

Kommissar Oettinger & ES Secretary of State Victor Calvo-Sotelo
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OUT OF SCOPE

Copyright – in Spain

- We have followed with interest the discussions leading to the approval of Spain's new Copyright Act.
- We take note that elements of the Commission's Action Plan on Enforcement are shared by the new Spanish law (e.g. the "follow the money approach", with the involvement of advertising service providers and payment services) – so there is much scope for us to work together.
- The Commission is interested in better understanding the impact of the new measures on the new exception for online news aggregators on the digital single market and how they will work in practice - particularly after Google's decision to stop the providing Google News services in Spain.

Copyright - EU

- At the EU level, copyright will be at the centre of the action of the new Commission in the context of the digital single market policy – as outlined by President Juncker.
- We will present a legislative proposal on copyright later in 2015. The objective is to modernise copyright in the light of new technologies and consumer behaviour, in the overall context of the Digital Single Market.
- We need to modernise copyright to make it fit for the Digital Single Market. We want citizens and businesses to access and exercise online activities. At the same time we want to make sure that copyright remains a driver for creativity and investment.
- We are looking forward to working, in partnership with Member States and the Parliament, on a balanced copyright modernisation initiative.

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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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3. EU COPYRIGHT POLICY – STATE OF PLAY

A. *Current situation*

The EU copyright acquis is a set of ten directives, the main of which is the Directive on Copyright in the Information Society ('InfoSoc Directive'). In addition, the Directive on the Enforcement of Intellectual Property Rights ('IPRED') covers horizontal civil enforcement aspects valid for all forms of intellectual property, including copyright. This acquis provides for a high level of copyright protection and has harmonised the key author and neighbouring rights and, to a lesser degree, exceptions and limitations to copyright. These are listed in EU directives but most of them remain optional for Member States to implement.

The Barroso II Commission developed policy and legislation on a number of specific copyright aspects, including the proposal and adoption of the directives on Orphan Works and on Collective Management of Rights, a Memorandum of Understanding on Out-of-commerce Works and a stakeholder dialogue to foster licencing solutions (Licences for Europe). The often heard argument that the Commission "has not done anything on copyright recently" should therefore be rejected.

There is however a wide expectation, buttressed by the announcements and political guidelines of President Juncker, that the new Commission will introduce further reform proposals covering certain 'core' aspects that have not been revisited since the adoption of the InfoSoc Directive in 2001. The modernisation of copyright has been formally included in the Commission Work Programme for 2015. Such modernisation can be delivered based on a review carried out recently by ex-DG MARKT, including a number of legal and economic studies. This has assessed the functioning of the current framework, the need to adjust certain rules and the impacts of possible changes, in particular on issues such as territoriality of copyright and exceptions. The new Commission will need to decide how to proceed with such reform prospects.

B. *State of play of consultation*

The Commission carried out a public consultation on the review of the EU copyright rules between December 2013 and March 2014, covering a large number of issues. Almost 10,000 replies were received, including from 11 Member States.

Furthermore, the Council Working Party had some exchanges of views during the Greek Presidency of the EU (first half of 2014). Discussions are also taking place in some Member States (e.g. DE, UK, ES, IE, AT, FI, SK, HR), either around national legislation reforms or the role of copyright and copyright enforcement in the digital economy more generally. The UK, ES and SK have recently introduced changes to their national laws.

In the European Parliament, MEP Pavel Svoboda (EPP, CZ), the new chair of the JURI Committee (which traditionally has copyright in its competences) has set up an inter-group on copyright, while the only Pirate Party MEP, Julia Reda (Greens/EFA, DE) was appointed rapporteur on an own-initiative report on the implementation of the InfoSoc Directive and has held a series of hearings on the matter. Her draft report was published on 19 January 2015.

C. *Main positions of stakeholders, MEPs and Member States*

Very different views were expressed during the public consultation by stakeholders, with users and institutional users (consumer organisations, libraries, cultural heritage institutions, etc.) calling for a review of EU copyright rules to facilitate access to content and right holders (authors, publishers, producers, etc.) largely considering that the current rules remain appropriate in the digital environment. Generally speaking, the stakeholder environment is very divided, although positions vary in tone and content depending on the issue at hand. A detailed overview is available in the report of the consultation mentioned above, available here: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.

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D. Possible ways ahead and possible timelines

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⁶ On average in 2008-2010 (source: European Patent Office - Office for Harmonization in the Internal Market, *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union*, September 2013).

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