

Publisher's Right

Remarks on the Study

"Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive"
published by the European Parliament's Policy Department for Citizens' Rights and Institutional Affairs

A. Summary

Under the title "Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive" the European Parliament's Policy Department for Citizens' Rights and Institutional Affairs has recently published a study ("Study") regarding certain aspects of the proposal by the European Commission for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market ("EC Proposal"). The Study pretends to give an unbiased view and an impartial assessment of certain aspects of the EC Proposal – inter alia of the publisher's right (Article 11). The opposite is the case. The authors of the Study, notably Martin Kretschmer, are strong and outspoken critics of the proposed publisher's right who have prior to this study and for the record expressed their opposition to a European publisher's right in various publications. Therefore the Policy Department knew exactly what they will get when they commissioned these authors to write this Study. The Study violates fundamental principles of a research-based and objective analysis. The conclusions and recommendations presented in the Study are to a large degree based on opinions and second-hand information instead of facts. Furthermore, the Study ignores ongoing efforts by the European Parliament and its committees to provide clarity in particular about definitions set forth in the directive, and importantly individuals' capacity to continue to link and share content under a European publisher's right, which would address many of the concerns expressed.

Hence, this Study does not provide an unbiased view on the matter, and it does not offer an objective analysis of the EC Proposal. Instead, the Study echoes previously published criticism of its authors, and masks it as the conclusion based on objective and balanced assessment. Members of the European Parliament are therefore advised to not use this Study as a basis for their forming their position on the proposed publisher's right.

B. Analysis

The following analysis highlights some of the major flaws and weaknesses of the Study.

1. The authors of the Study are not impartial

The authors of the Study include Professor Marin Kretschmer and Professor Lionel Bentley. The two are among the first signatories of an open letter regarding the EC Proposal, dated 22 February 2017, which expresses strong criticism on the concept of a publisher's right and of a comment on the EC Proposal in 2016 signed by 37 academics based in the UK. Kretschmer has expressed his views on the proposed publisher's right in a number of articles and lectures. Hence, by commissioning Kretschmer and Bentley to write this Study, the Policy Department for Citizen's Rights and Constitutional Affairs has determined the result of the Study, because their view regarding the EC Proposal for a publisher's right have long been on record. No one could have expected these authors to come to conclusions contradicting their earlier publications. In other words: The Study was destined to be biased and its results were known from the outset. Unfortunately, the Study does not disclose to the reader that their authors have already taken sides in the debate about a European publisher's right.

2. The Study gives more room to critics than to supporters

The Study creates the false impression that the EC Proposal is receiving almost no support, and that even the majority of press publishers is not in favour of a European publisher's right. This false impression is created by the selection of references as well as the empirical assessment which is based on very poor facts (see below). Most of the authors whose literature is quoted, are either signatories of the open letter which was initiated by the authors of the Study (e.g. Bert Hugenholtz and Raquel Xalabader) or supporters of the views expressed in this open letter (e.g. Mireille van Eechoud and Michael Grünberger).

3. The Study provides no sufficient empirical basis regarding Germany and Spain

The Study presents a very one-sided judgement on the rights that were created in Spain and in Germany to support press publishers, and it uses the Spanish and the German example as proof that a publisher's right won't work. The Study argues that "if there are new revenues, they will be a drop in the ocean", that "the ancillary right poses a threat to the nature of news communication" as well as "a threat to innovation and new entry". Yet, none of these allegations are supported by facts. In total only eight interviews with nine interviewees were conducted. For Germany these included an interview with the collective management organisation, VG Media, and with two (!) "major" publishers. The Study mentions that VG Media represents more than 200 digital press offerings regarding the German publisher's right. Yet the authors of the Study consider the findings from two (!) interviews

with German publishers and little more in Spain to be robust. It needs no further explanation that conclusions like the ones quoted above can hardly be justified with so few sources.

The answers provided in the interview by the VG Media, explain that the VG Media and the publishers represented by VG Media clearly take a different view and why. VG Media has made it very clear in the interview that enforcement of the new right will naturally take its time, but that VG Media believes things are on a good way. Especially since the Regional Court of Berlin has expressed its opinion, that the pending claims which were raised by VG Media on behalf of the publishers against Google are at least in part justified. However, the Study makes very selective use of the VG Media interview and has omitted the elements that show the real benefits from the German publisher's right.

Further, the Study ignores some basic public data, and in particular the Eurobarometer survey from 2016 indicating that 47% of internet users do not click through on links and snippets (in some countries this is as high as 67 %).

At this point it should be noted that perhaps the Spanish situation should not be used as a benchmark in the first place, because the Spanish law takes a different approach. The Study ignores that the Spanish law provides no ancillary right for press publishers.

