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Supporting press publishers in a digital era

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The history of media, including press publishing, has always been linked to technology advancement. The sector has been continuously transforming itself in line with the emergence of new distribution models and evolving consumer behaviour. Today, digitalisation is the main driver of that change. The media industry has no other option but to invest in innovation and modernise its business model. Outlets that have proven successful in doing so have gained access to bigger markets and found new audiences. Those who will fail to keep up with the digital transformation will progressively lose relevance. As it has already been doing for centuries, the media has to adapt to a changing landscape.

BACKGROUND – ACCELERATED TRANSFORMATION

Press publishing in the digital world

The World Wide Web is changing the press publishing industry in many ways, including by changing consumer preferences and creating new forms of competition. Consumers value quick access to the most updated content and often choose the Internet as their favourite channel. This technology-induced behavioural change has paved the way for new business models (e.g. social media, news aggregators) that connect users with the information they are looking for.

Throughout the industry, advertising and publishing revenues[1] in general are declining. Publishers find it difficult to monetise the use of their work. They continue to compete with each other to secure both consumers and online advertising revenues. But large platforms are winning this race.

Some publishers argue that the influence of some online intermediaries is dominant and that they do not have the choice of where and when their work is displayed. They argue that a regulatory solution such as a copyright reform is necessary to support publishers' business models. They justify such an intervention on the basis of three perceived market failures: first, publishers and online news aggregators are very different by nature and cannot compete on the same grounds. Second, the privileged position of online platforms creates the risk of abuse of market power. Third, the lack of clarity in the definition of copyright exceptions may have created a deficiency in the assignment of property rights (i.e. copyright) in the digital environment. The rise of new business models on the Internet may have created grey zones, or a lack of property rights assignment in the copyright exceptions related to online news, such as the communication to the public.

However, this view of the sector is by no means universal. A number of publishers[2] value online intermediaries as a means to provide a steady flow of readers and an increase in advertising revenues due to increased traffic on their website. They see the relationship between publishers and intermediaries as symbiotically important for both sectors to thrive. It could be argued that the difficulties met by some publishers stem from the failure to adapt to the new digital environment whereas some publishers (e.g. Financial Times, The Economist) have managed to successfully modernise their business models by introducing paywalls (restricting access to content via paid subscriptions) for example.

The EU dimension

The digital transformation of the traditionally heavily regulated media sector, including the publishing industry, has an EU dimension as the increased use of the Internet for the consumption of press publications knows no national borders. In addition, digitalisation itself is at the heart of the EU political debate: the Digital Agenda for Europe is one of the seven pillars of the Europe's 2020 Strategy. The completion of the Digital Single Market (DSM) is one of the ten political priorities of the Juncker Commission: It aims to enable citizens and businesses to reap all the benefits of digitalisation.

In a nutshell, the transformation of the media sector hinges on copyright issues that are critical to the DSM. In December 2015 the Commission gave a hint of its intention with the Communication "Towards a modern, more European copyright framework"[3], stipulating that there is a need for improved legal certainty and fairness in the way copyright is applied on the Internet. The 2016 Copyright Directive proposal[4] aims at modernising the copyright rules in the DSM, by improving the choice of and access to content, adapting copyright rules on research, education and cultural heritage, as well as "creating a fairer market place for online content".

STATE OF PLAY – COPY WRONGS

New neighbouring rights for press publishers

In its proposal, the Commission introduced a new right for press publishers, so called neighbouring rights, entitling them to receive remuneration in the form of royalties from online services (such as search engines and news aggregators) that, for example, display snippets of news in search results.

But it is questionable whether this new right will deliver the desired results. Instead, it may have the reverse effect, reducing the benefits for all stakeholders involved. An EPC Discussion Paper[5] published in May 2017 found that similar rights did not deliver the expected economic benefits in Germany or in Spain. In Germany, the right did not work in practice and publishers decided not to enforce it. In Spain, the law made it more time-consuming for users to find relevant information. It also disadvantaged innovators without delivering the anticipated economic benefits.

