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EU Copyright Reform and Startups – Shedding Light on Potential Threats in the Political Black Box

On 14 September 2016, the European Commission tabled its Proposal for a Directive in the Digital Single Market ("Copyright Directive")[1] – a complex piece of (draft) legislation that could have a major impact on start-up businesses. If adopted, the proposed new rules would affect a wide variety of modern forms of using copyrighted content, including the use of snippets and links, and the application of text and data mining technology. The copyright reform would raise new issues of liability for user-generated content and new problems in the field of rights clearance for news. Hence, the time is ripe to have a closer look at the proposed legislative package. What does it say exactly? How would it affect start-up businesses?

User Upload Filtering

One of the issues addressed in the Copyright Directive is the liability for user-generated content (content uploaded by users) – a core element of many online platforms. With the opportunity to upload photos, films, music and texts, formerly passive users become active contributors to online discussion and news fora, social media and content repositories. A delicate question arising from this user-involvement concerns copyright infringement. Under which conditions is the online platform liable for infringing content uploaded by its users?

Status Quo

Until now, EU legislation in the field of e-commerce shielded platforms from liability for copyright infringement by offering a so-called "safe harbour" for hosting:

> *Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:*
> *(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*
> *(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*[2]

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[1] European Commission, 14 September 2016, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, Doc. COM(2016) 593 final.

[2] Article 14(1) of the E-Commerce Directive 2000/31/EC of 8 June 2000. For commentary from a comparative perspective, see M. Peguera, "The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems", *Columbia Journal of Law and the Arts* 32 (2009), p. 481, available at http://ssrn.com/abstract=1468433.

This provision was drafted and adopted at a time when modern user-generated content platforms had not emerged yet. However, the field of application of the provision has continuously been broadened to also cover modern platforms ranging from online market places to social media.[3] With this enhanced scope, the provision serves as an important engine of innovation in the field of online platforms and services. Platforms including user-generated content – with DailyMotion, YouTube, Facebook, Instagram, Dropbox, OneDrive, Flickr, Medium.com, eBay as prominent examples – would hardly exist in the EU in their present form if the safe harbour for hosting did not shield them against liability for uploads containing infringing material. The provision rests on the assumption that a general monitoring obligation would be too heavy a burden for platform providers. Without the safe harbour, the liability risk would thwart the evolution of platforms depending on third party content and frustrate the development of e-commerce.[4] In this vein, Article 15(1) of the E-Commerce Directive 2000/31/EC explicitly provides that

> *Member States shall not impose a general obligation on providers, when providing [hosting services], to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*

Instead, platform providers need to have an efficient notice-and-takedown system in place that allows them to react promptly when an infringement is notified. The legal requirements for notice-and-takedown procedures (including the question of staydown) are in a constant state of flux. However, the notice-and-takedown principle as such, including the prohibition of a general monitoring obligation, remained untouched so far.

Proposed Reform

The proposed new rules would recalibrate the safe harbour for hosting and change the investment climate for platforms depending on user-generated content. The Commission tabled draft legislation that, while leaving the general safe harbour rules in the E-Commerce Directive 2000/31/EC intact, would add particular rules in the framework of the EU copyright reform. Article 13(1) Copyright Directive reads as follows:

> *Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.*

Obviously, this provision is based on the assumption that platforms hosting user-generated content should enter into contractual agreements with copyright holders seeking to prevent the availability of infringing user-generated content. Article 13(1) also clarifies which "measures" the Commission has in mind:

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[3] CJEU, 23 March 2010, cases C-236/08-238/08, Google France and Google/Louis Vuitton et al., para. 114.

[4] Article 15(1) of the E-Commerce Directive 2000/31/EC of 8 June 2000.

> *Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate.*

On its merits, "content recognition technology" can be understood as a reference to filtering tools that allow the identification of unauthorized content on the basis of information provided by copyright holders. The regulatory model underlying the proposed new legislation is thus based on cooperation between platforms and right holders with regard to the application of content filtering technology.

The central question, then, is why hosting platforms should feel inclined to enter into such cooperation agreements in the first place. Article 13(1) Copyright Directive refers to "agreements concluded with rightholders" without setting forth a formal obligation to conclude such agreements. The answer to this question seems to lie in Recital 38 Copyright Directive:

> *In respect of Article 14 [E-Commerce Directive 2000/31/EC], it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.*

This legislative statement implies quite a radical change of the interpretation of the traditional safe harbour for hosting (laid down in Article 14 of the E-Commerce Directive). So far, the test for applying the safe harbour was whether a hosting platform played a neutral role,

> *in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.*[5]

The financial interest which the hosting platform may have in its service was not decisive in the framework of this examination.[6] The new test proposed in Recital 38 Copyright Directive, by contrast, could be understood in the sense that the safe harbour for hosting is already unavailable when a platform provider structures user-generated content in a certain way, for instance by providing content categories or columns, or when the provider refers to uploaded content in advertising. This, in turn, would mean that many hosting platforms could no longer rely on the immunity from liability which currently follows from the application of the traditional safe harbour.

