just in the area of distribution. If we just focus on innovation and investments in the segment of distribution of content, automatically the incentives to actually create high quality content will decrease and a dis-balance will be created. Ironically, those that distribute content don’t benefit either if there is nothing left to distribute. You first have to have content to actually attract anyone with its aggregation and distribution.

Next myth: the whole right would be just about protecting the press publishers’ old and some would even say outdated business models, trying to copy the print business model into digital business which works differently. But the truth is: press publishers were amongst the first that really engaged heavily with digital markets and they entered these markets at a very early stage. Many of them have subsidiaries that operate platforms that are very sophisticated, innovative and all the rest of it, so it’s not really true that they are just pursuing old business models. What is true, however, is that the publishers’ right aims at creating a fair, level playing field. It is simply counterproductive to have a situation where on the market for online advertising, companies are competing with the same content that one has to produce at very high costs and the other one simply copies and uses at negligible costs. In this situation there is no fair level playing field but you have to create this level playing field by

telling these guys “sorry, you can’t just take our content to then compete with that very content, for the same readers and the same advertisers with the same advertising budget”.

Of course we have seen some new models for press publishers as well. I mentioned already that there are new subscription based models, but leaving the question aside whether that should really be the future for us to read news, also these models depend on the protection of press publications because if press publications could be freely copied and made available anywhere, then obviously the value of subscribing to a website and paying a fee for the same content would not really be there. It’s not very persuasive to say you have to pay for my content when you get it anywhere else for free.

Next counter-argument I would like to touch upon and I think that’s the last, it has been argued that equivalent publishers’ rights have already failed in Germany and Spain. This has been mentioned in the introduction here too. It is true that similar rights have been enacted in Germany and Spain, but if you look at the details, they were actually not identical. The Spanish model is ultimately only addressed at Google News and the German model only at search engines and similar aggregators. In contrast, the proposed right has a different approach. It is probably also not true to say that they have entirely failed. It is correct that, so far, we haven’t seen large revenues following from this legislation, but I’m pretty sure that the landscape of aggregators would look differently in these countries today, at least in Germany, if these laws did not come into force. There are so many companies that invested in start-ups that just do aggregation, that it was only a matter of time that they all pop up and grow and grow and then there would be more and more aggregators and at some point press publishers’ sites couldn’t be found amongst them anymore. In Spain, for instance, once they had the legislation that basically said Google News would have to pay, in place, Google News stopped its service and what happened then? Well, more direct traffic came to press

publishers' sites, direct traffic meaning consumer going straight to the websites of press publishers. But that's exactly what press publishers want. They want direct contact with their audience so that they can engage with the individual, provide more specific content to the audience and make the advertising more tailored. So it is probably not correct that these laws failed entirely. Plus, there are still so many disputes pending regarding remuneration issues that the complete result of this legislation will probably only be determined in a couple of years.

Irrespective of that, even if this legislation has shortcomings, and I agree there are a few, would that really be a reason to say "let's leave it entirely" or would that not just create an incentive to say "let's make it better"? I would say that is the better approach. If you see that other countries have adopted the legislation, it has some effect already but some results have not been achieved, I would say learn from these shortcomings and make a new proposal, a European proposal, that is better.

To sum the lecture up, there are five reasons why the press publishers' right is overdue. First of all, press publishers, to keep up their work, to play their part for a democratic society, are dependent on marketing their content, but for this marketing sovereignty they need their own rights. It is not enough to just depend on the derived individual rights of journalists and photographers. Publishers need their own rights.

Secondly, similar rights have already been granted to similar media agents such as film and music producers and broadcasters. There are no reasons that would justify not protecting press publishers. The decision on whether a press publisher is better off by cooperating with a platform, be it a social network, a search engine, or whatever it is, should be with the press publisher. They should have the right to determine yes, this platform is helpful for me or no, this platform is not helpful for me and that's why I will disallow the use of my content.

Currently, publishers cannot do that. It's basically up to the aggregator to decide what content they want to use.

And I think we can also agree that in a time where fake news is increasing and everyone is dependent on reliable, trustworthy choices for information, the press plays a very significant part for a free society. To protect the basics, the economic foundations of the free press is therefore of high political relevance.

