

## European Copyright Society

# Opinion on the Proposed Press Publishers Right

April 25, 2018

The European Copyright Society supports the *Academics Against the Press Publishers Right* Letter from Professor Marco Ricolfi, Professor Raquel Xalabarder and Professor Mireille van Eechoud to Members of the European Parliament, published on April 25, 2018, and available at <https://www.ivir.nl/academics-against-press-publishers-right/#sig08>

We attach the original letter as an appendix and adopts the views expressed therein as the views of the ECS.

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## **Academics against Press Publishers' Right:**

### **A Statement from European academics on proposed Press Publishers' Right.**

We, the undersigned scholars working in the fields of intellectual property, internet law, human rights law and journalism studies at universities all over the European Union (and the European Economic Area), write to oppose the proposed press publisher right.

Article 11 of the proposal for a Directive on Copyright in the Digital Single Market, as it currently stands following negotiations in the EU Council and Parliament, is a bad piece of legislation.

Why?

- The proposal would likely impede the free flow of information that is of vital importance to democracy. This is because it would create **very broad rights of ownership in news** and other information. These rights would be territorial – there would be one for each Member State. The rights would be owned by established institutional producers of news. And in each Member State, the new right would sit on top of all the other property rights that such publishers of news already enjoy: copyrights, database rights, broadcast rights and other related rights.
- This proliferation of different rights for established players would make it more expensive for other people to use news content. **Transaction costs** would be greatly increased, as permissions would need to be sought for virtually any use. Even using the smallest part of a press publication (except perhaps for strictly private use) would mean payment would be due to an institutional news publisher.
- That means, the proposal would be **likely to harm journalists**, photographers, citizen journalists and many other non-institutional creators and producers of news, especially the growing number of freelancers.
- The people most likely to benefit would be the big established news institutions. If they should benefit, this is likely to **exacerbate existing power asymmetries in media markets** that already suffer from worrying levels of concentration in many Member States.

- That said, it is not clear that even these big news institutions would benefit. Similar rights introduced in Germany and Spain were not effective.
- The proposed right would provide no protection **against 'fake news'**.
- There is **no sound economic case** for the introduction of such a right. An additional intellectual property right would not change the fundamental problems that news institutions face. They would still have to compete with many other actors for consumer attention, advertisers and hence revenue.

### **Problems with the Initial EC Proposal**

The academic community is virtually unanimous in its opposition to the European Commission's proposal for a press publishers right. We commend to you the previous critical interventions from Bently *et al*, Danbury, the European Copyright Society, Geiger *et al*, the Max Planck Institute, Peukert, van Eechoud, and the Study conducted by Bently, Kretschmer *et al* for the JURI Committee in September 2017.

We agree with the supporters of this right about one thing: **journalism matters, and quality journalism matters even more**. As public watchdog and forum for public debate, the traditional print press plays a vital role in democratic societies, but so do newer online media. All actors in the media ecosystem enjoy freedom of expression, as guaranteed under the European Convention on Human Rights and the Charter of Fundamental Rights of the EU. This proposal will do nothing to help journalism, but seriously risks doing disproportionate harm to media creators, to smaller publishers, to SMEs seeking to innovate with online media services, to citizens and to society at large. Inventing new rights is not the solution.

In order to appreciate why the balance is so clearly against this proposal, it is important to understand that **press publishers already have very significant rights in their publications**. They own enforceable rights in much of the material in a publication by virtue of assigned copyright (or exclusive licences), through national rules on employer ownership or collective works, and through the EU wide *sui generis* right in databases (a term broad enough to cover all newspapers). This is already a formidable arsenal. Even without the introduction of the proposed right, it is unlawful (and when done knowingly and with a view to profit, often criminal) for third parties without licence (or a

defence) to reproduce or make available copyright-protected material. The reproduction or making available of small parts of such material may also be unlawful, where those parts are themselves creative. The EU's *sui generis* right in databases not only gives investors in collections of material the right to prevent wholesale copying, but also to prevent the systematic extraction of insubstantial parts.

While press publishers are very well protected already, the Commission did identify particular problems for German press publishers in relying upon authors' rights in articles and photographs. As a result of German rules and procedure, it is administratively cumbersome and time-consuming for press publishers to rely on such rights. Documentation is required from authors in respect of the rights in each and every item in a publication. However, a German procedural problem deserves a German solution, not one at a European Union level. That is exactly what has occurred with the one year *Leistungsschutzrecht* introduced in Germany. There is no need for the other 27 Member States to swallow the German medicine, the efficacy of which is so far wholly unproven.

The proposed right would not improve the economic position of press publishers elsewhere. There is no basis for the suggestion that an "EU wide right" (in fact, separate rights for each MS) would improve the bargaining position of press publishers vis- á-vis platforms: they already have authors' rights and the EU's *sui generis* right in databases. If it has any effect, the recognition of a press publishers right would strengthen their bargaining position with respect to authors and creators, a relationship which is hardly one of economic equivalence as it stands. However, such a right may well exacerbate existing media concentration problems, not least because media outlets would themselves have to seek permission from one another for the use of publications (and parts of publications), thus placing SMEs at a bargaining disadvantage.