Instead, hosts of user-generated content may become liable for infringing content uploaded by users. In consequence, they may be willing to enter into agreements with right holders to minimize the liability risk. Ultimately, the proposed new legislation would thus lead to a *de facto* obligation to apply filtering technology in cooperation with copyright holders. Under the proposed Article 13(1) Copyright Directive, this would include the obligation to report on the "recognition and use" of protected content. Article 13(2) supplements this obligation with the additional requirement of "complaints and redress mechanisms" for users who may bring disputes about the application of filtering technology. This implies that, in essence, start-up companies would become responsible for overbroad use of filtering technology which they introduce on request of right holders, and which they apply in accordance with potentially

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[5] CJEU, 23 March 2010, cases C-236/08-238/08, Google France and Google/Louis Vuitton et al., para. 114.

[6] CJEU, ibid., para. 116-118.

excessive instructions given by right holders. Implementing complaint mechanisms, start-ups would de facto act as a first instance "court" deciding on cases of controversial filtering – with all financial and administrative burdens coming along with this role.

Way Forward

In sum, the proposed new legislation would thus substantially change the liability rules governing user-generated content: from a liability privilege and an exemption from a general monitoring obligation (Articles 14 and 15 of the current E-Commerce Directive 2000/31/EC) to a *de facto* obligation to apply filtering technology and manage related reporting and complaint obligations (Article 13 of the proposed Copyright Directive).

To avoid this result, initiatives are necessary that prevent the evolution of a *de facto* obligation to conclude agreements about filtering technology with copyright holders. From the outset, the regulatory model underlying the Copyright Directive is problematic because such agreements will lead to industry cooperation that is likely to focus on filtering efficiency rather than content diversity. Copyright owners would be entitled to look into, and interfere with, the engineering of technologies used by platform providers. Filtering measures may become excessive in the sense that mash-ups and remixes of protected works will simply no longer appear on user-generated content platforms because automated filtering technology is incapable of drawing a line between infringing copying and permitted parodies and quotations.[7] The filtering of content will also become excessive if it does not distinguish between protected works and public domain material, commercially exploited content and content offered under a Creative Commons license, and if it does not ensure that copyright owners limit their filtering requests to works in their own repertoire. In *Scarlet/SABAM*, the Court of Justice of the European Union already warned against the introduction of filtering technology because this

> *could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.*[8]

Hence, the concerns of start-up businesses working with user-generated content can easily be placed in the context of a broader societal values, namely freedom of expression and information, the right to privacy and freedom to conduct a business in the digital environment.[9] As Article 13(1) Copyright Directive would erode the legal certainty following from the current safe harbour regime and, in particular, the exemption from a general monitoring obligation, it is important to inform EU policy makers about the potential corrosive effect of a reform of the current safe harbour regime.

Being exposed to an enhanced risk of liability for copyright infringement and additional financial and administrative burdens following from the introduction of content recognition

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[7] As to these well-established use privileges in copyright law, see M.R.F. Senftleben, "Quotations, Parody and Fair Use", in: P.B. Hugenholtz/A.A. Quaedvlieg/D.J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912-2012*, Amstelveen: deLex 2012, 359-412, online available at http://ssrn.com/abstract=2125021.

[8] CJEU, 24 November 2011, case C-70/10, Scarlet/SABAM, para. 52.

[9] CJEU, 24 November 2011, case C-70/10, Scarlet/SABAM, para. 53.

systems, it will be much more difficult to find investors for new start-up platforms. At the same time, it will be much more difficult to finance new platforms because additional investment in rights clearance and monitoring systems is indispensable once the safe harbour for hosting is abolished in the context of copyright law. The costs arising from the introduction of filtering mechanisms must not be underestimated. Content recognition technology with a satisfactory identification percentage requires a high level of sophistication and has its price. If different categories of content can be found on an online platform, several filtering systems are necessary which, in turn, multiplies costs. Quite clearly, the investment in content recognition technology can easily become disproportionate in the case of small or medium-sized start-up businesses. Big players with large-scale operations can use their filtering systems more broadly. The burden for start-up companies is thus heavier than the burden for bigger companies.

