



The impact of ancillary rights in news products

In this briefing document, EDiMA seeks to summarise research available on, so-called, “ancillary rights” in news, so as to contribute towards an open and evidence-based policy making process. All research cited – economic, empirical and legal - is publically available.

The research demonstrates an overwhelmingly negative impact for consumers, for news publishers and for innovation in countries which have attempted to create such ancillary rights. Research also highlights key legal issues such as compliance with international law and respect for fundamental rights.

Furthermore, there is compelling evidence that online services are increasing the opportunities for news providers to reach their audiences online and develop their business in the digital age and online services are increasing pluralism, media diversity and access to information for EU citizens.

The impact of an unworkable and invalid concept

Negative impact on innovation

The laws in Spain and Germany concerning ancillary rights still appear to face near-insurmountable challenges in their practical implementation. Their scope is very broad, affecting many online activities, including linking and quoting and many services, from websites to apps. Moreover, they touch upon a vast array of creative works, as “news” is a malleable legal concept encompassing content that is regularly updated.

Small innovative companies are impacted as a result. For smaller European companies ancillary right provisions represent a strong deterrent because of the legal uncertainty and the enforcement through collecting societies. These concerns were already raised before the adoption of the law in Germany, but were not taken into account. In Spain, Planeta Ludico, NiagaRank, InfoAliment and Multifriki have already closed down, in addition to Google News (AEEPP/NERA, 2015).

Ancillary rights would also create a competitive advantage for already established, successful online services, making it harder for new European companies to compete and develop new services. There is a wealth of scientific opinions supporting this view, from the Max Plank Institute to the report of the Spanish Competition authority.

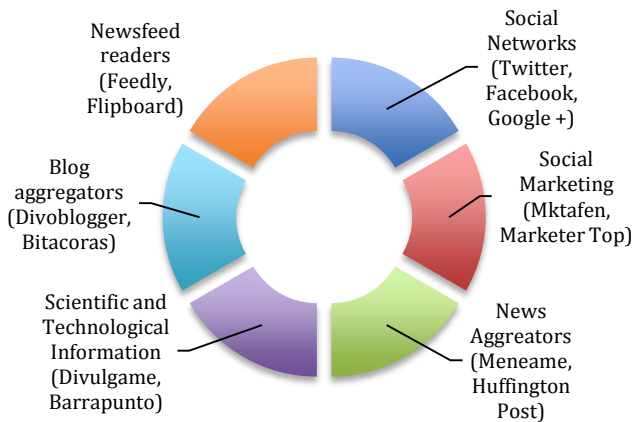
European start-ups hit by ancillary rights

“The development of mobile apps sorting information and data, an area with an interesting future, will remain curtailed in Spain”, Niagarank, a now closed product of Spanish start up CodeSyntax, employing 15.

“A legal dispute with [the German publisher association] would have dragged on for years, finally leading to bankruptcy of tersee.de - regardless of the outcome. Four years of intensive research and development would have been for vain. We thought about removing German media from our search index and to relocate our headquarters abroad”, Mikael Voss, from tersee.de, a German start-up.

Other start-ups and services already affected in Germany and Spain include Radio Utopia (news agency), Unbubble.eu, Links.Historische (news for historians), Rivva (blog aggregator), Nasmua.de (news search engine), Newsclub.de, commentarist.de, DeuSu.de, Planeta Ludico, NiagaRank, InfoAliment, Multifriki, Meneame, Astrofísica y Física, Beegeinfo...

Services impacted - Spain



Services and publications that rely on disseminating content under creative commons type licenses cannot escape the law. Similarly, scientific publications that rely on open access, e.g. Public Library of Science, would see a fee collected for the circulation of their information (Xalabader, 2014). This hampers innovation and knowledge sharing in Europe.

Negative impact on news publishers and pluralism

The introduction of ancillary rights creates significant problems for news publishers in Europe, which has led to a number of news publishers already condemning the creation of those rights.