Now, I would also like to give you five reasons as a summary why no one really has to be afraid of the proposed right. First of all, as I outlined, the link is safe, acts of hyperlinking, including framing are not covered by the law. Secondly, the press publisher is free to waive its rights so if a platform actually generates more traffic and therefore more advantages for a press publisher than it takes away, then it is up to the press publisher to say "okay", I waive my right, you can have my content and you can even take a bit more content if you like. But this decision should be with the press publisher. Thirdly, the general exceptions that apply to copyright also apply to this new right, including the right to quote, so you can of course quote press publications or use them privately. Finally, the term of a "press publication", what is actually protected, is defined rather narrowly. The threshold for that is high. This ensures that not every odd scribble online is protected, but that only those that actually pay a contribution to our democratic societies are granted this right.

Thank you for your attention. We can now discuss all your further points.

Questions and Answers:

Question - Kris Erickson, CREATe Lecturer in IP and Innovation, and Director of CREATe Postgraduate Research Development:

> Not being familiar with the specificities of this proposal could you help me understand, a lot of news aggregators use hyperlinks in conjunction with the headline of the target article. Is the headline safe and what are the limits in terms of the design of acceptable aggregators that do not infringe this right versus those that do?

Response - Thomas Höppner (TH):

> That's a good question because it raises the issue of what is a link and what does it cover that is excluded from the proposed right. Of course, we would all agree that the URL is a link and that is probably what is primarily used to link to another website. So we can be pretty sure that the URL is free. Thus you can always use the URL, even if it contains text and nowadays it already contains, usually for search optimisation reasons, the title of an article. So if you take the URL that is just the link and there is no infringement there. It's a different story, however, if you've got a link and then you have the headline below that as well or you take the headline and you create a link out of it. In other words, difficulties arise where aggregators take a text and just put the link on top of it. I think in this case we will probably have to assess how long the link and the text is that it includes. I think it is clear that if you want to exceed it and just take basically the whole article and make a link out of it, that may not fall under the definition of a "hyperlink" any more, given that traditionally the purpose of a link is just to refer to another website, the source and for that the URL is sufficient. But I don't know whether that would be seen as a circumvention then and courts would say "good attempt but actually that's more than a link because what you are doing is including all

sort of information into your link".

Question - Martin Kretschmer, Professor of Intellectual Property Law & CREATe Director:

(Paraphrased) *Seeking TH's views on the quotation exception.*

Response - TH:

Yes, the quotation exception would apply and it's very important that it applies. Consumers shall be free to quote. If you look at the requirements for a quotation, however, it has to be an individual reference to a source, basically to bring your text in line with what the source is saying. An automatic scraping of content, which is totally irrespective of what you are writing yourself, is not a quote. Automatic scraping and then putting the entire content on your website is not basically a sum of quotes because you are not referring somewhere else to support your own opinion, you are just taking extracts from somewhere else. There are court decisions that say this automatic taking of extracts from somewhere else without the purpose of actually supporting your opinion is not a quote. So while it would remain free for consumers to take advantage of the quotation rights, this right would not mean that now that there is a quotation exception, the whole publishers' right is rendered irrelevant. Again because of automatic scraping not being a quote.

Question - Joy Davidson, CREATe Centre Manager:

I'm not a legal expert. You touched on fake news. I was wondering in light of the rise of fake news and the concerns that people have, is there maybe a moral obligation for publishers to not restrict the number of aggregators, just to provide a counter to the rise of the fake news, to provide a bit more trustworthy, go direct to the site.

Response - TH:

I think the relationship between this right and fake news is an interesting one. As I

said, part of the protection is the editorial responsibility that makes sure, for legal reasons, that you won't have fake news in a trustworthy press publication and this will distinguish them from fake news which don't have that liability, so there's nothing for them to lose. What you are saying is interesting because you're basically suggesting press publishers have more of an obligation to prevent the amount of fake news by topping their good stuff over them. While this is without doubt a good target and probably many will agree, the difficulty arises once the aggregators that you would try to protect in a way are then not really playing nicely because they are just taking your content without paying anything in turn or asking for your consent. I think the best way to deal with fake news is to make sure people can rely on established press publications, brands that they are familiar with, so that they know if I turn to this page, chances are this is not fake news. I think the press publishers' right can pay a contribution to that because it strengthens the foundation of established press publications. If these foundations fall away, then I think the room is opened to fake news more because there are far less reliable press publications that you can turn to for your information and the fake news will probably take over.

