

THE IMPORTANCE OF PRESS PUBLISHERS TODAY AND WHY A PUBLISHER'S RIGHT IS NECESSARY

I. Why are publishers essential?

Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. -Thomas Jefferson, 1787.

A press publisher does not merely publish content created by an author. The publisher is responsible for overseeing the entire operation involved from the initial concept to the financing, production and management of a newspaper or magazine, in print or online, and takes legal responsibility together with the editor for the making available to the public of the final published edition(s) and any updates thereafter. Crucially, the publisher creates an editorial brand. The impact of a brand on public opinion depends on its popularity and regular readership, which in turn influences the levels of support from advertisers.

At least the following aspects need to be considered in depth to understand the press publisher's role and the value they create.

1. Creation and management of press products, including editorial responsibility

The publisher decides on the concept of the publication, its title and the important questions of genre, and the frequency and channels of publication in print and in digital formats. The publisher also determines the journalistic and political orientation which, reflected in editorial statutes and guidelines, is represented in a brand.

The publisher is responsible for the staff, the financial health and strategic direction of the enterprise including decisions regarding any future investments. Publishers take over the responsibility for the published content ensuring their staff are trained and fully equipped to hold those in authority to account at home or abroad, insuring and protecting journalists in the field especially when they face dangerous situations.

Publishers 'go on the record' and defend their journalists, their views and positions in court if necessary whether they publish in print or online. Unlike e.g. anonymous bloggers or commentators, publishers can be clearly identified and take responsibility for the published content.

2. Technical production and distribution of the press

The publisher is responsible for the technical production and original first-time distribution of press products whether by subscription or single sales models. The final journalistic product on paper or screen requires the necessary premises, technology, staff and services all under the publisher's organisation, maintenance and financing.

3. Investment in marketing and advertising: Selling to readers and advertisers

The widespread availability and choice of a variety of press products offered in a variety of ways, from the single article or copy of a publication to a short or long-term subscription, by different means of supply, is an indispensable prerequisite for the existence of a free press. Sustaining readership requires effort and investment through professional organisation and marketing. 10 to 30 % of subscribers need to be replaced every year just to maintain the circulation.

Advertising revenues form an indispensable pillar for the funding of an independent press. For online publications, it is often the only revenue stream. A successful advertising sales force requires investment in training, and sophisticated organisation across different genres and frequency of publication. Publishers equally must invest in the overall marketing of a title, to promote its journalistic content to both readers and advertisers.

4. Financing and entrepreneurial risk

It is the publisher, calibrating on a daily basis how to cope with fierce competition in the journalistic and economic market for readers and advertisers that must bear the financial risk of survival. He has to finance the whole production of content as well as the distribution and reproduction, marketing and subscription and advertising sales and has to calculate if, how and when a title generates profit. Even in cases of sustainable funding and intensive efforts by publishers there is always the risk that quality journalism publications fail.

5. Reaching readers across all platforms – facing the challenges of a technology neutral press

Publishers today are conveying local, regional, national and international news, independent reportage and professionally produced information to soaring audiences across many platforms and devices of choice all over the world.

But technology has radically changed where our readers find and read our content – with profound consequences for the future of press publishers. Not only do publishers make their content available in print but also on many digital platforms, in different formats, on fixed and mobile devices. Although popularity of press publishers' content is increasing rapidly, current revenues to fund this production and distribution in the longer term are not viable. Indeed online press is in most cases still cross-subsidized from the print side of the business. With a growing shift from print to digital, the problem of funding the digital press is increasing and further exacerbated when readers find publishers' content first on third party platforms who have not paid publishers for this service, while at the same time have diverted advertising revenues to their services from the publishers. Yet the role of the press has not changed, only the way in which press publishers' content is distributed.

6. Playing a crucial role in democratic society

The role of press publishers remains inextricably linked with the vital role that a free and independent press plays in democratic societies, enabling the open exchange of information and opinions, exposing wrongdoing and corruption, holding public officials accountable in the public eye, publicising difficult or important matters that need attention or scrutiny, and helping citizens to make informed decisions often creating communities of interest or concern.

Not only has the digital revolution spawned an infinite amount of information and opinion, sources of news, but also misinformation and rumours. Professional editing of quality journalism is needed more than ever to separate the wheat from the chaff. This can only be guaranteed through adherence to the law and self-regulatory rules, by submitting to sanctions and punishing those professionals and/or their employers who do not obey these rules.