4. The Study is based on second hand information

Notably regarding the question as to whether the German and the Spanish regulation have created additional revenue streams for publishers, the Study relies on second hand information from articles by authors who are outspoken critics of the publisher's right. For a true and accurate record of the experience in Germany the authors of the Study should have taken into account the information provided to them by the VG Media (the collective management organisation which administers the publishing right in Germany) in the interview conducted by the authors of the Study.

5. The Study ignores the effects of online monopolies on the press publishing industry

The Study alleges that the downward trend in the newspaper market have little, if anything, to do with the free riding of online platforms on publishers' content. And – again with a total lack of evidence – the Study endorses the assumption that the (unauthorized) use of content from press publications by online services creates a win-win-situation to the benefit of publishers, echoing one of the key arguments by online platforms without a critical analysis of this argument. In particular, the Study makes no efforts to assess the effects of the market dominance of monopolies like Google on the online distribution of press publications.

6. The Study misunderstands the amendment proposed in the Comodini Paper

Without any in-depth analysis the Study endorses the amendments proposed by the former Rapporteur in the Legal Affairs Committee of the European Parliament (JURI), Therese Comodini Cachia. That said, the authors apparently misunderstand the concept behind this proposal. While Ms. Comodini has suggested a presumption of *representation*, the Study refers to her proposal as a presumption of *ownership*. This is considerably different from Ms. Comodini's proposal, and the Study makes no attempt to explain these differences: A presumption of representation, as proposed by Ms. Comodini, would grant press publishers the status of a mere "agent", who may act on behalf of the author and enforce the author's rights vis-à-vis a third party. For this reason a presumption of representation fails to provide adequate and effective protection of European press publishers in the digital world, in particular because it falls short of the necessary protection of small excerpts from press publications ("snippets") with regard to the massive and automated use of such excerpts by search engines and news aggregators. And it would give press publishers no exclusive right, but instead merely the right to sue in their own name for infringements of the rights of authors whose work is contained in the press publications. The concept of a presumption of ownership would by (rebuttable?) presumption grant publishers a statutory right regarding the work created by the author which is used in a press publication. Such a presumption would likewise provide no effective protection of press publishers. Moreover, this approach is opposed by journalists as it would be a legally sanctioned rights-grabbing exercise of the authors' rights. This would be contradictory to the objectives of the proposal by the European Commission which seeks to safeguard the authors' rights. The Study does not explain why it expresses concerns that a publisher's right may have negative effects on authors' rights -which is not true- while at the same time the Study support a regulation which would clearly have such negative effects.

7. The Study misapprehend the EC Proposal with respect to exceptions

The Study suggests that the proposed publisher's right would create confusion about the application of the current exceptions: the EC Proposal makes explicit reference to the fact that all the current (and new) exceptions from copyright law would apply to the publisher's right. The Study takes the view that as the quotation/citation exception is not a mandatory exception, the proposed right would put an end to the right of quotation in the countries where this has not been implemented. This is unlikely as this exception is covered under the Berne Convention.

8. The Study misunderstands the EC Proposal regarding hyperlinking

The proposal for a neighbouring right does not expand the scope of copyright. It merely creates a new category of beneficiaries of two exploitation rights for the digital uses of publishers' content that have already been harmonised at EU level under the 2001/29/EC Directive: the reproduction right and the right on communication to the public. Furthermore, CJEU case law which deals with these

rights would apply to the publishers' right as is the case for all other rightholders. It may be helpful to clarify in European statutory copyright law the various interpretations by the CJEU, but this is not what the proposed publishers' right should do. Concerning the Study's criticism that the provision that "the publisher's right shall not extend to hyperlinks which does not constitute communication to the public" is a recital and is not written in Article 11 itself, this is a point that should be considered.

9. The Study misapprehends the need for a protection of snippets

The Study argues that at least the use of small excerpts (snippets) should be excluded from the scope of the publisher's right- either through a threshold which is based on the size of the snippet or the investment of the publisher. Such a *de minimis* is inappropriate. It is notably the use of snippets by online platforms which deprives press publishers of the values they create with their press publications. The protection of snippets is a key element of the publisher's right. Notwithstanding this, clarifications may need to be considered. A certain investment shouldn't be the basis for a threshold either. The database directive contains a similar provision, which creates quite some uncertainty. Besides, it would be impossible to allocate a certain investment to specific parts of press publication.

10. The Study's assumption regarding the effect on authors lacks evidence

The Study assumes that a publisher's right would have a negative effect on the income of authors. However, the Study gives no facts to support this assumption, nor does the Study consider the fact that the purpose of this right is to strengthen the eco-system of a free and independent press which includes the journalists: revenues provide the possibility to pay for journalists. Instead of facts, the Study endorses the mere opinion (!) of one single source (i.e. the Strasbourg Intellectual Property Centre) without even trying to verify this opinion.

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