Question – Roderic Page, Professor of Taxonomy, Institute of Biodiversity Animal Health and Comparative Medicine, University of Glasgow:

(Paraphrased) *About the difference between giving a right to journalists or giving a right to publishers, whose existing business models are collapsing.*

Response - TH:

Maybe you have missed one important point. We are talking about the market for online advertising and this is a real existing market right now and press publishers compete in that and aggregators compete in that too. Press publishers with their content

that they have produced and paid for; aggregators with simply the copying of it. That has nothing to do with whether this news is relevant or whatever the news is, if we need this news or whatever. Just imagine that situation in another environment. It is crystal clear that this competition is not fair and square because some are just free-riding on the other ones' investments and automatically taking them over and then selling them as their own. Selling that as their own and then making money with it is in conflict with the core purpose of copyright, that you maintain the incentives for those that actually bear the cost to create the content. The law aims at ensuring that the content is actually created. If you don't protect that, then no one will create in the first place. Everyone will focus on distribution. Why would you invest in a network of journalists, a global network costing millions for journalist that are risking their lives - a lot of responsibility - if you could simply just copy the results of that work from another site and compete in the same market. No one would do the former.

Question continues:

If the aggregators were working, so why haven't news publishers got it right [inaudible – and launched their own news aggregator] so if publishers can't do that that's their problem they need to sort themselves out.

Response - TH:

That is basically saying "well you have written a great book, why do you fail of copying it so often and distributing it globally, why are you so weak that you can't deliver your book to everyone in the world so that others have a market for copying that." I don't think you can really blame press publishers for not having created the best search engine in the world. Only one company has succeeded in that and with as investments that press publishers could not have made. I think it's also false to make

the protection of a work dependent on the owner of that work being able to fulfil the entire value chain himself. That isn't efficient. If you want to force an author to also take care of all sorts of distributions of its work, that author will never create anything new because he's so busy with the distribution of the previous work. I think that it can't be the answer to just say "well it's your own fault, you're not as good as these aggregators". Plus, some press publishers actually have created their aggregators, but if you have an aggregator that competes with ten others that have no cost, then you are doomed to fail. Another point is that press publishers have difficulties to actually cooperate with one another for anti-trust reasons. It's not as if the leading press publishers could just come together and say "look, let's create a new news aggregator and we just put our best content on that and all the rest of it". That would be a cartel. It is much easier for outsiders to create these news aggregators that then take the content from everywhere and anywhere without infringing competition rights.

Question – Arpit Gupta, LLM Student, IP and the Digital Economy:

Paraphrased (*Question linking publishing industry to film and music where enhanced rights have not stopped piracy).*

Response - TH:

I'm not entirely sure whether I've understood all elements of it. It sounded a bit to me like because there is still piracy going on, quite a lot of it, but still we have creative works, somehow the correlation between piracy and production doesn't seem to be there. Is that an element of your question?

Question – AG:

Paraphrased *(clarifying that creative production does not need connection with economic return).*

Response - TH:

I think the difference here is you are talking about YouTube as an example. YouTube is a user produced content, user generated content, so individuals producing their content and making it available online. They don't do that, most at least I would say, to become millionaires. Some probably do, but there are also many other motives, being present, having a profile, becoming famous. For press publications it is different. You can't compare them with user generated content. Press publishers have their task to inform everyone about what's happening in the world and this task requires certain minimum investments. You have to have a comprehensive network and all the rest of it. I do believe that it has direct effects that if your business model cannot work because others are free to take your content without consideration, that this affects your business decision of where you put your money. It is crystal clear to me that a press publisher, if they notice, look even though we do all the hard work, create news, create articles, everything is superb, people are consuming our products elsewhere, that they will at some point decide, well then I can't employ so many journalists any more, can't employ so many photographers any more. That already happened in other areas. If you look at the picture industry. For many years, Getty Images, a huge company, was leading in the provision of images, but because images are not efficiently protected, they had to lay off quite a lot of people. Their business model simply couldn't work anymore in an environment where everyone is taking their content for free. So I do believe that at least in the field of press publications, there is a direct link between the protection of the content and the incentive to actually invest in it.

Question continues:

Still you have no data showing the exact loss for press publishers. They are still doing

it, even after half of their viewers are not going to their website, they're still publishing.

