PRESENTATION ABSTRACTS

Panel I: Call for legal certainty in online press publishing

Raquel Xalabarder

Definition of press publication: addressing Spanish and German experiences and relationship with the Berne Convention

The EU Commission's proposal of Directive on Copyright in the Digital Single Market intends to grant press publishers an exclusive related right that would allow them to license (or prohibit) digital uses of their press publications for a period of 20 years. This proposal would upset the delicate (and necessary) balance between the protection of copyright and the non-protection of information and is contrary to international obligations (such as Art.10(1) BC), as well as inconsistent with CJEU doctrine and EU acquis. Nothing suggests that a related right for press-publishers is going to achieve something different from the copyright they already acquire from authors in their press contents. Furthermore, prior national attempts in Germany and Spain to secure remuneration for press publishers from aggregation services and search engines notably failed; we will examine these two national provisions, their scope and different nature, and compare them with the EU proposal.

Thomas Höppner

Licensing for news intermediaries: perspective of publishers

News intermediaries have an incentive to display and combine more news content than is required for intermediation purposes. They generate revenues by satisfying a significant share of the information demand of consumers. Since, on average, half of the users of such platforms only browse and read news extracts on these websites without clicking through to the source pages, there is a significant substitution effect. Press publishers are losing readers and corresponding revenues. Publishers are competing with news intermediaries for the same budgets of the same advertising customers. At the moment they are also competing with the same content that publishers produce at high costs and that intermediaries copy at no costs. This free-riding significantly reduces publisher's incentives to invest and innovate to the detriment of consumers.
The current copyright regime is not capable of dealing with this market failure. In lack of originality of small news extracts, author's rights do not provide protection against mass exploitations by means of news snippets. Robust copyright protection is crucial, however, for the refinancing of a free press. The publisher's right as proposed by the European Commission is a step in the right direction. Bringing the protection of press publications in line with that of music, film and TV productions, the proposed right updates the EU copyright directive to today's realities. Given that hyperlinks are excluded and all existing exemptions and limitations to copyright apply, the proposed right will benefit journalists, consumers and press publishers of all sizes alike without hampering innovation or start-ups.

Bernt Hugenholtz

Coherence of the neighbouring right for press publishers with the EU copyright acquis

The neighbouring right for press publishers proposed in the European Commission's proposal for a Directive on Copyright in the DSM is ill-

conceived, and inconsistent with the rules of the EU copyright acquis. Whereas art. 2(8) of the Berne Convention excludes copyright protection for «news of the day», art. 11 (1) of the proposed Directive would create a new exclusive right for press publishers. Whereas the InfoSoc Directive, and its interpretation by the CJEU, permits hyperlinking to content lawfully posted to the web, the press publisher's right would create an exclusive right to control "the digital use of their press publications".

There are other systemic objections as well. What would be the scope of such protection? In copyright law the rules of scope are fairly straightforward (see the CJEU's Infopaq decision): if what is taken is the product of creative choices, there is infringement. But news is not created, it is reported. Absent any substantive prerequisite, like originality or substantial investment (as in the EU's sui generis database right), there is no way to determine the press publisher's scope of protection.

In sum, it is not only undesirable, from a perspective of copyright and freedom of the press, to attach rights to news and press information, it is also extremely difficult to define its contours and boundaries. The proposed neighbouring right would severely undermine legal certainty, and greatly increase transaction costs in the news publishing industry.

Ana Ramalho ***The competence of the European Union to create a Union-wide ancillary right***

This contribution examines the competence of the EU to introduce a neighbouring right for press publishers. The assessment of competence is carried out following a step-by-step approach: first, a competence norm must grant the EU the necessary powers to legislate on the chosen subject. Here, the competence norms of the Treaties will be analysed taking into account case law from the CJEU. The second step, assuming there is a valid competence norm, involves the application of procedural checks, during which it is evaluated whether the proposed right complies with the principles of subsidiarity and proportionality. The presentation concludes for the lack of legislative competence of the EU in this domain.

Valeria Falce ***An ancillary right for press publishers. Call for legal certainty and risk of over-protection***

Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market introduces a new ancillary right in favor of press publishers with the view to support the proper functioning of a democratic society via "a free and pluralist press". As made it clear by the Proposal (Recital n. 31), the new right is intended to benefit publishers of press publications at least under three different and interlinked profiles, since not only it will allow the recoupment of their investments, but it will also ease the licensing of online use and speed the enforcement of their rights.