Ancillary rights act as a **barrier to competition and pluralism**, by making it harder for publishers to reach their readers online. Smaller publishers, regional publishers or new online news publishers are disproportionately affected, suffering a competitive disadvantage. In Spain, the decline in traffic following the adoption of the law saw **smaller publishers losing twice as much traffic as large publishers** (AEEPP/NERA, 2015).

Ancillary rights make it harder for news publishers to generate online traffic, creating more obstacles to the dissemination of their content. In Spain, **the loss for the news publishing industry, suffered predominantly by smaller, free or online publishers, is estimated to reach EUR 10 million a year**. The reduction in traffic threatens their advertising revenues (AEEPP/NERA, 2015).

The **property rights and freedom to conduct a business of publishers** is negatively impacted by the creation of these rights. Publishers are forced, through the Spanish law, to charge a fee, through the intermediary of a collecting society, for the dissemination of their news products online.

The **global competitiveness and diversity of domestic European publications** suffers. European publications such as the Daily Mail and The Guardian – respectively the 4th and 5th largest global audiences for news in 2014, Comscore – would find it harder to use online channels to reach their audiences. According to the Max Planck Institute the availability of local domestic content will be reduced and non-domestic content will be more visible (MPI, 2012).

Sources:

- Max Planck Institute for Intellectual Property and Competition Law, *Statement on the draft law for an amendment of the German Copyright Act (Urheberrechtsgesetz) to include ancillary copyright for publishers*, 27 November 2012. Available in German [here](#).
- AEEP, *Open Letter to Commissioner Oettinger*, 10 December 2014. Available [here](#).
- El Confidential, *“Cebrián dinamita el 'lobby' de la prensa”*, 7 July 2015. Available [here](#).
- *Schweizer Radio und Fernsehen*, *“Schweizer Verleger geschäftig mit Google”*, 11 December 2014. Available [here](#).
- *Der Standard*, 22 June 2015

Publisher views on ancillary rights

“There is a formidable consensus that no-one likes the law”; “as long as I am president of Prisa, no part of the media group will collect the [Ancillary Copyright] fee”, Juan Luis Cebrián, CEO of Prisa (owner of leading Spanish publication such as El País, Diario AS and Cinco Días).

Rainer Esser, CEO of German weekly “Die Zeit”, refers to the German law as a **“hazardous construction”**.

“This legislation is a step away from a competitive and diverse press. It will only make it harder for us to compete with other news outlets”, Arsenio Escolar, Spanish Association of Periodical Publications, Benedetto Liberati, President of the Italian Online Publishers Association, Alexandre Malsch, Co-founder and CEO of meltygroup, Tomasz Machała, CEO and Editor-in Chief, naTemat, Łukasz Mężyk, Founder & Editor-in Chief, 300polityka.

“The very few large and international publishing houses [...] want to prove that despite their dwindling journalistic influence, they are still in a position to instrumentalise parliaments in Europe for their purposes and to create obstacles for unwelcome competition. In my opinion, those few large companies have never been after the ancillary copyright per se, but after strengthening their future bargaining position [...]”, Wolfgang Blau, The Guardian, Director of Digital Strategy.

Hanspeter Lebrument, President of the Swiss media Association: the adoption of the Spanish law is **“shooting yourself in the foot”**.

Negative impact on consumers and citizens

Ancillary right type laws create **increased search costs for consumers**, as it makes it harder for them to access news from aggregators, apps, blogging services, social networks etc. In Germany, 57% of the consumers find text “snippets” helpful (Bitkom, 2015).

The choice and diversity of news sources available to consumers is also reduced.

Reduced access to online news aggregation services results in **users being less likely to investigate additional, related content in depth** (Chiou and Tucker, 2015).

Concretely, in Spain alone, this mean a **loss of EUR 1.85 billion a year for consumers – in so-called “consumer surplus”** (AEEPP/NERA, 2015).