The functioning of democracy in the 21st century is endangered by terrorism, migrations, cyber attacks, and the prioritisation of security over freedom. Press publishers play a vital role in countering the temptation to limit freedom. Without a free and independent press sector provided by publishers who take legal responsibility for what they publish, responsibility for public information and safety resides only with government, which seriously undermines a country's democratic freedom but also its security and economic growth. Press publishers in particular are essential to the functioning of a democratic society, safeguarding freedom of expression and upholding ethical standards in public life, especially through the journalism and accurate reporting their publications contain. Integrity and independence are at its core, and the notion of independence comprises the equally important financial independence and independence of government.

More than a third of the world's people live in countries where there is no press freedom. Overwhelmingly, these people live in countries where there is no system of democracy or where there are serious deficiencies in the democratic process. Europe must be at the forefront of safeguarding freedom of the press and more so in a climate in which 110 journalists have been killed in 2015, 153 imprisoned and 54 held hostage, according to the latest Reporter without Borders statistics.

Hence, Europe cannot afford to lose its established free press in the search for greater European integration; Europe cannot afford to risk losing the access to democracy that our independent, diverse media promotes. This is a unique sector that provides so much more to its governments than profitability.

The existence – and the future – of today's press sector in Europe, **depends on publishers' ability to invest in that content.**

- *Press publishers bear the high costs and risks for the production of journalistic content.*
- *Publishers make substantial **investments in human, financial and technical resources** in order to ensure the **quality and credibility** of their works and to comply with applicable legal requirements.*
- *Press publishers make a **creative contribution in selecting and editing** the individual works and other items created by journalists and others, **compiling and incorporating** them into published editions through **editorial direction and production processes**.*
- *Press **Publishers play a pivotal economic, cultural and societal role in Europe** by publishing professional content on any and every topic - under their **editorial responsibility** - in both print and digital forms.*
- *Publishers are essential to the **functioning of a democratic society**, safeguarding freedom of expression and upholding ethical standards in public life*

II. How does the rights situation differ between publishers and other producers

Publishers today, unlike film and music producers or broadcasters – do not possess any rights of their own at European level as regards their published products. Instead, they have to rely on the assignment of exclusive rights conferred on them by their authors. This does not provide sufficient protection or legal

certainty for publishers. While this was an acceptable and manageable situation in the print age, the more complex licensing environment imposed by the digital market place and the way how the published edition has evolved into a dynamic creation needs a solution allowing publishers to fully be able to exercise their rights.

Given the huge investment and resources required to produce professional press and other published content, it is only natural that press publishers should enjoy the same rights as producers from other creative industries, as regards **reproduction** and **communication to the public** (as set out in Articles 2 and 3 (2) of the InfoSoc Directive 2001/29/EC), as well as a **distribution right** (as set out in Article 9 (1) of Directive 2006/115/EC).

At the time of the InfoSoc directive publishers were not yet subject to the mass reproduction and communication to the public that is the reality of today's digital landscape. The very different environment that press publishers operate in today now requires a related right for publishers (which would be **without prejudice to the authors' rights**) at EU level.

III. Why do publishers need a stable legal framework (and in particular a publishers' right)?

To remain competitive and independently financed in Europe's Digital Single Market, publishers need to be able to compete effectively and profitably on all platforms. This requires clear rights that are recognized in the market: **the current lack of clarity benefits those that would like to freeride on the press publishers investment.**

Publishers want to be able to not only simply continue meeting the demands of their readers, but also exceed their expectations, by developing innovative, quality, professional publications in print, fixed screens or mobile devices. Given the huge amount of investment required in particular for digital publishing and its increasing importance to publishers' business models, it is vital that publishers can be confident in this investment.

They need the legal certainty as regards the scope of what is protected so they can monetise their content and enforce their rights when there is unauthorised use by other commercial entities in particular.

Press publishers in Europe make a significant contribution to Europe's economy and jobs. According to data from various studies¹, in 2013 the newspaper and magazine publishing sector employed 528,000 people: more than any other of the creative industry sectors. These figures would be much higher if freelance journalists were also included. The figure could also be multiplied if the jobs in related sectors serving the publishing industry (advertising, printing, technology etc.), were also taken into account. This contribution could be much more significant – and our press sector even richer in content and analysis – with a more reliable and stable legal framework.

