

Ancillary copyright goes against the EU Digital Single Market

EDiMA Members both create copyrighted material and disseminate material created by others, whether professional creators or consumers. As a result, we understand the importance of several aspects of copyright: the importance of providing incentives and rewards for creative intellectual effort when it seeks remuneration; the importance of providing disseminating creative content to the public; and the importance of supporting fundamental values such as free speech and the exchange of information and ideas.

Distorting copyright law to protect interests which are foreign to copyright and in a manner that has deterring effects on the EU internal market and negatively affects the freedom to information online is a wrong policy approach.

Importance of access to information and knowledge

EU Fundamental Rights – Article 10/11

The introduction at national level of new ancillary rights contradicts the harmonised scope of the right of making available online (Art.3 Directive 2001/29/EC) and has deterring effects on the EU internal market.

Aggregation and search engines play a key role in the development and enhancement of the fundamental right to freedom of information granted in Art.10 European Convention on Human Rights of 1950 and Art.11 of the Charter of Fundamental Rights of the EU of 2000. Ancillary copyright recommendations do not correctly balance the copyright interests with the fundamental right to information, thus disregarding Art.7 TRIPs which obliges States to enforce IP law in a manner “conducive to social and economic welfare and to a balance of rights and obligations”. Similarly, the ancillary copyright recommendations disregard the principle of proportionality which has been consistently applied by the CJEU to balance copyright with other fundamental rights and public interests.

Why snippets are a critical part of these fundamental rights

The Internet is transforming the media and content industries. Content discovery is facilitated by online services which allow publishers to disseminate and monetise content, and readers to engage with this content. Search engines, social networks, news aggregators, instant messaging apps, micro-blogging services all drive traffic to other news sites as consumers find it easier to access content that interests them. Web portals and search engines frequently offer ‘snippets’ – brief excerpts and headlines from new stories – that are important drivers of traffic to publications’ websites. This is supporting the rejuvenation of traditional print media. Digital sales of The Economist have risen 47% in one year,¹ and over two thirds of the FT’s total paying readership is online (and its digital circulation is growing 33% per year).²

¹ http://www.economist.com/sites/default/files/theeconomist_cmprpressrelease_sept14_final.pdf

² <http://recode.net/2014/10/01/ft-editor-lionel-barber-now-sofwares-driving-the-journalism-qa/>

Balancing Copyright Interests with Fundamental Rights

Proportionality

Driving traffic to publisher's site has always been, is, and will remain a key goal for news aggregators. As we value and nurture our relationships with publishers, we continue to innovate and develop new models for a sustainable online ecosystem where all the key players can benefit from the current and future technologies and offerings.

Also, Start-ups are investing fast in the digital news space, and working on experimenting with new ways to disseminate and monetise news online. In Europe, this wave of innovation is now underway. As with all innovation and experimentation, there will be failures as well as opportunities, but these efforts are the best place to deliver the solutions that will satisfy consumers and sustain the creation of news.

Historical and recent legal treatment of links/quotations

The Court of Justice of the European Union [CJEU] recently ruled that linking to copyrighted content freely available online does not amount to an act of communication to the public (Judgment of 13 Feb. 2014, C-466/12 Svensson).³

Even when assuming that the provision of a link involves an act (or several acts) of exploitation, online news aggregation is mandatorily exempted by the quotation exception in Art.10(1) Berne Convention [BC],⁴ without requiring any compensation.

Ability of Copyright owners to self-help (via robots.txt)

It is also eye-opening to note that the Spanish Competition Authority (Comisión Nacional de los Mercados y de la Competencia - CNMC) found no evidence of market failure to justify the introduction of ancillary copyright. According to the CNMC, the existence of a direct competition in the market between the original sites and the aggregators (that would justify the need for a remuneration scheme) has not been proven. In fact, the report makes express reference to the availability of standard robots.txt exclusion protocols that could be easily used by copyright owners to avoid aggregation (if they so wished) and the possibility of contractual agreements (including remuneration) on a voluntary basis, which are enough to reach efficiency in this market and clearly disavow the market failure argument.

Recommendations

EDiMA recommends that the EU Member States and the EU should not further pursue the concept of ancillary copyright, as it is a clear obstacle for the news aggregators and new players to provide new and better solutions to their key partners (the publishers) and ultimate customers (the EU citizens consuming information via the Internet).

³ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0466&from=EN>

⁴ http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P144_26032