Links, without context, are practically useless to consumers and Internet or app users. Without small extracts of text, links in apps and on the Internet would be reduced to “[blue URLs](#)”. URLs themselves often include text for instance using the title of an article. This is why the Max Plank Institute clearly states that “copyright law cannot be applicable in such cases, as otherwise **the use of links which contain minimum indications of the content to be found would often be blocked**”.

There would be a clear impact on the ability of Europeans to exercise their right to information (accessing information online), a chilling effect on freedom of expression and broader social and economic consequences from such a course of action.

EU citizens also exercise their own freedom of expression online, using many online tools and services that will be affected by an ancillary right. As an indication of the scale of those activities, in 2013, over 20% of EU news users engaged in some form of news commentary every week. Close to 8% commented on news stories online, over 2% wrote blogs on news or political issues, over 3% sent news videos or pictures to a news website (Reuters Institute, 2014).

Sources:

- *Reuters Institute for the Study of Journalism and Oxford University (2014), Reuters Institute Digital News report 2014. Available [here](#).*
- *Lesley Chiou and Catherine Tucker (2015), Content Aggregation: The Case of the News Media, NET Institute Working Paper No. 11-18. Available [here](#).*
- *Pedro Posada de la Concha, Alberto Gutiérrez García and Hugo Hernández Cobos (2015), Impact of the New Article 32.2 of the Spanish Intellectual Property Act, Conducted by NERA Consulting, Commissioned by AEEPP. Available [here](#).*
- *Bitkom (2015), Ancillary Copyright for Publishers – Taking Stock in Germany. Available [here](#).*

Distortions of copyright and legal impact

Ancillary rights for publishers **distort copyright law**, using copyright to subsidise a part of the news publishing industry (Xalabarder, 2014). The Max Planck Institute adds that “[i]ndustrial property rights are only required where such a market failure is imminent. This situation does not exist in the case of published works in relation to aggregators.”

The 1886 Berne Convention protects the right to quote from newspaper articles, the only mandatory exception under international law. Incorporated under EU law via the TRIPs agreement, **restrictions against quotations rights infringe EU and international law** (Xalabarder, 2014).

Restricting the ability to link meaningfully with accompanying words of context infringes the right to **freedom of information** and the right to link (MPI, 2012).

The obligation to charge a fee administered by a collecting society infringes **the right of rightholders to conduct a business and their right of property** – or to dispose thereof (Xalabarder, 2014). This includes the loss of the ability to apply creative commons licences and to allow indexing, linking and sharing freely to one’s works.

Ancillary rights generate **legal uncertainty**, as they create rights which are ill-defined and overlap with the existing rights of publishers and journalists, to such an extent that “circumstances in which the right is based can scarcely be rewritten” (MPI, 2012).

Sources:

- AEEPP/NERA, *ibid.* Available [here](#).
- MPI, *ibid.* Available in German [here](#).
- Raquel Xalabarder (2014), *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, IN3 Working Paper Series, WP14-004, Internet Interdisciplinary Institute. Available [here](#).
- Bundestag Expert Hearing (2014), “Experten für den Wegfall des Leistungsschutzrechts”. Available [here](#).

Academic opinions on ancillary rights

Max Planck Institute for Intellectual Property and Competition Law: “*When considered overall, the [bill does] not appear to have been well thought-through. Furthermore, it is not possible to justify the draft with any objective argument. Even the publishers are not fully supportive of the measure*”.

Prof. Raquel Xalabarder, Universitat Oberta de Catalunya: “*The proposal amounts to an attempt to subsidise an industry at the expense of another and it does so by distorting copyright law rules and infringing EU law and international obligations*”.

Prof. Dr. Gerald Spindler, University of Göttingen: “*The [law] is a strange entity in copyright law and is posing several problems which can’t be overcome effectively.*” “[*It needs to be abrogated as press products cannot be differentiated from other parts of texts. Even the weather forecast is covered by the AC*”.

Prof. Dr. Axel Metzger, Humboldt University Berlin: “*The [legislation] is a lobby-driven law*” and “*created a massive bone of contention in the information society. Legislation in this field seems half baked and lobby-driven*”.