Text and Data Mining

A further issue addressed in the context of the copyright reform is text-and-data mining. The digital environment offers unprecedented opportunities for generating and analysing data. Big data analysis allows the development of new products and services with important added value. The deduction of patterns and trends from complex data can yield deeper insights and enable new combinations of available information in various fields – from the prediction of consumer behaviour and economic developments to the more efficient use of scientific knowledge. If data resources enjoying copyright protection are used for the analysis, however, text-and-data mining gives rise to complex legal questions. Does the use of protected audiovisual material or texts, such as newspaper articles, scientific journals and books, require the prior authorization of the copyright holder? Does even the use of unprotected raw data amount to infringement?

Status Quo

The analysis of "rich" data material enjoying copyright protection, such as texts, images and films, may require the copying of source data prior to an automated text-and-data mining process. Existing legislation addressing the issue clearly reflects this potential conflict with the exclusive right of copyright holders to prohibit unauthorized acts of reproduction. In the UK, a new copyright exception laid down in Section 29A(1) of the Copyright, Designs and Patents Act reads as follows:

> *The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that—*
> *(a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and*
> *(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).*

As the wording shows, the objective underlying this provision is to exempt the making of a copy with regard to a "computational analysis of anything recorded in the work". If a preparatory reproduction of copyrighted source material is necessary for a text-and-data mining process, the exemption from copyright thus makes this reproduction possible without a need to seek the authorization of the copyright holder. In other words, the copyright holder

has no veto right. He cannot prohibit the big data analysis even if it requires a preparatory reproduction of a protected work. The UK provision, however, is confined to "research for a non-commercial purpose".

Apart from preparatory acts of reproduction, copyright protection may also have an impact on the dissemination of text-and-data mining results. This additional dimension of the problem is not relevant in all cases. From the outset, copyright protection does not cover ideas, procedures, methods of operation or mathematical concepts as such.[10] As long as the presentation of results of a big data analysis remains limited to a general explanation of main findings and does not include verbatim copies of parts of copyrighted source material, such as text fragments, picture thumbnails or snippets of audiovisual works, the dissemination of results is unlikely to amount to copyright infringement. The description of general outcomes of the analysis is unlikely to go beyond the explanation of insights that can be qualified as general ideas and concepts underlying analysed works. If, however, the presentation of results includes parts of analysed works, copyright protection will have to be factored into the equation. In such a case, the dissemination of results among a broader audience may encroach upon the right of copyright holders to control the communication of (parts of) their works to the public, including the making available of works on the Internet.

The situation is also complex when it comes to the use of unprotected "raw" data. First of all, this category of unprotected data may be smaller than expected. In the EU, the threshold for obtaining copyright protection is relatively low. In *Infopaq*, the Court of Justice held that even a short sequence of 11 words may enjoy copyright protection if it reflects a sufficient level of creative choices leading to an "own intellectual creation".[11] In other words, it cannot be ruled out that even if the taking of parts of a text only concerns a fragment of 11 words, the use may still amount to copyright infringement. Multiple extractions of text from the same source, such as the systematic mining of a blog, further enhance this risk.[12] It remains to be seen how the Court will apply the *Infopaq* approach to other types of creative content, such as graphical or audiovisual information. It seems clear, however, that as a general principle, relatively small takings of source material can already raise copyright issues.

Even if copyright protection is not an issue because the source material consists of simple non-personal information units, such as measurement data, prices, statistical or financial data,[13] the data mining process may still amount to infringement. The mere fact that the source material does not enjoy copyright protection does not mean that the data are actually "free". If the data mining leads to copying of the creative selection or arrangement of a compilation of raw data, or requires a taking of substantial parts, or a systematic taking of non-substantial parts, of a database containing raw data, it may still be infringing. In *Innoweb/ Wegener*, for instance, the Court of Justice found that the systematic extraction of data concerning second hand car offers amounted to infringement of *sui generis* database rights

[10] This is a universal rule that has been confirmed internationally in Article 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights and Article 2 of the WIPO Copyright Treaty.

[11] CJEU, 16 July 2009, case C-5/08, Infopaq, para. 48.

[12] CJEU, ibid., para. 49.