These new neighbouring rights for press publishers proved inefficient at national level. And yet, the EU's neighbouring rights proposal is even more ambitious: it intends to apply to all online services (not only news aggregators and/or search engines as in Spain and Germany), making it, at best, very hard to ensure compliance and measure its effectiveness. It does not make it more likely to live up to its ambition to support press publishers in the digital age.

Media policy in a dynamic environment

The decision to introduce new rights for certain players may prove once again ineffective in a dynamic environment, where digital business models benefit from a great flexibility to innovate and adapt to regulatory intervention. Neighbouring rights go against the transformative power of digitalisation rather than making use of it, making it more difficult for traditional publishers to adapt to the digital age.

Considering the wider societal impact of media and its regulatory framework, the modernisation of a copyright legislation should encourage the modernisation of market players, including in supporting quality journalism. But neighbouring rights for press publishers do not necessarily target quality journalism. Press publishing and quality journalism are often used interchangeably in the political debate. But supporting press publishers does not necessarily entail promoting quality journalism. Neighbouring rights will be assigned to any publisher, with no consideration given to the level of investment or quality of its publications.

In addition, while one of the aims of the EU copyright proposal is to achieve greater harmonisation of member states' copyright legislations, the instrument selected (Directive) provides a "margin of manoeuvre for the member states" when transposing it in national legislation. Each member state could apply different exceptions and limitations. This could lead to a differentiated implementation of neighbouring rights across the EU-27, making it very difficult to comply with the rules across the EU. While the proposal will provide some level of harmonisation, the uniformity of legal protection at the EU level will remain patchy.

PROSPECTS – NEIGHBOURING RIGHTS VS. INNOVATION

There is a large consensus that while publishers are investing to make journalism available, they are not a public service and need a sustainable business model that ensures their work is being paid for. The harmonisation of the EU copyright legislation has great potential to deliver benefits to creators, intermediaries and users if it is done correctly by, amongst others, decreasing legal uncertainty and reducing market fragmentation. According to the European Commission, a modern copyright framework that enables the use of the full potential of digital technology will ensure that copyright remains a driver for creativity and investment, having a positive impact on the production and availability of content and thus, on media pluralism.

However, neighbouring rights for press publishers do not seem capable of delivering on this ambition. Arguably, no legislative measure has the potential to fix a trend driven by a fundamental change in market conditions. The new rights would, at the very least, limit the options for small, innovative publishers and intermediaries to find new business models and grow. It also opens the door to an increase in copyright infringement litigations, and runs the risk of a differentiated implementation across the member states, thereby hindering legal certainty.

Moreover, limiting the right to link to content carries the risk of harming users and undermining the public's freedom to share and search information on the Internet. The administrative burden and cost of obtaining and managing licenses for indexing/referring to news articles could limit the number of search results to what is perceived by online services as manageable or 'necessary', based on their respective business models. There is thus a substantial risk of reducing the economic benefits for all stakeholders (e.g. users, press publishers and online services).

To this end, it is rather unlikely that the proposed neighbouring rights would be able to deliver the desired economic benefits. In the context of an open market economy and divergence across EU member states, EU legislation does not necessarily help to improve the competitiveness of EU quality press, publishers, or online services.

Numerous stakeholders have already warned the Commission that neighbouring rights might not be the answer. For example, BEUC, the European consumer organisation, stressed that they could be associated with serious consumer loss, such as lower variety of available choices, and even possible threats to fundamental rights. Other institutes, such as NEXA, the Centre for Internet and Society[6], and the European Intellectual Property Review[7], underscored the limited economic benefits to be delivered by such rights. In the European Parliament, 70 MEPs, including the previous rapporteur on the file, MEP Therese Comodini Cachia, filed an amendment[8] to scrap neighbouring rights for press publishers altogether.