Prof. Dr. Thomas Hoeren, University of Münster, “*The introduction of [the legislation] has been a disaster. One needs to have the courage to abolish it again. [...] Actions taken by the [German publisher association] have been a confession of failure and the explanation for this behavior are embarrassing*”.

A destructive solution in search of a problem: digital technology is a positive force for pluralism and news publishing in Europe

In search of a problem

Research shows that there is no “substitution effect” – online services using links and snippets are not substitutes for news articles and do not reduce traffic to news websites or apps (MPI, 2012; Spanish Competition Authority, 2014; Chiou and Tucker, 2015; AEEPP/NERA, 2015).

Instead, online services drive online viewers to the websites of news publishers, who then generate revenue from advertising and / or subscriptions (AEEPP/NERA, 2015).

Further, news and other publishers can opt-out simply of the various online services that provide links or snippets (Spanish Competition Authority, 2014).

Consumers use a vast number of different online tools to access news and inform themselves (Reuters Institute, 2014) – meaning publishers of news or others are not reliant on a single service to reach their readers.

Sources:

- AEEPP/NERA, *ibid.* Available [here](#).
- MPI, *ibid.* Available in German [here](#).
- Chiou and Tucker (2015), *ibid.* Available [here](#).
- Comision Nacional De Los Mercados Y La Competencia (2014), “Proposal on the Amendment of Article 32.2 of the Bill to amend the recasted Intellectual Property Act”, PRO/CNMC/0002/14. Available [here](#).

Consumers use a broad mix of services to access news

In the EU (UK, FR, IT, ES, DE, FI, DK), according to the Reuters News Institute, close to 40% of news users directly access news via the website of a news brand. Other tools include email, social networks, news aggregators and micro-blogging services.



Online services increase diversity and pluralism

European online news users access significantly more news brands than offline users. Users of social media, mobile apps aggregating news and search tools read more diverse news sources.

	UK		FR		ES		FI		IT		DK		IE		DE	
	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users	Online users	Offline Users
# of news brands accessed	4.28	2.8	6.12	3.28	6.83	4.13	6.12	3.96	7.05	4.61	6.61	4.47	7.07	4.88	7.07	4.64

Number of news brands accessed, comparison between online and offline news users. Source: [Reuters](#), 2015.

News aggregators allow readers to consume more news overall (AEEPP/NERA, 2015).

French readers are found to consume more news, especially local news, when their news portal service is relevant to their geographical location (Athey and Mobius, 2015).

Internet users in Germany and Italy visit new, smaller sites for their information, in addition to their usual sources. The Italian Institute for Policy and Data Valorisation finds that services such as search engines are significant in allowing smaller, alternative sources to be discovered and gain traffic.

Sources:

- Susan Athey and Markus Mobius (2012), *The Impact of News Aggregators on Internet News Consumption: The Case of Localisation*, Preliminary research presented at seminars at Microsoft Research and Toulouse Network for Information Technology. Available [here](#).
- Luca Bolognini et al. (2014), *The Effects of Search Engines on the Pluralism of Information*, Italian Institute for Policy and Data Valorisation. Available [here](#).

European publishers leading in digital

Digital sales of The Economist have risen 47% in one year. Over two thirds of the FT’s total paying readership is online (and its digital circulation is growing 33% per year) and mobile is now generating 50% of total traffic. At the Guardian, print revenues remained stable in 2014 but digital revenues increased 24%.

In Germany, Axel Springer reports that more than half of revenues for 2014 were generated from digital activities and an increase in profits of over 13%.

In Italy, two of the larger national newspapers have successfully implemented paywall strategies. Italy’s RCS Media Group, owner of the Corriere della Serra, reported that for the first nine months of 2012, some 20% of paid circulation came from digital subscribers and that digital revenues accounted for around 15% of group revenues.

Sources:

- Reuters Institute, *ibid*. Available [here](#)