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**EPC** | European  
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## **EPC DRAFT POSITION PAPER: PRESENTING THE CASE FOR A PUBLISHERS' EXCLUSIVE RIGHT**

To remain competitive and independently financed in the European Digital Single Market publishers need to be able to compete effectively and profitably on all platforms.

Europe has a long standing tradition a free press which is the fruit of centuries of democracy, and press publishers' investments are the essence of a free press.

Publishers have over the past decade managed successfully an important period of transition from analogue to digital. To fulfil the potential of exploiting efficiently past and new content on digital platforms, engage with new business partners and licence new uses - B2B in particular, is of crucial importance to ensure a sustainable growth of Europe's diverse publishing sector.

When it comes to copyright and licensing, the situation online is far more complex than offline. The potential of the publishing sector can only be reached with the support of an appropriate legal framework which (a) values the content for which publishers bear the investment risk, and provide financial, commercial and legal resources for, carry legal responsibilities and which (b) supports licensing.

If a licensing solution is going to work it has to involve two 'willing' (or mandated) 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.

Therefore, the legal and regulatory framework has to **provide two new solutions**:

- (i) **Re-balance the bargaining power**, in order to remove incentives to ignore licensing options, so that licensing becomes a better option for both sides.
- (ii) **Unequivocal conditions to licence the current range of unauthorised activities**. The untapped potential for revenues for publishers and authors from what is currently extensive and unauthorised re-use of publishers' content is substantial.

The EU copyright framework is thus more important than ever to incentivise and reward the

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making available of professional content, not only to the public, but also through business to business, and institutional licensing. It is important to clarify that in this paper we are focusing not on individual readers or users, but on the many instances in which other businesses monetise our content without authorisation or payment. To appreciate the extent of unauthorised (and unpaid) activity today, and therefore the untapped potential for future business relationships, please find at Annex 1 an analysis of activities where content is taken without permission.

The situation in which publishers find themselves today has been exacerbated by several factors:

- The very first experiments on the web by newspapers 'giving away' their content for free has led to slow acceptance for subscription models on the web, with publishers becoming overly dependent on online advertising revenues to a greater extent than ever in print.
- The increasing entry of new market players, becoming the new distributors of news media content, sometimes in whole or in part, often without authorisation.
- Continuous investment costs during transition from print to digital, including the redesigning of newsrooms, technology transition in operations, training for new skills, adaptations to new models of financing etc.
- A challenging rights clearance situation due to the fact that in many European countries publishers do not always have the necessary rights beyond those for first publication. This makes it difficult to exploit fully the opportunities offered by digital, let alone constitute publishers' own archives through mass digitisation projects.
- With the arrival of digital, publishers in most European countries have invested resources and processes in adapting contract by contract the assignment of rights from their contributors, journalists, photographers and freelancers, to be able to secure the exploitation rights beyond the first publication and to be able to enforce rights in case of infringements regarding individual works.
- Recent case law on the communication to the public puts digital press publishers in a particularly fragile situation as this case law allows for reuse of content on a publishers website without any pay wall protection, thus depriving publishers of the possibility to request a licence for any third parties' commercial use of that content<sup>1</sup>. While publishers want their individual readers to be able to access the content and to link it further (through an implicit licence), third parties with commercial purposes, linking to the publishers' content should to be subject to authorisation and possibly a payment.

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<sup>1</sup> Svensson/Retriever C-466/12, main conclusion is that linking to content that has been published on a website that is freely accessible, and not beyond a pay wall, there is no new communication to the public. BestWaterInternational/Michael Medes C-348/13 indicating that embedding content from another website does not constitute a communication to the public published on a website that is freely accessible, and not beyond a pay wall.



## Impact of unauthorised uses

Unlicensed republishing by commercial entities has a direct impact on content revenues, as well as resulting in the indirect cost of lost audience for advertising as shown in Annex 1.

According to recent statistics **produced by the Belgian press publishers associations**, 6% of the articles that appear in printed newspapers and 27% of articles that appear on newspaper websites are reused without a licence.

The unauthorised use of content take the following forms:

- piracy (i.e. copying all or part of an article)
- parasitism (i.e. rewriting an article without any original creative input)
- aggregation of links to articles without proper deep linking.

Websites using piracy, parasitism or aggregation often market non-licensed content via the sale of advertisements through reused content without having contributed to the production costs. Moreover, the reuse of content without a licence leads to an estimated loss of licence revenue amounting to around EUR 27 million due to piracy and EUR 7 million due to parasitism. Added to this is the lost advertising revenue. See methodology used in appendix.

Newspaper and magazine websites lose page views because their articles can be read elsewhere in pirated, parasitized or aggregated form. In addition, copy-pasting and rewriting or sharing articles without a licence lead to a devaluation of newspaper and magazine brands and of the professional online written press in general.

## What is needed?

As shown above, in order to find a sustainable future in the online environment, to be able to grow, to become profitable and continue to invest in and produce new high quality professional content publishers need a balanced legal framework allowing them to fully exercise their rights.

### 1. A Publishers' Right

Most European copyright laws have traditionally introduced related rights for three categories that are closely involved in content creation, i.e. performing artists, phonogram producers and broadcasting organisations. Publishers today are in a similar situation as the above three categories. Due to the predominance of the physical distribution model for so many years (for newspapers, magazines and books) and the fact that the high value of press content is ephemeral did not present the need for additional rights in the physical distribution world. Now publishing has evolved and is changing radically and for good. However, the needs and role of the press, and investments in content remain unchanged. The so-called cable/satellite directive addressed a similar situation for the cable redistribution of broadcasters' programmes when the free-to-air



terrestrial signal of national broadcasters was being re-transmitted by cable and satellite operators without permission.