However, we doubt that the failure of the off-line business model in the transition from press to digital shall be solved thanks to the introduction of

a new right, whose legal nature risks being neglected as its legal and economic implications risk being underestimated.
In particular, Member States (i.e. Spain and Germany) where new rights related to the organizational and financial contribution of publishers have been introduced have proven to be unsatisfactory. Besides, the costs related to the enforcement of the new right seem unnecessary and excessive because of the very broad and unclear definition of the relevant subject matter, the length of the new right and the difficulty to reconcile the new provisions with other rights provided for in the Union law to authors and other rightholders. Also, balanced licensing and enforcement of press publishers could be better achieved through different instruments, already existing both at European and at National level, i.e. database rights and specific publishers' rights.
In conclusion, we share the final goal pursued by Article 11, since "quality journalism and citizens' access to information" are fundamental rights. Though we question the feature of the new right, that risk leading to an unnecessary expansion of IP realm. We propose instead to reinforce the publishing sector and contribute to a free and pluralist press favoring a sound reconciliation and a flexible enforcement of existing Union and National rights.

Panel II: Balancing interests in online press publishing

Brando Banifei ***Digital uses. Freedom to link. Nature of the web***

Caroline de Cock ***Press Publishers' Rights: Threatening Press Pluralism and Users' Rights to Access and Share Information***

The European Commission has proposed to extend the scope of copyright by creating a new neighbouring right for press publishers in its Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (Article 11 – Recitals 31-35). This proposal raises a diversity of concerns in terms of the threat it poses towards press pluralism and the access and sharing of information rights of users. It also raises the spectre of a flawed logic in the adoption of legislation whereby, against a perceived failure from a commercial nature, the proposed remedy is one that creates new rights under the 'copyright' umbrella as opposed to a more 'ex post' approach such as the use of competition law.

Jennifer Baker ***Role of journalists. Contractual agreements between publishers and journalists: bargaining power and division of levies***

Role of journalists. Contractual agreements between publishers and journalists: bargaining power and division of levies
I will first set out the importance of independent, ethical journalism to society and move on to look at news media in crisis, examining where mistakes were made in news management more than 15 years ago in comparison with other industries. I will highlight that the motivations and interests of journalists are not always the same as those of the publishers given that we have little bargaining power and do not hold our own copyright. I will then take the example of ancillary copyright in Spain to explain how, far from helping

smaller publishers, neighbouring rights can put them out of business to the benefit of a few larger players resulting in fewer jobs for journalists and living wages further decreased. Finally, I will question what the next model for news reporting should be, pointing out that relying on advertising is short sighted particularly if we consider ethical reporting to be in the public interest.

Claudio Giua ***Ancillary rights and OTT data - Developments and proposals in a publishers' perspective***

In the last few years Gruppo Editoriale l'Espresso has been at the forefront of European publishers in order to try and level the competitive field in the digital environment. One of the tools that we have extensively discussed and championed was the creation of the so-called ancillary rights for news publishers. But we think that we need to find a way beyond that.
We should imagine a comprehensive system that takes into account both intellectual property protection and the need to facilitate sharing of information.
Digital platforms reached such large dimensions that the actual bargaining power of publishers - even if the neighbouring rights were to be established - may not be strong enough.
To gain some leverage in a radically changed market we think we should at least partly redefine the field. The problem is not only to get cash in exchange of our content, the problem is to be accepted as strong and equal partners in the business and relational ecosystem that the OTTs are building.
We think it is possible to build a new conceptual framework for the rights of publishers following four steps:

1. Protecting intellectual property in a strong, though flexible way
2. Establishing rights along accountability lines
3. Finding new and effective ways to exercise those rights
4. Defining ownership of data

Panel III: Intermediary liability and control over content – drivers of proposal

Lauri Rechardt ***Control over content. Dissemination of works on the internet. Licensing and enforcement by creative industries***

Thanks to proactive recording industry licensing practices and innovative digital services the recording industry registered in 2016 year-on-year growth for the second consecutive year. The main driver for the 5.9 % revenue growth was the increasing popularity of subscription streaming services, which now generate revenue that more than off-set the decline in CD sales and downloads. This digital market growth benefits the entire creative value chain as creators and artists receive a bigger share of industry sales revenue. However there continue to be major challenges to a sustained market growth. The main challenge is the Value Gap caused by the lack of clarity as regards to the liability of certain online services, in particular user upload content (or UUC) services, that distorts the online market place. Also piracy continues to threaten the sound development of digital markets, with new forms of piracy such as stream ripping gaining in popularity.

