



A publisher's intellectual property right: implications for freedom of expression, authors and open content policies



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Executive Summary

The proposed Copyright in the Digital Single Market Directive (COM(2016)593) of July 2016 would introduce a new intellectual property right for publishers of press publications, or ‘PIP’. Publishers would have the exclusive right to authorize or prohibit any reproduction (in whole or in part, direct or indirect) and making available to the public of ‘press publications’, for a period of 20 years.

This study examines the justifications for the proposed new PIP, and assesses how it would fit in the EU copyright framework. In this Study, special attention is paid to the freedom of expression dimension, for two reasons. One is that the most important justification advanced in support of a publisher’s right is that it promotes a sustainable quality press and media pluralism. The vital role that the press play in democratic societies —as public watchdog and forum for public debate—is a key consideration in the interpretation of the fundamental right to freedom of expression as guaranteed under the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU (CFR). The second reason is that the introduction of an intellectual property right, i.e., an exclusive right to control information flows, itself constitutes an interference with freedom of expression. The main recommendation is that the EU legislator should elaborate a clear assessment of what pressing social need a PIP would serve, of the PIP’s proportionality and of alternative solutions (other than merely the option to encourage stakeholder dialogue, cf. the Impact Assessment). This is especially important because, for news and other public interest information, the European Court of Human Rights (ECtHR) upholds a strict standard of scrutiny. Any regulatory intervention must comply with the right to freedom of expression, as laid down in article 10 ECHR / 11 CFR.

With respect to existing copyright and database law, the study concludes that the proposed new publisher’s right would have a wider operation. This is because there is no built-in restriction to the reproduction right, unlike in copyright where the originality requirement prevents appropriation of facts, ideas and non-original expression. The publisher’s right would also be broader than the sui generis database right. The proposal sets no substantial investment requirement, and the reproduction would apply to the smallest parts. The introduction of the publisher’s right would mean that unless he or she can invoke a limitation or exception (e.g., for private copying, or quotation purposes), anyone using the smallest bit of text, image or sound contained in a digital press publication would need prior permission from the publisher.

This study also considers the likely effect of the proposed new right on authors, especially freelance journalists, photographers and editors. A growing proportion of the workforce in the newspaper and magazine industries is not employed, but instead consists of freelance professionals who are increasingly dependent on maximum exposure of their work in order to secure new assignments. Publishers are in a position to dictate the terms of agreement for both employed and freelance creators, and already effectively control the ownership of copyright. If the operation of the proposed publisher’s right were to lead to a decline in referrals, shares, snippet-linking or the ability to blog about a journalist’s works, this would directly harm the journalist’s visibility, and thus opportunity to sell future work.

The EC proposal seems to attempt to take the form of newspapers and magazines as we have known them from the age of print, and plant them in the online environment. In light of structural changes to advertising markets and changes in readership behaviours, it can be questioned whether a focus on the form of (traditional) press, rather than a focus on its functions, is the best way forward. What

is more, press publications as currently defined in the proposal would potentially cover all other domains where periodical publications are a form of communication, including professional, business, educational, and government publications. However, for these domains it is unclear that there is any actual need for additional intellectual property right protections. At the very least, publications that emanate from public sector bodies should be excluded, as there is no need in that domain for an intellectual property right to incentivise publication. Quite the contrary, the fast development towards more transparency, active dissemination of public sector information and open licensing (open data) suggests the introduction of a new right would only produce additional costs and barriers. The exclusion of academic and scientific publishing makes perfect sense in light of the strong market position of commercial science publishers and the pursuit of open access and more broadly open science policies by the EU and its member states. To ensure that the exclusion is unequivocal, it is recommended that it be included in the substantive provisions (i.e., Articles) of the Directive, rather than merely in its recitals.

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