



# THE ANCILLARY COPYRIGHT FOR NEWS PUBLISHERS: WHY IT'S UNJUSTIFIED AND HARMFUL

## What is the Ancillary Copyright?

While there is no agreed definition, two EU countries have adopted ancillary copyright laws. Spain has imposed a levy on online services for the display of short text fragments, so-called 'snippets', of freely accessible news content. Germany has tried to extend copyright protection to snippets so that their display would require a license. Neither law has provided any benefits.

A great variety of online services display hyperlinks together with snippets, including news apps, search engines, aggregators, social media, etc. Snippets are *fundamental* for users to find the information they are looking for: without them, users do not have any indication on what is behind a hyperlink.

## There Are Strong Arguments Why Europe Should Not Adopt An Ancillary Copyright

### News Publishers Benefit from Innovative Online Services

Online services benefit from news publishers' investments just like news publishers undoubtedly benefit from the investments of online players. This economic interplay, be it offline or online, is the normal and *desired* outcome of a market economy. *All* freely accessible content online is subject to this interplay. Publishers have long recognized this by putting their content on e.g. social media platforms themselves to drive traffic to their websites.

Econometric analysis on the **value of online services expanding traffic to publisher websites** revealed the following:<sup>1</sup>

- Between 2011 and 2013, **the estimated value of a visit to a news publisher website ranged between €0.04 and €0.08**. The range represents the average value across four European markets (France, Germany, Spain, UK).
- More than 34% of visits to news publisher websites came from users directly navigating to the site (e.g. typing the URL). **66% of visits came from users accessing the page from links, blogs, social media, news aggregators, email, etc.**
- On this basis, **the referral traffic from online services to newspaper publishers generated an estimated €746 million** across the four markets in 2014.

### There is No Identification of a Problem That Justifies Intervention

It is not clear which **economic** problem an ancillary copyright for press publishers would solve. The Max Planck Institute<sup>2</sup> and the Spanish Competition Authority<sup>3</sup> have both stressed the symbiotic relationship between online services and press publishers' content online.

Without a clear identification of an economic problem, intervention is poised to regulate a business model into continued existence, at the expense of new business models, including those developed by publishers themselves.

<sup>1</sup> Deloitte. *The impact of web traffic on revenues of traditional newspaper publishers. A study for France, Germany, Spain and the UK.* (March 2016). Available at: <http://www2.deloitte.com/uk/en/pages/technology-media-and-telecommunications/articles/the-impact-of-web-traffic-on-revenues.html>.

<sup>2</sup> Max-Planck-Institut. (2012). *Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger.* [http://www.ip.mpg.de/fileadmin/templates/pdf/Leistungsschutzrecht\\_fuer\\_Verleger\\_01.pdf](http://www.ip.mpg.de/fileadmin/templates/pdf/Leistungsschutzrecht_fuer_Verleger_01.pdf).

<sup>3</sup> CNMC. (2014). *Propuesta referente a la modificación del artículo 32.2 del proyecto de ley que modifica el texto refundido de la ley de propiedad intelectual.* [https://blog.cnmc.es/wp-content/uploads/2014/05/140516-PRO\\_CNMC\\_0002\\_14-art-322PL.pdf](https://blog.cnmc.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf).



## Cooperation is the Way Forward, Not Regulation

The news publishing industry is in a state of flux. Some do very well in monetizing quality content online, while others experiment with various business models. Technology companies play their role to support publishers through cooperation. Below are just some examples:

- The **Accelerated Mobile Pages Project** is an open source initiative involving publishers around the world and technology companies like LinkedIn, Google, Pinterest and Twitter. The project aims to make publishers' webpages with rich content load faster on mobile devices to retain users. An ancillary copyright could endanger initiatives like these.
- **Facebook's Instant Articles** enhances user access and experience by loading publishers' content far quicker on Facebook. A better user experience promises to drive more and more sustained traffic to publishers' sites, increasing monetization opportunities.
- **Dutch digital company Blendle** cooperates with major publishers to provide an experience similar to Spotify for news content. Their approach is based on micro-payments. This model is not a silver bullet, but it illustrates the need to leave space for experimentation and cooperation – not regulation.

