

Press publishers' position on the proposed press publisher's right (Commission Proposal for Copyright in the Digital Single Market (COM(2016) 593))

To remain competitive and independently financed in the EU, press publishers need to be able to compete effectively and profitably on all platforms, which requires clear rights that are recognised in the market. The proposed introduction of a press publisher's right at such a critical time for the digital transformation of the press is therefore welcomed by the four European press publishers associations - EMMA, ENPA, EPC and NME – which represent the interests of thousands of newspaper and magazine publishers across the EU. This position paper sets out the reasons why the introduction of such a right is so crucial and also how the proposal might be further improved.

To be able to sustain a free, independent and diverse press in Europe for the future, the simple fact is that publishers must secure enough revenue to pay journalists, photographers and freelancers, to finance their training and security, to publish a diverse range of professionally produced content. This includes everything from the news of the day, to analysis and opinion to sending journalists and photographers to cover wars and conflicts, or to allow for months of investigative journalism like the Panama papers all of which is part of the cornerstone of a democratic society. Under the editorial responsibility and legal liability for the broad output our readers enjoy, press publishers whether in printed editions, online or via mobile provide fact checked news and analysis, features, opinion, sport and entertainment on an hourly, daily and weekly basis.

Today, this capacity is increasingly threatened by a reduction in the traditional sources of revenues¹ which not only impacts publishers but the livelihoods of employed and freelance journalists. It is hard to replace print sales with online subscriptions while so much content is made available for free, including the publishers' own content distributed by third parties without permission or remuneration. The majority of advertising revenues online go to search and social media²; print advertising revenues are declining, whereas unauthorised and unremunerated large scale re-use of publishers' content is increasing.

Increasingly part of the internet reality is the 'substitution effect', which is illustrated by the data provided by the Eurobarometer n° 437/March 2016. It shows the increasingly important number of people who do not click on links to access the whole article but are 'satisfied' with the headline in the hyperlink and the snippet to get an overview of the news of the day (67 % in some cases). This substitution effect impacts press publications because if there is no click through there is no traffic, and if there is no traffic there is no advertising revenue. Data shows that more and more people get their news through news aggregators, search platforms and social media, but also that the news content is what drives traffic to these platforms.

¹ Between 2010 and 2014, print revenues decreased €14 billion while digital rose to €4 billion, giving a net revenue loss of €10 billion for the European newspaper and magazine industry over just four years. This pressure means that despite audience growth, publishers are cutting editorial and operational costs while also struggling to fund digital investment.

² Over 75% of growth in digital ad revenues goes to Google and Facebook which together get 72% of all digital advertising revenues in the world outside of China.

Today there is a lack of legal clarity to enable publishers to negotiate licences or deal with enforcement action against largescale infringements. Recently, and strikingly, the fact that publishers are not beneficiaries of the harmonised rights at European level in their own right led to the decision of the ECJ in the HP/Reprobel case³ that publishers are not entitled to claim a share of the compensation collected in recompense of copies made under an exception.

To rely solely on derived rights of the authors to protect against the unlimited and unauthorised reproduction and making available of published content by third parties is not sufficient and does not provide the legal certainty publishers need also for the new and ever evolving digital environment, when it comes to licensing of their content and the enforcement of those rights. This has been highlighted in the recent “*Rapport de la mission de réflexion sur la création d’un droit voisin pour les éditeurs de presse*” de Laurence Franceschini⁴.

This is why it is necessary to make sure that press publishers have their own rights to protect their press publications under EU copyright law, to protect the sum of the contributions from journalists, photographers, designers and editors under the investment and editorial responsibility of the publisher. A new “press publisher’s right” will afford publishers the same related rights as already enjoyed by music, film and TV producers, whose finished works are copyrighted in their entirety without prejudice to the underlying rights of authors and performers, giving them the legal right to decide on how and where their content is made available. Furthermore, software program producers have full exclusive rights under EU copyright law. We are asking to:

- Put publishers on a par with existing related rights owners (such as broadcasters, film producers and phonogram producers etc.);
- Have more say in how content is re-used on the web on a commercial basis, and entitle publishers to a share of licensing incomes in a more balanced relationship with third parties and digital platforms, to the benefit of publishers and their journalists;
- Incentivise and reward investment by press publishers in editorial content and professional journalism, to protect their brand, platform and people;
- Provide legal certainty to the publishing value chain as a whole, but also to the commercial users; and
- Provide a clearer basis from which to tackle piracy and pursue enforcement actions.

None of these requirements changes the relationship between the publisher and individual users, who will be able to continue to share content as they are doing today for non-commercial purposes, and to post links to social media and other platforms in their private capacity.

³ C-572/13

⁴ See the study from 2016 “*Rapport de la mission de réflexion sur la création d’un droit voisin pour les éditeurs de presse*” de Laurence Franceschini, assistée de Samuel Bonnaud-Le Roux pour le Ministère de la Culture, France, page 4, section 1.2.1 : <http://bit.ly/2cQS00s> : in case of enforcement actions when publishers need to prove the transfer of rights to have the right to sue. Where a large amount of articles that have been infringed (i.e. unauthorised mass scraping of content) this can amount of providing thousands of contracts proving the transfer of rights from each contributor. With a neighbouring right this would not be necessary, nor would it limit the author to join the action.

SUGGESTED IMPROVEMENTS TO THE COMMISSION'S PROPOSAL:

1. Extend rights to cover both digital and print in Article 11 and Recital 34

The proposal only provides rights for digital uses, whereas the role of the publisher and the investment of the publisher into the publishing enterprise is for both print and digital regardless of the method of dissemination. Other neighbouring right holders (phonogram producers, film producers and broadcasting organisations) enjoy the full scope of rights. Only to grant rights for digital uses creates a notion that the print edition is not worth the same level of protection and disregards any unauthorised print reproduction, distribution and rental/lending and would mean that the publisher will have to deal with two sets of rights. Not having the analogue rights would be similar to not covering DVDs and CDs for film producers and phonogram producers which would be inconceivable.

2. Definition of press publishers needs to be improved to cover all periodical press

All kinds of press content and publications are being misused by third parties, ranging from daily newspapers, special interest magazines to scientific journals. The definition in the proposal is problematic as it divides and excludes parts of the periodical press. Scientific journals are part of the periodical press but in the proposal these are explicitly excluded despite the fact that they suffer as much from large scale commercial piracy as other publications. Including them will not impact a TDM exception and nor will this impact negatively open access policies. The definition of press publication could take into account identification numbers (i.e. ISSN) to ensure a coherent definition.

3. Align the term of protection to the protection given to other related right holders

All the other related right holders enjoy a term of protection of at least 50 years.

CONTACTS