Response - TH:

I don't think that is actually entirely true, because if you look at the landscape of press publishers, you will have seen that there is a decline, a real life decline, in particular in local areas. Local press publishers are closing their doors because their business simply is not sustainable any more. They can't pay their employees. So press publishers, unfortunate as it is, are dying off in Europe and that is a reality and it's not as if they can simply hold on to their last revenues and make losses. At some point they automatically have to close down and this is already reality.

Question - Sukhpreet Singh:

Paraphrased *(disputing TH's contention that Youtube is simple a user generated content site, but that the large studios and broadcasters all use it for professionally produced content based marketing. Can't TH's free-riding argument from earlier be inverted and seen from the other point of view?)*

So the aggregators are providing free…

Response - TH:

…advertising for the press publisher.

Question continues:

Yes, the press publisher is the free-rider. So if it was not for the aggregators, one could argue that 47% would never have accessed that at all. That's one way of perhaps looking at it.

Response - TH:

That's the way Google would want to make you believe… *all laugh.*

But my perspective is crystal clear on that. The difference between a YouTube teaser

and a news snippet is if you've seen a YouTube teaser, you will nevertheless watch the film. In no way can a film clip substitute the consumption of the film, whereas if a news extract contains all the information that you are interested in, there is no need to visit the website anymore, so the news teaser can already substitute the consumption of the entire article. Let me give you an example. You read the text extract, Donald Trump won Presidency. That's all you have to know - why click on it and read further? So unfortunately, because the way news are, the best news are those ones that keep it very short, keep the important message short. Journalists invest a lot of time in exactly that, drafting headlines and drafting summarising extracts that include all the relevant information. It is easy to convey the value of the whole article in a short extract and if that extract is then copied, the main value of the whole article is gone because people are interested in that fact that is in that short extract. That is different with a film where you don't watch an interesting teaser and then believe to know it all and don't watch it anymore. But if you read "there was an earthquake in China", well you know there was an earthquake in China. You don't want to know the ins and outs; all you want to know from a reliable source is that there was an earthquake in China. What I'm saying is there are differences in how we consume news towards films. News you just want the information in a short, summarised way and for that an extract can suffice. With a film that's a different story. I have another one, your teaser argument, this 47%.

Question continues:

That's not exactly, that's not the only way, there's a newspaper and I'll give you another example. Sometimes I stumble on an article, let's say from another website user, let's say Guardian or on Time of India etc.… if I have my ad-blocker on, it refuses to serve me that article. Google doesn't refuse to aggregate, but that does stop my

experience of reading that article and then if I am really desperate to read that article from that web page or that website, I have to unlock the ad-blocker.

Response - TH:

I would say if you access a site and your ad-blocker makes sure or causes that you can't see that right, you cannot really blame the site for that because the site is giving you the content for free, but on the condition that you do not block out the adds. They have to earn their cents somehow. It's a two sided business model, they need advertisers. So if you turn on the ad-blocker, in a way you are telling the newspaper "it's great that you're giving me content for free but I don't like that advertising part". I don't think you can really blame the publishers. Switching off the ad-blocker is probably the right thing to do in that respect. I don't think that with Google ad-blockers are working because Google is simply not accepting them. If the ad-blocker was also targeting Google's ads, then it would be a different story. But I would like to come back to what you said earlier on, the presumption that this 47% that just stay on the aggregator site would never have seen it. Again I come back to the simple belief that you and me will continue reading news tomorrow and in the future and we will find our way to read this news and we will not read less news because there are less aggregators. You will simply read this news elsewhere and to put it to the extreme, if there was no aggregator left, we would read our news on our press publisher's website, so there would be 100% of consumption on the press publisher's website. It may be a bit more awkward, so there will always be aggregators, but don't forget that all the sophisticated press publishers have their own search functionalities on their sites, so it would be very simple to go to the home page of the "Focus" or whatever you want to go, and search for articles. I don't believe for a second that without aggregators we would read less.