[13] As to these examples, see M. Caspers/L. Guibault, *Baseline Report of Policies and Barriers of TDM in Europe*, Amsterdam: Future TDM 2016, available at www.futuretdm.eu and www.ivir.nl.

because the dedicated search engine extracting the data came close to a "parasitical competing product".[14]

The reason for this lies in the protection of data collections as such – irrespective of whether individual database elements are protected as well. Seeking to stimulate investment in "modern information storage and processing systems",[15] the EU legislator harmonized the rules for copyright protection of data compilations and supplemented this copyright protection with an additional *sui generis* protection regime. The EU Database Directive 96/9/EC regulates not only copyright to databases with an original selection or arrangement of contents, but also *sui generis* protection for

> *the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents.*[16]

The configuration of this *sui generis* database right differs from copyright protection in several respects. Whereas copyright focuses on originality and requires a creative selection or arrangement of database elements, the *sui generis* database right requires substantial investment in the "obtaining, verification or presentation" of data. This includes the gathering of pre-existing works, data or other materials; the monitoring of the accuracy of collected (and continuously added) materials; and the resources used for the systematic or methodological arrangement and individual accessibility of materials.[17]

Proposed Reform

This brief overview shows that the current regulation of data extraction and reuse is quite complex and restrictive in the EU. As a result, start-up businesses using text-and-data mining must cope with a considerable degree of legal uncertainty.[18] In its December 2015 communication "Towards a modern, more European copyright framework", the European Commission recognized this dilemma:

> *The need to better reflect technological advances and avoid uneven situations in the single market is also clear with text-and-data mining (TDM), through which vast amounts of digital content are read and analysed by machines in the context of science and research. The lack of a clear EU provision on TDM for scientific research purposes creates uncertainties in the research community. This harms the EU's competitiveness and scientific leadership at a time when research and innovation (R&I) activities within the EU must increasingly take place through cross-border and cross-discipline collaboration and on a larger scale, in response to the major societal challenges that R&I addresses.*[19]

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[14] CJEU, 19 December 2013, case C-212/02, Innoweb/Wegener, para. 48 and 53-54.

[15] Recitals 11 and 12 of the EU Database Directive.

[16] Article 7(1) of the EU Database Directive.

[17] Cf. P.B . Hugenholtz, in: T. Dreier/P.B. Hugenholtz, *Concise European Copyright Law*, 2nd ed., Alphen aan den Rijn: Wolters Kluwer 2016, p. 404-405. The production costs for creating works, data or other materials, by contrast, fall outside the *sui generis* protection regime for databases. See CJEU, 9 November 2004, case C-203/02, British Horseracing Board/William Hill

[18] Cf. the findings of M. Caspers/L. Guibault, *Baseline Report of Policies and Barriers of TDM in Europe*, Amsterdam: Future TDM 2016.

[19] European Commission, 9 December 2015, Doc. COM(2015) 626 final, p. 7.

This statement already indicated that the Commission would focus on the research community in the context of new legislation on text-and-data mining. Not surprisingly, Article 3(1) Copyright Directive only addresses a new exemption from copyright and *sui generis* database protection covering "reproductions and extractions made by research organisations":

> *Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.*

From the outset, this provision limits the beneficial effects of additional breathing space for text-and-data mining to traditional research institutions. Recital 8 Copyright Directive only refers to research organizations, "such as universities and research institutes". The Recital recalls that these organizations

> *are confronted with legal uncertainty as to the extent to which they can perform text and data mining of content.*

The legal uncertainty faced by other players, such as start-up businesses, is not addressed. Recital 10 Copyright Directive only clarifies that

> *[r]esearch organisations should also benefit from the exception when they engage into public-private partnerships.*

This consideration seems to indicate that start-up businesses may benefit indirectly from the proposed use privilege when they carry out text-and-data mining activities in the framework of a collaboration with an established research organization. Apart from this specific situation, the proposed new rules have little to offer. The confinement to "research organisations" excludes new, innovative big data analyses of commercial entities, such as start-up companies, from the scope of the new use privilege. Innovation in the commercial sector, including start-up innovators, does not benefit from the new area of freedom delineated in Article 3(1) Copyright Directive. Instead, the proposed copyright reform would even add an additional layer of complexity. The adoption of the proposed new neighbouring right for press publishers (see below), would lead to a situation where, in addition to traditional copyright and sui generis database rights, the new neighbouring rights of press publishers would have to be cleared as well.

The proposed new legislation also fails to offer appropriate solutions with regard to the final publication of text-and-data mining results because it remains limited to "reproductions and extractions". The new rules focus on the making of copies that may be necessary as a preparatory act for the analysis. In the absence of any reference to the right of communication to the public, however, the inclusion of content fragments in the final presentation of results falls outside the scope of the provision. The existing right of quotation laid down in Article 5(3)(d) of the Information Society Directive 2001/29/EC offers room for communicating short parts of a work to the public. However, this existing use privilege requires use for purposes "such as criticism or review". In the case of an automated text-and-data mining

process generating uncommented results (such as Internet search results), it is unclear whether the traditional quotation right applies.[20]

Way Forward

Quite clearly, EU legislation seeking to solve the problem of legal uncertainty in the field of text-and-data mining would have to take much more ambitious steps than the cautious approach underlying Article 3(1) Copyright Directive. A starting point for such a more general – and more promising – reform initiative can be found in the basic configuration of copyright law itself.