Copyright is likely to be - sooner or later - more harmonized, and there is already discussion of a European copyright title. Publishers deserve to be at the heart of the future EU copyright acquis. If publishers are not acknowledged as rightholders by then, unlike broadcasters or film and music producers, they will be **left without any protection in European copyright law in their own right.**

¹ <http://www.strategyand.pwc.com/media/file/The-digital-future-of-creative-Europe-2015.pdf> page 25

IV. How would a publishers' right help?

Adequate legal protection of published editions is of great importance from cultural, societal and economic standpoints and is **necessary to foster the continued substantial investment** made by publishers in published editions, in a similar manner to the protection afforded to the other producers and broadcasters which have exclusive rights in respect of their works as set out in the provisions of Directive 2001/29/EC. This can be achieved without prejudice to other rights in the field of copyright, including the ownership of rights by employers in some member States, by the **inclusion of publishers into the catalogue of rightholders in EU copyright law allowing protection for the published edition, covering:**

- **Reproduction right** (new Article 2 (f) in Directive 2001/29/EC or via a whole new Directive)
- **Right of communication and making available to the public** (e.g. new Article 3 (2) (e) in Directive 2001/29/EC) including a clarification that re-use by third parties for commercial purposes in whole or in part is a restricted act requiring permission, or via a whole new Directive)
- **Distribution right** (new Article 9 (1) (e) Directive 2006/115/EC or via a whole new Directive)

Granting full and exclusive rights to publishers in EU copyright law is indispensable in recognition of the creative contribution, endeavour and investment made by publishers. This will not only enable innovation in licensing of publishers' content in whole or in part for remuneration, but also ensure publishers are among the beneficiaries **of levies and compensation**. In particular:

- **A publisher's right is indispensable in cases of exploitation of large excerpts and whole articles**, Derived rights, which are no longer sufficient for the legal protection of complex, multimedia, and dynamically updated products cannot help in this situation. Enforcement at an individual article level doesn't reflect, or protect, the investment and creative endeavour in commissioning, curating, editing and delivering a complex and dynamic product on a 24x7 basis. E.g., a single right of use, which is usually granted by freelance authors, does not entitle publishers to license beyond the first edition, or to enforce prohibition of use, or claim compensation.
- **A specific right for publishers is indispensable in order to allow to publishers to dispose of their small excerpts and their digital exploitation by digital platforms**. A publisher's right will help fight against **systematic, large-scale exploitation of content in a manner which bypasses publishers' revenue streams** (whether advertising or subscription revenues). This systematic creation and distribution of extracts of press publishers content, is done in a way which amounts to a substitute for using our services. Derived rights cannot help in this situation, as the author's right would not necessarily cover small excerpts. EU copyright needs to **explicitly protect excerpts, which are not necessarily subject to the protection of Article 2 (a) of Directive 2001/29/EC**.
- **Without acknowledgment as rightholders in EU copyright law, publishers have no claim to a share of reprography levies and might have to pay back millions of Euros**. The CJEU has ruled that a compensation with respect to the limitation in Article 5 (2) Directive 2001/29/EC shall be paid out only to those who are mentioned as rightholders in Article 2 of the Directive. However, as press publishers are not mentioned in Article 2 they are thus not entitled to the compensation. A temporary fix in some member states' national laws does not provide a sufficient solution and legal certainty for publishers across Europe, in particular with the increasingly harmonised EU Copyright law we are facing.

- **Without the ownership of rights according to EU copyright law publishers will also be excluded from all other compensative payments** for legally stipulated limitations to the abovementioned rights.
- It is necessary to have clear rights that are recognized in the market: the current lack of clarity benefits those that would like to freeride on the press publishers investment.

Importantly, a publishers' right, by strengthening publishers' economic capacity, would benefit the employees, freelancers and photographers alike. It would allow for further investment in digital skills and the creation of new jobs. This would ultimately benefit the EU's economy and society.

V. How has the market changed for publishers?

Since the advent of the digital age, the publishing sector has undergone dramatic changes. This is evidenced by the fact that today we are able to enjoy a diverse range of professionally produced publications in both print, but also on fixed screens and mobile devices, wherever and whenever we want, including across EU borders. Huge investment in new platforms and products, coupled with innovations in licensing, mean that it is now easier than ever before to access and use publishers' content. With this increased availability and choice, there are more "users" than ever before.