The presentation discusses the latest developments in the markets for licensed digital music as well as the main challenges to sustainable market growth. The presentation also discusses briefly the European Commission copyright directive proposal, which addresses the Value Gap in order to create a fair and balanced European digital content market; one that would allow both the digital services as well as the content creators and producers to foster

Tobias Mckenney ***Content recognition technologies. How do they work. Who carries the costs***

Lenard Koschwitz ***Hurdle Race or High Jump: Entry Barriers and Legal Certainty from a Startup-Perspective.***

Startups in Europe can only be successful if they have solid rules in the online space. But in an attempt to limit the power of tech giants, the European Union risks hampering the next generation of European startups too. The startup landscape in Europe is a prime example of how evolving mindsets, hard work and risk-taking can pay off in the form of economic growth and innovation. Investment in European startups is steadily increasing as new tech hubs take shape across the continent and European-headquartered companies expand internationally. Much of the success of startups comes from their lean, agile structure. Startups succeed when they build bridges between consumers and suppliers in areas that brick-and-mortar companies never focused on. Altogether, startups employ a staggering 4.52 million people in Europe.
But this success can be vulnerable to radical changes in public policy. In an attempt to control and information flows and user's activity, the European Commission proposed copyright rules for online platforms that will stifle the next generation of startups.

Giancarlo Frosio ***Intermediary liability (or responsibility?) from fundamental rights perspective: freedom of speech and right to information***

A number of emerging trends in intermediary liability policy might have a difficult coexistence with fundamental rights, such as freedom of information, freedom of expression, freedom of business or a fundamental right to Internet access. Miscellaneous policy tools—such as monitoring and filtering obligations, blocking orders, graduated response, payment blockades and follow-the-money strategies, private DNS content regulation, online search manipulation, or administrative enforcement—might have a negative impact on fundamental rights by limiting access to information or causing chilling effects. In addition, increasingly, governments—and interested third-parties such as intellectual property rightholders—try to coerce online intermediaries into implementing these policy strategies through voluntary measures, self-regulation, and private ordering, thus jeopardizing due process. The recent proposal of the European Commission for a Directive on Copyright in the Digital Single Market does highlight this conundrum for fundamental rights in the platform economy by seeking the implementation of filtering obligations for online intermediaries—which inter alia would upset the balance in favour of users' rights that the eCommerce Directive's knowledge-and-take-

down negligence-based intermediary liability system attempted to achieve. Meanwhile, the EU Digital Single Market Strategy has endorsed voluntary measures as a privileged tool to curb illicit and infringing activities online. This presentation would like to contextualize the recent developments in intermediary liability theory and policy within a broader move towards turning online intermediaries into Internet police. Public enforcement lacking technical knowledge and resources to address an unprecedented challenge in terms of global human semiotic behaviour would coactively outsource enforcement online to private parties. This process might be pushing an amorphous notion of responsibility that incentivizes intermediaries' self-intervention to police allegedly infringing activities in the Internet. *As I argue, the intermediary liability discourse is shifting towards an intermediary responsibility discourse.* Further, enforcement would be looking once again for an "answer to the machine in the machine." By enlisting online intermediaries as watchdogs, governments would de facto delegate online enforcement to algorithmic tools. Due process and fundamental guarantees get mauled by technological enforcement, curbing fair uses of content online and silencing speech according to the mainstream ethical discourse.

Panel IV: Consistency and integrity of *acquis* from the perspective of new obligations

Eleonora Rosati

The interplay between new obligations and the EU acquis: just a 'clarification'?

The EU Commission's proposal to address the so called 'value gap' is to impose a number of obligations on certain types of hosting providers, including an obligation to prevent the uploading of potentially infringing content. The overall construction of Article 13 and Recital 38 in the proposed directive on copyright in the Digital Single Market also appears to assume that at least certain hosting providers make acts of communication to the public within Article 3 of the InfoSoc Directive. Some commentators have argued that the 'value gap' proposal merely clarifies already existing obligations and liabilities of hosting providers. However, it is questionable whether this is actually the case: a more thorough reflection on the interplay and potential conflict between the 'value gap' proposal and the EU acquis – notably the E-commerce and InfoSoc directives – is needed.