Traditionally, copyright is understood to offer the right holder control over certain acts of use, in particular the copying of a work and its communication to the public. However, copyright has never been understood to also cover the act of consulting a work – reading a book, regarding a picture – as such. Strictly speaking, text-and-data mining processes can be understood to fall into this latter category of mere consulting of a work. The Commission itself characterized text-and-data mining as a process "through which vast amounts of digital content are read and analysed by machines".[21]

Drawing a parallel with the traditional freedom of consulting and reading copyrighted material, it could be said that text-and-data mining *a priori* does not have copyright relevance. Where the focus is on deriving new insights from an automated text-and-data reading process, copyright and *sui generis* database protection should not pose obstacles to the creation of new insights and new knowledge. Hence, an open regulation of the issue of text-and-data mining should prevail – open in the sense that text-and-data mining should be exempted from the control of right holders altogether, at least in cases where the analysis does not culminate in an exploitation of the commercial value of source data.

A reform based on this more flexible approach would have benefits for society as a whole. It would allow to unlock the full potential of innovative text-and-data mining technology and generate new products and services in the field of data analytics. It would allow start-up companies to pave the way for increased EU competitiveness and knowledge leadership in the promising field of (big) data analytics, as desired by the Commission.[22]

Neighbouring Right for Press Publishers

In the proposed Copyright Directive, the European Commission also included a new neighbouring right for press publishers with regard to the digital use of their publications "to ensure quality journalism and citizens' access to information."[23] Undoubtedly, a free and pluralist press is one of the cornerstones of democratic societies. The question is, however,

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[20] For a more detailed discussion of this point, see M.R.F. Senftleben, "Internet Search Results – A Permissible Quotation?", *Revue Internationale du Droit d'Auteur* 235 (2013), p. 3, available at http://ssrn.com/abstract=2331634.

[21] European Commission, 9 December 2015, Doc. COM(2015) 626 final, p. 7.

[22] European Commission, 9 December 2015, Doc. COM(2015) 626 final, p. 7.

[23] Article 11(1) and Recital 31 Copyright Directive.

whether this goal can be achieved by adopting an additional layer of protection. From an economic perspective, it seems essential that publishers, including press publishers, develop new business models in the digital environment to ensure the survival of quality journalism.

Status Quo

Traditionally, press publishers enjoy relatively robust copyright protection. As discussed above, the Court of Justice pointed out in *Infopaq* that even if the taking of parts of a news article only concerns a fragment of 11 words, the use may still be relevant from a copyright perspective and amount to copyright infringement. Press publishers, thus, have far-reaching control over the use of content snippets under the current legislation.[24]

A similar picture can be drawn with regard to the use of hyperlinks. The Court of Justice held in *Svensson* – a case concerning links to press articles – that hyperlinking could amount to a relevant act of communication to the public in the sense of copyright law.[25] Having opened the door to copyright liability in this way, the Court nonetheless sought to safeguard the freedom of hyperlinking. It stated that no relevant new public would be reached if the hyperlink only referred to content that had already been made available on the internet – without access restrictions – by the copyright owner or with his consent.[26] It made no difference in this context whether a traditional or embedded hyperlink was used.[27]

After this liberal approach to hyperlinks in *Svensson*, the Court developed more complex rules in the *GS Media* case with regard to hyperlinks referring to illegal content made available on the Internet without the copyright holder's consent.[28] The case concerned Playboy photographs of the Dutch celebrity Britt Dekker which had been made available – prior to official publication – on the Australian data storage site Filefactory.com without consent. Reporting about the leaked photos and providing a hyperlink, GeenStijl generated additional traffic to the illegal content. Discussing this use of hyperlinks, the Court introduced a subjective knowledge test in the infringement analysis to be carried out in the case of commercial use of hyperlinks:

> *Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.*[29]

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[24] CJEU, 16 July 2009, case C-5/08, Infopaq, para. 49.

[25] CJEU, 13 February 2014, case C-466/12, Svensson, available at www.curia.eu, para. 18.

[26] CJEU, ibid., para. 27.

[27] CJEU, ibid., para. 29.

[28] CJEU, 8 September 2016, case C-160/15, GS Media.