The specific situation with news is that in many cases, as indicated in a recent PEW study, the snippet and short extracts are now a substitute for the full article; i.e. a situation where the very short display is actually replacing the desire to go to the full article as readers seem to be satisfied by the short displayed content, which is not creating traffic back to the publishers' websites or associated advertising revenues.

The creation and production of original news content is costly and labour-intensive. Yet publishers today are in a weak position. The fact that publishers do not always have the online rights makes it difficult to exercise and enforce rights. Enforcement also bears with it high judicial costs and excess bureaucracy in courts with uncertain outcomes. Publishers also have practical difficulties in proving that content is being used for commercial purposes and have little or no negotiating power with dominant players.

In today's competitive market it has become impractical that for the protection of their investments in content production, publishers are still entirely dependent on a contractual relationship with the author

Therefore publishers are calling for the restoration of fair competition for all media, by granting to publishers a related right to protect their investments and to enable the exploitation and protection of both paper and digital versions of their content.

A reinforcement of the legal position of the publisher need not affect the copyright position of the author. A specific legal publishers' right in the form of a related right can be introduced without prejudice to the right of the author to his work. The publishers' right aims to protect the investment in the final products and services of the publisher, while the publisher-author relationship continues to be governed by the contractual agreement between publisher and author.

A specific neighbouring/related right for publishers would strengthen the publishers' economic capacity; for press publishers it would benefit the employees, freelancers and photographers alike. The risk of a declining workforce due to lack of capacity to compete in the digital environment would be diminished, and importantly it would allow for investments in digital skills and the creation of new jobs.

## 2. Communication to the Public of Publishers' Content

Several relatively recent developments show the necessity to tackle by legislative means systematic unauthorised scraping for commercial purposes of publishers' content and the negative outcomes of recent case law (referred to in footnote 1).



The unlicensed use of excerpts from content on media and publishers' websites by search engines and aggregators which, as a distillation of articles, may substitute for the articles and result in substantial loss to the publishers of those sites is an increasing problem that publishers in Europe.

While publishers must be able to allow their individual readers to share and link content that is made freely and openly available on the publishers' websites for the general public, a third party who wishes to use that content in the form of text, hyperlinks or through framing - all for commercial purposes - a new communication to the public for such uses must be granted by the publisher. If not we will witness continuous erosion of press publishers' ability to further control the exploitation of their investment.

Many other creative sectors are facing similar consequences from the recent case law on how the communication to the public has been interpreted in relation to hyperlinking and framing. EPC already raised its concerns on hyperlinking and framing in its recent Copyright Vision Paper: "Copyright enabled on the Network", published in 2014<sup>2</sup>.

Attached:

Annex 1 : Examples of reuse by third parties without permission and for commercial gain

Annex 2 : Table of legislative options

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<sup>2</sup> <http://epceurope.eu/issues/our-copyright-vision/>



## Annex 1

### Examples of reuse by third parties without permission and for commercial gain

#### I. News Aggregators:

- **Consumer-oriented** news aggregation services, which also include websites focused on a specific region. Such aggregators take, store, reproduce and distribute the publishers' content reproductions of articles or extracts of articles, together with pictures and headlines, from various press sources by crawling the publishers' sites without prior authorisation. Due to the pooling of the news sources, news aggregators become a destination for users.
- **Business-oriented** services that make a profit either by advertising revenues, or by subscription models, based on the selection of third parties' content, for example, by placing content in a 'news portal' to attract professional customers at a profit. For example, so-called "harvester" companies, which discover content on the Internet via an automated process, copy it, and pass it on to their customers, offering a paid-for keyword research for newspaper and other published pages. The results are provided to their customers, using the logo of the newspapers and magazines, and extracts of about 50 words from articles, on a password-protected server are also sent to customers on request.

#### II. Search Engines:

Some activities of search engines can result in copyrighted content being made available from in "cache" memory, without prior authorisation by the rightsholders, even when the content has been placed in the paid-for archives of the publisher or behind a paywall.

#### III. Re-use of articles, images, video and classified ads:

- Third parties, for example websites for a specific profession, (as well as some content aggregators) are using publishers' content by copy-pasting the articles, images and videos with little or no changes. For example, an IT company scanned without the permission of the relevant publishers about 23,000 articles from newspapers in one EU Member State. The articles were offered on a website for downloading.
- Press-clipping and media monitoring companies acting without permission or/licensing from publishers creating searchable databases with thousands of articles. Summaries of press articles sent to customers by email, with selection criteria by means of a 'data capture' process.
- Systematic deep links services providing direct links to published articles and bypassing the front page of the newspaper or other publications, or bypassing authorization tools.



- Systematic copying of news articles for internal use e.g. public institutions and private companies that reproduce publishers' content on their intranet and even on their Internet sites for marketing purposes.
- Using advertising to monetise content, a commercial company made newspaper articles dealing with that company, available on its website to the public without due payment to the publisher.
- Newspapers' classified ads reproduced and re-used for commercial purposes.

#### **IV. Cyber-lockers, file sharing sites, "peer to peer" sites, and indexing sites for infringing content**

Numerous websites exist for the purpose of encouraging illegal "sharing" of news, magazines, journals, books and other cultural products.

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