Question - Thomas Margoni, Senior Lecturer in Intellectual Property and Internet Law, and Director LLM IP in the Digital Economy:

> I have a few questions and I'll try to summarise it in one, which is I still fail to see how the creation of a new right would change anything because in fact the market works on either the transfer of rights or an exclusive license. I remember in your slide you pointed out that a lot of freelancers are reluctant, journalists are reluctant to transfer the copyright over in an exclusive license to publishers, to bring legal proceedings. The solution is very easy: pay a premium and require an exclusive license, which seems to me a much easier and direct way to obtain the exclusivity that you need because I agree that from the publisher points of view something has to be done, my doubt is whether it is the right way. I think that this attempt is a way to turn this even further the corporate system in a battle between two giants, publishers and Google – you avoided to mention Google as a [*inaudible*] at the beginning of your presentation. So shouldn't you go through other ways other than trying to create a [right] that feels clearly not very well received if we base our… and could share even further like negative rights on publishers or rights holders in general rather than putting them in a brighter … you know a place where they should be because I agree with you that they play a fundamental role in the [*inaudible*] especially when we phase the issues from that. So really is this the best attempt you could ever come up with?

Response - TH:

> I think if there were better suggestions, they would be very welcome and everybody open to it. I just think that the solution, just making sure publishers get their exclusive right from the journalist, would not solve the whole issue because then you would still have the traditional threshold for the infringement of that copyright, which is that the

part that you take must be original.

Question continues:

That doesn't change. In your example Trump voted the President, it's only a fact, it's not protected by copyright nor by the new proposed right. This is not protected in either case, so perhaps I'm wrong, I'm still failing to see where this new proposed right would bring something additional to what copyright would bring in the past and which could be transferred by the usual means.

Response - TH:

To infringe the copyright of the journalist, you have to take a part that is as such original and if you look at the case law for these media, film and music producers, that enjoy a related right, it is sufficient for the reproduction "in part" if you just take one sequence, one sequence which does not in itself have to be original. So if you adopt this approach you would come up with a protection that is not based on the originality of what you take. That would make it easier to automatically say this are now four sentences, original content, that is already a section of the publication and therefore an infringement. Whether that also infringes the journalist's rights, I don't know because I would have to assess whether these 4 sentences are original or not, but I think it is important to point out that the threshold for an infringement, if you follow this case law, is then lower when it comes to the length of the content that has to be taken, which makes enforcement easier and of course is the only way to actually deal with aggregators that take out these extracts. If the threshold was the same, you could indeed just give the exclusive right from the journalist to the press publisher and then it would be sorted, but that is only one aspect of the current problem.

Question - Martin Kretschmer:

There can be no doubt at all that it will be possible already. So the big question for me is if it's already possible and press publishers don't do it, what would they really want to do with the new right and that has not really come out.

Response - TH:

Probably press publishers would disagree because they have had their legal battles in several countries based on database protection and based on the copyright of journalists. When it came to database law, the problem was to show that these snippets somehow use the significant, substantial part of my database and just take out a few bits here and there. That's not the case. And with the journalists' rights, the point was that to sue for damages you would have to show what is the scope of the infringement is. Thus, you have to show for every article that you have the right and that the extract was original. That is such a high burden if you have to do it for tens of thousands of articles, that the cost of your litigation would explode.

Question continues:

I still can't see what press publishers are proposing is delivering that.

Response - TH:

Again, the court proceedings that have tried to enforce journalists' rights have failed. They did not succeed. Look at the Infopaq or Meltwater proceedings where they made all these arguments and said "look at this infringement" but the courts came to the conclusion "no, it's not", because the copyright infringement of the journalists would depend also on showing that the used extracts are original. To show that for tens of thousands of snippets, I think, is quite a burden. You have to analyse for 10,000 snippets whether they are original or not. I couldn't draft a claim saying they have used 1 million of my snippets and exactly 555,812 of those constitute infringement because

these snippets are so long that they are original. I couldn't do that. But in a litigation where you wish to claim damages for that, you have to be precise and if the claim is not precise enough because you can't find out which snippets are now infringing your right and which ones are not, then the claim won't be successful. So I think it comes from the experience in court where publishers failed in dealing with these aggregators because they missed to show originality on a mass scale and they failed to show a chain of rights on a mass scale, which is what is required to succeed.

Closing remarks - Sukhpreet Singh:

We have gone beyond 7 pm and I think there are still lots of questions but we have to stop now. Can I request Prof. Martin Kretschmer (Director of CREATe) to come and offer a vote of thanks.

Closing remarks - Martin Kretschmer:

Thank you very much for coming. It can't be easy doing this ambassador work. We have a CREATe tartan, which we registered on the Scottish Register of Tartans and since you've got a Scottish wife, she might appreciate it, but we wear it as well among the male colleagues.

Response - TH:

Thank you very much.

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