Over the past 10-15 years the market has become more complex, with new entrants, with substantially modified and declining advertising revenues and with new types of uses. This has led to a devaluation of the content that publishers invest in, with this investment often taken 'for granted' and overlooked. In the digital market place where advertising revenues are being increasingly diluted and difficult to capture, press publishers need to become less advertising dependent, and need to have the ability to become more dependent on content revenues. This is critical to continuing to invest in world-class journalism and technological innovation. Publishers are managing the transition successfully. However, it is apparent that in this complex digital market place something is fundamentally lacking in protecting the creative investment of press publishers.

Huge challenges remain for many publishers when it comes to being able to monetize use of their content, with licensing being difficult if not impossible in many cases, particularly when **dominant platforms** are concerned. **Unauthorised republishing by commercial entities is having a devastating impact** on publishers' businesses. Specific threats include unauthorized re-use by other businesses (e.g., search engines, press-clipping aggregators); aggregation of links to articles without proper 'deep linking'; framing, as well as parasitism (i.e. re-publishing major parts of an article without any additional original creative input). On top of that, there is the commercial scale piracy, which threatens publishing businesses.

The impact of unauthorized republishing of content is particularly negative given that readers are **substituting the snippets and short extracts for the full article** (i.e., reading the snippets rather than clicking through to the full article). In such cases, the negative effect is cumulative, combining a lack of revenue from a use that should have been licensed, with the loss of traffic back to the publishers' websites or associated advertising revenues, and is therefore extremely detrimental to publishing businesses. At the same time, these websites are able to monetise un-licensed content via the sale of advertisements through reused content without having contributed anything to the production costs of that content.

For licensing to work, it has to involve two 'willing' parties. While there will always be some unwilling parties who must be dealt with via enforcement measures, the law should make these the minority. At

present, this is not the case, leading to a **“value” gap** between those who invest in the production of original content, and those who redistribute it for commercial gain (who have been able to benefit from a lack of clarity in the law). In fact, **publishers have seen platforms in particular building successful businesses on the back of publishers’ investments, without receiving any remuneration.**

There are also various problems relating to enforcement:

- Lack of the possibility to enforce rights because a specific usage of a part of a protected work is not clearly protected by a right, allowing the devaluation of the creative investment (as mentioned in the examples above).
- Difficulties regarding the enforcement of rights related to the systematic scraping of the publishers platform; i.e. the structural practice of copying many articles including by freelancers, which makes it difficult to enforce cease and desist notices when recipients challenge the publishers’ authority on grounds of lack of ownership of rights.
- Partially derived rights: there are also cases when the publishers need to clear all the rights, sometimes even for the simultaneous first publication offline and online if contracts have not been adapted, even more for second publication, as well as for the archives, even though the publishers originally invested in the creation of that content. Publishers do run into difficulties when enforcing misuse of individual articles if they have to provide for evidence that they have acquired the right for each individual article.
- However, the real issue is having to enforce at an individual article level, **when the bigger problem is systematic use of the content.** Enforcement in respect of individual articles doesn’t reflect, or protect, the investment and creative endeavour in commissioning, curating, editing and delivering a complex and dynamic product on a 24x7 basis.

As explained, we believe that introducing the changes to the legal framework, as set out above, would help to solve these current challenges.

VI. How are the German and Spanish publishers’ rights different?

National laws have been introduced in Germany and Spain to address **specific** issues regarding the exploitation of publishers’ content by third parties. Any European solution for a publisher’s right should be applied without prejudice to such national laws, and must be forward looking, neutral, sufficiently **broad and flexible** to be future proof for the years to come. It must set an overall high standard of protection of freedom of the press, by recognising that a press publication is a creative endeavour and without this incentive to invest, it would not exist.

Europe needs to offer a viable solution aiming to safeguard the press publishing enterprise, as we know it today, for the future. Europe needs to cherish the economic, social and democratic role of publishers.

Press publishers will always be at a disadvantage compared to the big, American players, if scale across the 28 EU Member States is the arbiter of success, and especially when that success has been realised through disregard for fair competition and intellectual property rights.

The internet economy is a low cost economy where there are virtually no barriers to entry, whereas quality journalism is a high cost business. Quality content is expensive and in the face of globalisation, the cultural, media and creative sectors give real value to society as a whole, and Europe's digital future depends on them. Professional journalists need to be paid, trained, resourced and legally protected by their publishers. It is therefore important that a press publishers' right is introduced at European level without delay.

9th March 2016

On behalf of:

EPC - European Publishers Council

ENPA – European Newspaper Publishers Association

EMMA – European Magazine Media Association

NME – News Media Europe