## Political, Social and Economic Concerns

- **The Ancillary Copyright is a Barrier to Entry.** It is particularly detrimental to technology start-ups and other smaller online businesses, as they do not have the resources to engage in costly licensing negotiations and pay licensing fees or provide 'fair compensation'. In Germany and Spain, certain start-ups closed down or discontinued some of their offers. It disincentivizes investments into innovative online services. (This is not to say that it does not impact larger players as seen by Google News' exit from the Spanish market).
- **Media Pluralism is Undermined.** On the publishing side, the Spanish ancillary copyright has proved detrimental to small publications.<sup>4</sup> Most EU citizens access news through the brand of the news publication.<sup>5</sup> Innovative online services are particularly important for small publications without brand recognition. It can't be in the interest of the regulator to enact laws that undermine media pluralism in the EU.
- **Many News Publishers Oppose the Ancillary Copyright.** Major news publishing houses like *SPIEGEL-Verlag*<sup>6</sup> and *ZEIT Verlagsgruppe* did not join the VG Media collecting society in Germany. Others voiced strong concerns with the European Commission over a potential EU-wide ancillary copyright.<sup>7</sup>
- **Consumers Lose Out and Will Find it More Difficult to Find European Content.** Non-European publications would be accessible without any restrictions. In that way, the ancillary copyright could function as a promotion tool for content of *not* European origin. NERA estimated the total loss in consumer surplus caused by the Spanish ancillary copyright to amount to €1.85 billion a year.<sup>8</sup>
- **The Ancillary Copyright is Antithetical to Business Models based on Open Publishing and Creative Commons.** A mandatory extraction of payments for use of content, as introduced in Spain, prevents content from spreading as widely as possible.
- **Europe's Private Copy Levy System Should Caution Policymakers.** If the EU follows the Spanish example, the cross-border flow of information could be seriously impeded. It would be more difficult for online services to display content from outside the 'home market'. That would be in contradiction to the Commission's aim to end unjustified geo-blocking. And that is not to mention serious transparency concerns associated with the distribution of levies.

4 NERA Economic Consulting. (2015). *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual*. [http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEPP%20\(VERSION%20FINAL\).pdf](http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEPP%20(VERSION%20FINAL).pdf).

5 See Reuters Institute. (2014). *Digital News Report*. <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Reuters%20Institute%20Digital%20News%20Report%202014.pdf>.

6 SPIEGEL ONLINE clarified it will not make use of the German ancillary copyright because it is not in its interest: <http://www.spiegel.de/netzwelt/netzpolitik/in-eigener-sache-spiegel-online-und-das-leistungsschutzrecht-a-890335.html>.

7 See [http://www.aepp.com/pdf/151204\\_Statement\\_on\\_Digital\\_Single\\_Market\\_FINAL.pdf](http://www.aepp.com/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf).

8 See footnote 4 above.



- **Didn't the Commission Confirm that Aggregation Services are Valuable?** In its Communication on Copyright<sup>9</sup> the Commission announced the creation of an aggregator of online search tools for audiovisual content. If aggregation services for audiovisual content are considered useful, aggregation services for news content should benefit from the same presumption.

### There are Serious Legal Concerns

- **The Ancillary Copyright Causes Conflict within Copyright Law.** In 2014 the CJEU clarified in the *Svensson* judgment<sup>10</sup> that linking to freely available content online is not an 'act of communication to the public' and hence does not fall under copyright protection.
- **Quotations from Newspaper Articles Shall be Permissible.** Under Art. 10(1) of the Berne Convention (BC) "quotations from newspaper articles and periodicals" are explicitly referred to as quotations that *shall* be permissible. WIPO characterized Art. 10(1) as permitting use "without the authorization of the owner of copyright, and without payment of compensation".<sup>11</sup> News publishers themselves are heavy beneficiaries of this exception. In addition, Art. 2(8) BC *excludes* news of the day or facts having the character of mere items of press information from copyright protection.
- **Berne-Infringing Laws Are A Trade Barrier.** The mandatory exception for quotations laid out in the Berne Convention is incorporated into TRIPS<sup>12</sup> – the EU (and EU Member States) could be held liable for the non-compliance with their international obligations.
- **Copyright Needs to be Balanced with Other Fundamental Rights and Public Interests.** The ancillary copyright threatens the fundamental right to freedom of information enshrined in Art. 10 ECHR & Art. 11 EU Charter by striking an incorrect balance between this right and IP rights.<sup>13</sup>

### Conclusion

There is no clear identification of a problem based on economic evidence. Academia has raised serious legal concerns. Politically, the ancillary copyright is highly disputed, including among news publishers, small and large, themselves. It risks to distort the news publishing industry in favor of big, established players. Accordingly, regulators should refrain from intervention.

#### About CCIA Europe

CCIA is an international not-for-profit membership organization dedicated to innovation and enhancing society's access to information and communications. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries.

Contact: James Waterworth, CCIA Europe, [jwaterworth@ccianet.org](mailto:jwaterworth@ccianet.org) & +32 477 782 563

9 COM(2015) 626 final. [http://europa.eu/rapid/press-release\\_IP-15-6261\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6261_en.htm).

10 Case C-466/12. *Svensson et al v. Retriever Sverige AB*.

11 See WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886), [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html).

12 Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 9 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971)").

13 See Xalabarder, R. (2014). *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2504596](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596).