Roberto Caso

Federica Giovanella

Art. 13(1) of the DSM Directive: a comparative perspective

This presentation illustrates the reasons that in the Nineties led the USA Digital Millennium Copyright Act's (DMCA) drafters to leave out of the Act a provision imposing content recognition technologies.
The drafters reached the conclusion that imposing such an obligation on providers would create a number of imbalances between the rights at stake and threaten the public interest.
We argue that despite the technological development, the same reasons still hold true today and that the European Union should resist imposing such

obligations on providers. Hence, art. 13(1) of the Proposal for a Directive on Copyright in the Digital Single Market (DSM Directive) should be delated. Finally, we maintain that in case of enactment of the current text, the Court of Justice of the EU could still help in re-balancing the rights at stake and serving the public interest that art. 13(1) would threaten.

Sophie Stalla-Bourdillon

Automated technologies and fundamental rights. Question of general monitoring obligations

"If online platforms already use sophisticated algorithms to optimise the visibility of money-making content then they should do use similar means to restrict unlawful content" is a common meme. This meme has recently become more popular when coupled with the argument that online platforms are in fact free riding on the coattail of right holders who should be better rewarded, as they produce original content. However, whereas 'automation' is described in some fora as a quick fix to the difficult question of online content regulation including copyright works, 'automation' is not synonymous to 'perfect accuracy' nor 'legitimacy'. Notably, automation raises human rights and fundamental freedoms issues, in particular when systematically used by private actors as a means of law enforcement. This explains why monitoring obligations of a general nature imposed upon online platforms are suspicious. While secondary European Union law prohibits general monitoring obligations under Article 15 of the E-commerce Directive, the Court of Justice of the European Union has clearly identified the roots of such a prohibition in the protection of the rights to privacy and data protection and freedom of expression. Although the European Court of Human Rights (ECtHR) case law has been more convoluted, the ECtHR has acknowledged that strict liability rules are problematic when they amount to imposing general monitoring obligations. The challenge is therefore to frame the development and implementation of automated means through the regulation of processes and acknowledge the responsibilities of online platforms with regard to human rights and fundamental freedoms.

Gerald Spindler

Intermediary liability in the eyes of the CJEU

Intermediary liability privileges are in place since 2000 as provided by the E-Commerce-Directive. However, liability of intermediares is far from being harmonized and clarified. The CJEU interprets Art. 12 – 15 of E-Commerce-Directive in a technological way, emphasizing the neutral and automated character of services. Whereas real liability cases are rarely brought to the CJEU the bulk of actions in the EU concerns injunctions, first developed in Germany. Courts began to carve out a set of obligations for providers in order to control their services after having received a cease-and-desist request by rightholders. CJEU accepted these injunctions, however, laying also stress on the shielding providers against enforcement costs as stated in the McFadden-Case. Moreover, CJEU strikes the balance between intellectual enforcement directives (InfoSoc, Enforcement-Directives) and the E-Commerce-Directive by applying fundamental rights of the European Charter. However, how much leeway Member States have to specify liability requirements has still be clarified (data retention cases). Further, important

areas of liability criteria still remain unclear, such as the notion of „knowledge", of notice-and-stay-down procedures, or – most important – relationship between data protection (anonymity) and identification of infringers, implying also monitoring obligations.

Joe McNamee ***AVMS and Copyright - a drive-by shooting of th e-Commerce Directive?***

Has the e-Commerce Directive been killed in a drive-by shooting?
Unwilling or unable to propose a reform of the E-Commerce Directive, the European Commission appears to have resorted to killing the Directive in a series of "drive-by shootings".
In the Audiovisual Media Services Directive, the Commission proposes extending TV rules to video-sharing platforms, including obligations to restrict legal content. The European Parliament Committee on Culture and Education (CULT) wants to extend this further to social media platforms.
Similarly, by re-defining key concepts in the E-Commerce Directive and ignoring Court of Justice of the European Union (CJEU) case law, the Commission's proposal for a Copyright Directive adds still more chaos and contradictions. The proposal abruptly alters the notion of what it means to be a hosting provider. For the Commission, to "store and provide to the public large amounts of works or other subject matter uploaded by their users" goes beyond the scope of being a hosting provider.
A second bewildering reinterpretation of the Commission, asserts that any optimisation or promotion of content, "irrespective of the nature of the means used" could alter the legal status of a hosting provider. Numerous amendments proposed in Parliament change the text to refer to the hosting providers "making available" the content that they host. The Commission also proposes that hosting companies should restrict availability of content – with the implausible argument that as long as they only search for something specific (like specific content identifiers), searching everything is not a general obligation to monitor.
Is this really the best solution?