

Briefing for a meeting of GHO with Spanish Minister Ignacio Wert Ortega

19 May 2015 at 12:00

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On Copyright review in general

- The Copyright modernisation is a clear priority for this Commission. The Commission is aiming at the adoption of a legislative proposal before end 2015.
- The reform will not overhaul the current copyright system but will deal with targeted issues to inject more Single Market in the copyright framework.
- The Digital Single Market Strategy adopted on 6/5/15, sets out our objectives in this area:
 - ensuring greater portability of legally acquired content and improving cross-border access to legally purchased online services while safeguarding the European audio-visual sector;
 - improving the legal certainty for certain types of use of content, for example for education and text and data mining;
 - tackling commercial-scale copyright infringements and modernising the cross-border enforcement of copyright;
 - clarifying rules applicable to online intermediaries for the use of copyright protected content, to ensure we have a functioning online market place and that right holders can exercise their rights and licence their content under fair terms;
- We will also launch this year a review of the Cable and Satellite Directive to assess whether its scope should be extended to online transmissions and whether any other measures may be needed in view of improving access to broadcasters' services.
- Overall, a **right balance between the different interests is essential**. While citizens and businesses should be able to provide services and have access to content across borders, copyright must continue to reward and trigger further creation and remain a key driver for innovation and investment in the digital economy.

Neighbouring right for press publishers – only if raised by the Minister, who may wish to know whether the Commission will follow the Spanish or German approach

- It is important to create a regulatory framework which gives incentives to press publishers for investing into new products and content.
- We are closely observing the discussions and legislative interventions in the Member States, notably in Germany and Spain.
- The Commission is interested in better understanding the impact of the new measures on the digital single market and how they will work in practice, particularly after Google's decision of stopping the provision of the Google News services in Spain.

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Defensives

The Commission will monitor the practical implementation of this new exception, particularly after Google's decision of stopping the provision of the Google News services in Spain.

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1. NEW SPANISH LAW: EXCEPTION FOR NEWS AGGREGATORS

a) Member States' legislative initiatives related to news aggregators

As an online news aggregator, Google News offers internet users access to news published in the press, by providing, together with hyperlinks to pages or articles in different newspapers' websites, the headlines and the first lines of press articles. This has led to litigation in a number of Member States (notably in Belgium and France). In France Google reached an agreement with press publishers in 2013 (by establishing a 60 million-euro fund to support French press publishers). In reaction to this type of situation, two EU Member States (Germany and Spain) have put forward legislative initiatives to address press publishers' concerns on this issue.

Google has been critical to these legislative initiatives and claimed that his activity benefits press publishers by increasing the traffic in their websites.

The effectiveness of the German law (in force since August 2013) is still to be confirmed, since Google News announced last year that it would not aggregate news snippets from those press publishers who want to exercise (be remunerated for) the new neighbouring right. As a result, most publishers have preferred to be aggregated by Google News against no remuneration.

The new law in Spain came into force on 1 January 2015. Google reacted to the adoption of the law in a similar way as in Germany. However, the compensation due to press publishers cannot be waived in Spain and is subject to compulsory collective management, so Google decided to stop the provision of the Google News services in Spain, as from 16 December 2014. This has given rise to a controversy amongst press publishers, who claim Google has refused to negotiate any compensation and has reacted based on its dominant position.

a) The Spanish law

In the context of the ongoing copyright review, a proposal addressing the activities carried out by online news aggregators was included in the law which was adopted on 4 November 2014.

According to this provision, a new exception has been added to the list of exceptions and limitations to copyright and related rights provided for under the Spanish law. Consequently, news aggregators do not need an authorisation from the relevant right holders to make news snippets available to the public.

This new exception, included in the law under the existing 'quotation exception', is subject to the payment of an equitable compensation to the publishers or authors of the original press articles. This compensation cannot be waived and is subject to mandatory collective management. The exception will not be applicable to images or photographs. For the latter, the exclusive right of the relevant right owners remains.

The provision exempts search engines from the obligation to pay a compensation if the use of the snippets does not have a commercial purpose and if they link to the website from which the content originated.

Stakeholders (i.e. collecting societies and news aggregators) will be given the possibility to reach an agreement regarding the tariffs and their calculation. Lacking such an agreement, an administrative body would determine the tariffs.

b) The German law

The German law, which entered into force in August 2013, created a neighbouring exclusive right for press publishers (also referred to as "ancillary right"). This right lasts for one year. As a result, news aggregators need to be explicitly authorised by the right holders to use snippets.

This new neighbouring right is therefore added to the existing rights of authors (e.g. the journalists), which are in any event often in the hands of the press publishers (under transfer or licensing agreements or, in some Member States, by a legal fiction that vests the rights in the publisher).

One year after the adoption of the law, its effectiveness remains unclear. Only certain publishers have chosen to claim their exclusive right against news aggregators. VG Media, the collecting society tasked with collecting the remuneration on the basis of the ancillary right, filed a complaint against Google with the Federal Competition Authority. In August 2014, the complaint was dismissed on grounds of inadmissibility. Also in August 2014, Yahoo News filed a constitutional complaint against the law with the Federal Constitutional Court. Meanwhile, Google News has recently announced that it will not aggregate news snippets from those press publishers who want to exercise (be remunerated for) the new neighbouring right.

c) Comparison between the Spanish and the German laws

Both aim at the same result (i.e. payment to press publishers for the use of their works by news aggregators), but differ in, at least, the following elements:

- The German law creates a new exclusive right concerning the use of snippets, while the Spanish law provides publishers and authors with a compensation which stems from a new exception to the existing exclusive rights.
- The German law requires that news aggregators seek the authorisation of the press publishers to use snippets (i.e. negotiate the licence). This may result in no payment if the bargaining position of press publishers is weak (e.g. compared to Google) as a licence can always be given "for free". The compensation for the quotation exception under the Spanish law cannot be waived and is subject to compulsory collective management.

d) Preliminary assessment

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