[29] CJEU, 8 September 2016, case C-160/15, GS Media, para. 51.

With this holding, the Court significantly reduced the legal certainty for new business models and online platforms. Establishing an obligation of "necessary checks" and a presumption of knowledge in cases of commercial hyperlinking activities, the Court established a heavy duty of care. A commercial user of hyperlinks is expected to conduct the checks necessary to identify content posted without the consent of the copyright holder. Accordingly, knowledge of the infringing nature of online sources can be presumed if a hyperlink is found to relate to illegal content. The obligation of monitoring content is thus imposed on the commercial provider of hyperlinks. Until the contours of the new knowledge requirement and monitoring obligation become clearer in subsequent decisions, the uncertainty surrounding the use of hyperlinks places a heavy burden on innovators who will hardly be capable of creating new online platforms and services without hyperlinking technology.

Small and medium-sized players will be hit harder than Internet majors. They will find it more difficult to carry out "the necessary checks"[30] to ensure that no hyperlink to illegal content is used. In many cases, they will be unable to participate in lengthy and costly lawsuits about the applicable knowledge standard. And they will find it more difficult to convince financiers to invest in a new online platform which, given the current Internet architecture, inevitably requires the use of hyperlinks.

Proposed Reform

Irrespective of the considerable scope of existing exclusive rights in press publications (and the potential corrosive effect of these rights on the evolution of new platforms and services), the European Commission proposes the introduction of a new neighbouring right for press publishers in Article 11(1) Copyright Directive:

> *Member States shall provide publishers of press publications with the rights provided for in Article 2 [right of reproduction] and Article 3(2) [right of making available in the digital environment] of Directive 2001/29/EC for the digital use of their press publications.*

This new neighbouring right would be awarded for a period of 20 years after publication. It would complement the exclusive rights of individual authors following directly from Article 2 and 3(2) of the Information Society Directive 2001/29/EC. The scope and reach of the new neighbouring right, however, remains unclear. Article 2(3) Copyright Directive gives the example of "a newspaper or a general or special interest magazine" to illustrate the concept of press publication. It also refers to "a collection of literary works of a journalistic nature", the purpose of "providing information related to news or other topics" and a publication "in any media under the initiative, editorial responsibility and control of a service provider." Given these generic indications, it cannot be ruled out that the proposed new right would cover a wide range of publications – from traditional newspapers to blogs, wikis and other collections of works.[31]

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[30] CJEU, 8 September 2016, case C-160/15, GS Media, para. 51.

[31] Cf. the detailed analysis of the potential scope of the proposed new right in L. Bently et al., "Response to Call For Views: Modernising the European Copyright Framework" (letter of 37 UK academics to the UK Intellectual Property Office), 5 December 2016, Appendix, p. 9-13, available at http://www.iposgoode.ca/wp-content/uploads/2016/12/IPOModernisingIPProfResponsePressPublishers.pdf.

Moreover, it must not been overlooked that Article 2 of the Information Society Directive 2001/29/EC grants a broad right covering reproduction "by any means and in any form, in whole or in part." As Article 11(1) Copyright Directive includes Article 2 of the Information Society Directive 2001/29/EC by reference, the new right of press publishers would cover the reproduction of parts of press publications. In the case of copyright law, this right to control the use of parts of a work is limited by the further condition that the various parts of a work only enjoy copyright protection if they share the originality of the work – in the sense of containing elements which are the expression of the intellectual creation of the author.[32] The new neighbouring right for press publishers, however, need not be subject to this additional condition. If the new neighbouring right is seen as a means of protecting investment rather than journalistic originality, it is conceivable that any snippet taken from a press publication would fall under the proposed exclusive right – regardless of whether the snippet is original or not. In the field of the neighbouring right of phonogram producers, it is already recognized that the neighbouring right covers even smallest fragments of a sound recording.[33] As the European Commission explicitly seeks to "place press publishers in a comparable situation to the one of other related rightholders in EU law, such as film and phonogram producers,"[34] the interpretation of the new neighbouring right for press publishers may be aligned with the existing interpretation in the field of sound recordings. In this case, however, even smallest text excerpts would enjoy protection and the new neighbouring right of press publishers would pose a serious threat to the free flow of information. Under international copyright law, "news of the day" and "miscellaneous facts having the character of mere items of press information" are explicitly excluded from copyright protection.[35] The proposed new right of press publishers would run counter to this international obligation – at least when interpreted broadly.