There is also no basis for thinking this proposal will tackle "fake news": indeed, the opposite seems likely. If certain users of platforms such as Twitter are prohibited from circulating the links posted by subscribers to online, publicly accessible, quality news, the chances are that such users will circulate information derived from other sources. The creation of rights so as to restrict further the circulation of quality news would simply play into the hands of producers of "fake news". This will not, as Mr Voss's amendment to recital 32 implies "guarantee the availability of [re]liable information" so much as guarantee the dominance of fake news.

In contrast, one thing is clear: the proposed right will be harmful. Adding yet another layer of protection will create uncertainty, both as to coverage and as to scope. The proposed right is not subject to a requirement of investment (by contrast with the existing protection or databases) or an originality threshold (as applies to copyright). As a consequence, the proposed protection would extend to virtually any use, even of the smallest part of a news item or other content. It has been suggested that the right will prevent the re-use of snippets from, and hyperlinks<sup>1</sup> to, publicly available websites. If these claims turn out to be true, the new right will also harm freedom of expression and freedom of art, and impede innovation. Even if they turn out to be unfounded, the duplication of protection will create congestion and make clearances more complicated. These harms are further exacerbated by the prospect that the new right would last for a full twenty years, that is, long after the publication has any value as ‘news.’

### **Rapporteur Voss’s Proposed Amendments Will Make Matters Even Worse**

As the legislative process reaches a crucial stage, various amendments have been tabled that make the proposed right even more harmful. In particular, the proposals of the JURI rapporteur, Axel Voss, are positively dangerous. These would:

- (i) Extend the right to “news agencies”;
- (ii) Extend the rights conferred beyond reproduction and making available to encompass rental, lending and other forms of distribution to the public (Articles 3 and 9 of Directive 2006/115/EEC);
- (iii) Create an unwaivable right for the benefit of press publishers to fair and equitable remuneration as a result of all uses of their publications – even licensed ones.

If it had not come from such an influential source, we would not take these three suggestions seriously.

The first proposal is fundamentally misconceived, because press agencies do not produce press publications (the subject of the rights recognised in Article 11(1)). If the effect of the proposal is to give rights in any item included within a press publication to both press publishers and news agencies, the result will be yet another layer of licensing. For example, even if a press publisher were

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<sup>1</sup> Of note, the usefulness of a ‘naked’ link (mere URL) on the web, or in other applications like ftp, is very limited as it offers the reader little useful information on the resource to which the link directs. Hence, it is customary to use link descriptors, snippets or thumbnails to assist the user in determining whether the resource linked to is worth consulting. For example, without some additional information a user will not know that <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593>> directs to the EC proposal on Copyright in the Digital Single Market, COM/2016/0593 final.

to permit re-use of a publication, any content within the publication deriving from a news agency would need a distinct licence.

The second proposed change, which extends the press publishers' rights to cover public lending, rental and distribution to the public, would seem to be designed to capture for press publishers a share of funds available for 'e-lending' by public libraries (following the *VOB* decision of the CJEU). This extension would either require the allocated funds to be increased to remunerate press publishers, or would inevitably leave authors and book publishers with a smaller slice of the cake.

The third Voss amendment would give press publishers unwaivable rights that European Union law does not even recognise for individual authors, photographers or journalists (Indeed, Article 15 of the proposed Directive would not create anything close to this, only allowing authors to claim "appropriate" remuneration where their contractually-agreed remuneration was "disproportionately low"). It is absurd to suppose that press institutions are less able to look after their own bargaining interests than individual authors. If press publishers license their rights cheaply, it is not the legislature's task to save them from their own bargains. Indeed, it may well be in press publishers' best interests to license their rights for nothing, relying on other business models to profit from their investments. It is not for the EU legislature to dictate particular business models to economic entities. Indeed, the Spanish precursor of Mr Voss's initiative attracted widespread criticism on this basis.

However, Mr Voss does propose two useful amendments. First, the suggestion that the right "shall not prevent legitimate private and non-commercial use of press publications by individual users" is welcome because it is the first recognition that, **if there is to be a new EU right, there is no reason why exceptions to that right should not also be mandatory**. That said, like his other amendments, the proposal is flawed. In particular, the addition of the term "legitimate" to "private and non-commercial" leaves users with no certainty as to where they stand. Moreover, there is no sense as to how this "exception" relates to the optional private copying exceptions in Article 5(2) of Directive 2001/29. Second, Mr Voss's proposal **that journalists should receive a share of any remuneration raised** is consistent with the goals of article 15 of the proposed Directive, though it will be virtually impossible in practice to identify (i) whether remuneration results from rights in the content (for which the author has already received contractual remuneration) or from the rights in the press publication itself, and (ii) the "appropriate share" of any additional revenue.

**Conclusion**

We call on all MEPs to oppose the Commission proposal, and with yet more determination, Mr Voss's amendments. It is time to reject, once and for all, this misguided legislative reform.

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