Policymaking 2.0

Ultimately, policymakers and stakeholders should work together to avert the risk of an unsatisfactory agreement that might have to be revised again soon, creating unnecessary legal uncertainty and risking losing the target and relevance with more time passing. Given the economic concerns of publishers, the introduction of economic and/or fiscal incentives may be more appropriate than assigning a property right. For instance, with the aim to support European culture through investing in the cultural sector, the Commission provides grants and financing schemes for the creative sector through its own budget.

But each member state has its own language, culture, traditions, and understanding. This gives member states a key role in supporting and preserving quality press publishing, for instance by reducing taxes, such as labour taxes or VAT. A step in the right direction would be reaching an agreement on the Commission's proposal for a reduced, or zero VAT for e-publication[9] discussed in the Council in autumn 2017. Such a tax benefit would bring benefits beyond the economic one. In combination with the development of new business models, it would contribute to the sustainability of the publishing industry by reducing the creators' economic dependency on ads. By removing the publications' focus on clicks, it could improve the overall quality of journalism online.

But for this to happen, the publishing sector must continue to adapt to the digital age to be better able to monetise works online. This could be done through diversified income flows from users (e.g. paid subscriptions, paywalls, and donations). There is a need to invest e.g. in digital tools for content distribution, subscription models' development and implementation, data analytics, and outreach and communication strategies to attract new audiences.

This is not a novelty, but cross-industry dialogue and cooperation could mainstream good digital transformation practices and bring economic benefits to all stakeholders. Member States could facilitate the dialogue and information sharing between local publishers, journalists, online services and large multinational publishing houses. The Commission could add value by providing an EU platform for a constructive dialogue on the future of the publishing industry through Expert Working Groups or Stakeholder Forums. Civil society also has a role to play to support the press publishing industry in its digital transformation while encouraging open dialogue on the complex challenges it faces in the process. Online services should share their know-how with the publishing sector and stakeholders should work together to remove existing barriers to innovation. Google has already taken the first step, revamping its "first click free" feature which allowed users' access to subscription-limited publications through search results. Together with Facebook, they also work with publishers to test paid subscription models. This cooperation needs now to intensify to be able to bear tangible results.

These measures are not easy to implement. They require both legal certainty, as well as investment in financial and human resources. Such measures would not be a panacea but they are more sustainable in the long term than quick regulatory fixes, such as neighbouring rights. Creating a framework that enables new business models is needed to guarantee the independence and sustainability of quality journalism. It is also necessary to support a positive and durable transformation of the press publishing industry. This can only happen in a stable regulatory environment, where legislation is introduced as a last resort and only if its impact has been carefully assessed.

In the end, the EU must resist the political temptation to change the rules to protect the publishing industry from disruptive digitalisation. The EU DSM strategy should live up to its initial objective, to create the right environment in the EU for businesses and citizens to reap the benefits of digitalisation. This requires a framework that provides legal certainty and predictability, while enabling and promoting innovation.

Cultural diversity, freedom of expression, access to information, non-discrimination and open markets are top priorities for the EU. Further reflection is needed on how to ensure European press publishers thrive in the digital age, supporting cutting-edge innovation and competition while ensuring the legal protection for creators and users. Neighbouring rights are not the answer.

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1 Revenue from both circulation (consumer spend on newspapers) and advertising in newspapers, and considers both physical print editions and digital editions.
2 See http://www.aeepp.com/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf
3 See https://ec.europa.eu/digital-single-market/en/news/towards-modern-more-european-copyright-framework-commission-takes-first-steps-and-sets-out-its
4 COM(2016) 593 final.
5 See http://www.epc.eu/documents/uploads/pub_7712_rewardingqualityjournalismordistortingthedsm.pdf
6 See http://cyberlaw.stanford.edu/publications/introduction-neighbouring-right-press-publisher-eu-level-unneeded-and-unwanted-reform
7 See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801595
8 See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-601.094%2B01%2BDOC%2BPDF%2BV0%2F%2FEN
9 Currently online publications are charged 15% or more VAT while the printed version only benefits of reduced VAT.

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