In general, the question arises which added value the grant of an additional exclusive right for press publishers has. In most cases, press publishers will receive the rights of reproduction and making available from individual authors as a result of an employment contract (in EU Member States providing for copyright ownership in this case), a transfer of copyright or an exclusive license. In comparison with these mechanisms for obtaining rights of reproduction and making available, the proposed grant of an additional layer of neighbouring rights seems to offer no substantial benefits. By contrast, the grant of neighbouring rights for publishers which, in substance, are similar to the copyright of authors, may lead to discussions about the necessity of a transfer or license. As press publishers would have their own rights in accordance with the proposal made by the Commission, individual authors contributing to a press publication may feel that there is no need and justification for a transfer or license any

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[32] CJEU, 16 July 2009, case C-5/08, Infopaq, para. 39.

[33] For example, see German Federal Court of Justice, 20 November 2008, case I ZR 112/06, "Metall auf Metall", para. 11 and 13.

[34] European Commission, 166. Cf. the critical comments by A. Peukert, "An EU Related Right for Press Publishers Concerning Digital Uses – A Legal Analysis", *Faculty of Law Research Paper* No. 22/2016. Frankfurt/Main: Goethe University Frankfurt 2016, para. 117-120.

[35] Article 2(8) of the Berne Convention for the Protection of Literary and Artistic Works (1971) which binds the EU by virtue of Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).

longer.[36] They may also feel that the value of their own copyright is reduced because of the additional right of publishers.[37]

Moreover, experiments with a neighbouring right or remuneration scheme for news publishers in Germany[38] and Spain[39] have already shown that attempts to impose a payment obligation for the use of content fragments on search engines and providers of comparable aggregation services[40] are unlikely to generate a meaningful new revenue stream for publishers.

The reason for this lies in the interdependence of online content offers and online referral services. While content aggregators have an interest in providing the most comprehensive overview of available online content, publishers offering content on the Internet have an interest in search results that enhance the visibility of their content repertoire. As a result of this interdependence, the remuneration claim is also interchangeable: publishers may argue that they should be entitled to compensation for the use of content fragments which search engines use to generate search results; search engines may argue that they should be remunerated for drawing the attention of Internet users to content offered by publishers.[41] In the light of this interdependence of interests and claims on both sides, it is conceivable that search engines and other content aggregators discontinue the use of content fragments instead of paying a licence fee or equitable remuneration.

In Spain, Google closed its Spanish branch of the Google News service and several smaller news aggregators stopped their activities after the introduction of a compulsory remuneration scheme for content fragments on 1 January 2015. A study conducted by NERA Economic Consulting on behalf of the Spanish Association of Publishers of Periodical Publications showed that during the three months following the entering into force of the new Spanish remuneration right, the number of newspaper website visits, on average, decreased by 6,1%.[42] The study also showed differences in the impact on news publishers: while big publishers were confronted with a decrease of 5,8%, publishers of average size were exposed to a 7,1%

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[36] Cf. the critical comments by D.J.G. Visser, "Viermaal auteursrecht in de digitale eengemaakte markt", *Nederlands tijdschrift voor Europees recht* 2016, 267 (272-273).

[37] Cf. the critical comments by M. Kretschmer/S. Dusollier/C. Geiger/P.B. Hugenholtz, The European Commission's Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society, *European Intellectual Property Review* 38 (2016), 591 (592-593); C. Geiger/O. Bulayenko/G. Frosio, *Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law*. Strasbourg: Centre for International Intellectual Property Studies 2016, 11-12; A. Peukert, "An EU Related Right for Press Publishers Concerning Digital Uses – A Legal Analysis", *Faculty of Law Research Paper* No. 22/2016. Frankfurt/Main: Goethe University Frankfurt 2016, para. 128.

[38] §87f(1) of the German Copyright Act (Urheberrechtsgesetz).

[39] Article 32(2) of the Spanish Intellectual Property Law (Ley de Propiedad Intelectual).

[40] In this sense §87g(4) of the German Copyright Act.

[41] Cf. Peukert, ibid., para. 33 and 45-46, speaking of a "symbiotic" relationship and stating rightly that a new neighbouring right "cannot generate consumer demand for journalistic content if that demand does not exist."

[42] NERA Economic Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual - Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)*, NERA 2015, p. 55, available at: http://www.aeepp.com/noticia/2272/actividades/informe-economico-del-impacto-del-nuevo-articulo-32.2-de-la-lpi-nera-para-la-aeepp.html.

reduction of Internet traffic to their websites, and smaller publishers had to cope with a decline amounting to 13,5%.[43] Instead of additional revenue, the new Spanish remuneration right thus caused a loss of the market expansion effect of search results indicating newspaper contents.[44] Given the strong corrosive effect on small publishers, the risk of market concentration and a loss of news diversity must also be taken into account. Experiences with a neighbouring right thus show that, instead of supporting a free and pluralist press, as intended by the Commission,[45] the introduction of a neighbouring right may thwart this objective and lead to less news diversity.[46]

In Germany, the neighbouring right of news publishers has been implemented as an exclusive right to prohibit the use of content fragments by search engines and comparable content aggregators.[47] As a result, the impact of the neighbouring right only comes to the fore in situations where a publisher decides to actively assert the right against search engines. An enforcement attempt made by the German collecting society VG Media on behalf of several publishers, however, had a corrosive effect on traffic to the websites of the publishers involved. The Bundesverband Informationswirtschaft, Telekommunikation und neue Medien e. V. (Bitkom) reports that, reacting to VG Media's claim for license payments, search engines, including Google, decided to no longer display snippets for related publishers' products or to hide the respective search results entirely. Small providers of search services decided to limit or shut down their service.[48]

In the debate on a neighbouring right for publishers, it has also been pointed out that a broad concept of content aggregation services liable to pay remuneration may include content platforms that are developed by publishers themselves.[49] This comment is particularly important in the context of new business models that may be developed by start-up companies. It cannot be ruled out that publishers with new business models have an interest in including snippets and references to information resources that are available elsewhere. Viewed from this perspective, the proposed new neighbouring right of press publishers is highly problematic. If it is intended to cover the use of content fragments by content aggregators, it poses an additional hurdle for start-up publishing and media services seeking to create new content platforms with advanced search functions themselves.

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[43] NERA Economic Consulting (2015), 55.

[44] NERA Economic Consulting (2015), iii.

[45] Recital 31 Copyright Directive.

[46] Peukert, ibid., para. 98-101 and 186-188; Geiger/Bulayenko/Frosio, ibid., 17.

[47] Kretschmer/Dusollier/Geiger/Hugenholtz, ibid., 594-595; Peukert, ibid., para. 105; R.M. Hilty/K. Köklü/V. Moscon, *Position Statement of the Max Planck Institute for Innovation and Competition on the "Public consultation on the role of publishers in the copyright value chain"*, Munich: Max Planck Institute for Innovation and Competition 2016, p. 4-5, available at: http://www.ip.mpg.de/fileadmin/ipmpg/content/aktuelles/MPI_Position_ statement_15_6_2016_def.pdf.

[48] Bitkom, *Ancillary Copyright for Publishers - Taking Stock in Germany*. Berlin: Bitkom 2015, p. 6-7, available at: https://www.bitkom.org/Bitkom/Publikationen/Ancillary-Copyright-for-Publishers-Taking-Stock-in-Germany.html.

[49] R. Xalabarder, "The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance With International and EU Law", *IN3 Working Paper Series*. Barcelona: Universitat Oberta de Catalunya 2014, p. 8, available at http://ssrn.com/abstract=2504596.

Way Forward

In sum, the proposed new neighbouring right for press publishers places an additional burden on content aggregators, social media and other media start-ups referring to news available elsewhere on the Internet. This additional burden is not outweighed by potential benefits of the proposed reform. The new right only seems to duplicate rights which publishers already have at their disposal as a result of the acquisition of copyright from individual authors. Instead of supporting a free and pluriform press, the new neighbouring right may dry out traffic to the websites of small and medium-sized publishers. The press landscape is not unlikely to become less pluriform and more dependent on strong brands of well-established publishers – brands that can easily be found even without the use of search engines. Given these flaws, it would be preferable to abolish Article 11 Copyright Directive altogether. In this way, additional burdens following from more complex rights clearance and enhanced infringement risks could be avoided.

In any case, it is of crucial importance that the proposed new right remains an exclusive right, the exercise of which is at the discretion of each individual press publisher. As long as the new right is not transformed into an obligatory remuneration claim, each individual publisher is free to decide whether he wants to invoke the new right or not. Publishers with an interest in the presentation of content snippets as search results can thus achieve this goal by simply refraining from the assertion of the new exclusive right.

Conclusion

The proposed copyright reform contains several provisions that are highly problematic from the perspective of start-up businesses. Hence, it is important to inform EU policy makers about the potential corrosive effect of the reform plans. Being exposed to an enhanced risk of liability for copyright infringement and broadened burdens of rights management and rights clearance, it will be much more difficult to find investors for new start-up platforms. In the absence of sufficient investment and financing options, ideas for new platforms may be absorbed by major players in the online market. The final result of the reform may thus be further market concentration and less information diversity.