Who we are

1. Open Rights Group (ORG) is the United Kingdom's only campaigning organisation dedicated to working to protect the rights to privacy and free speech online. With 3,200 active supporters, we are a grassroots organisation with local groups across the UK. We believe people have the right to control their technology, and oppose the use of technology to control people.

Summary

2. The European Commission has published a Draft Directive *on copyright in the Digital Single Market* (DSM) as part of a wider package of reforms. In this submission we will concentrate on the DSM Directive, and particularly on Articles 11 and 13 that create a new publishers' right and new obligations on online service providers, respectively.

3. ORG is very disappointed that the new Directive will complement and not reform current legislation such as the Infosoc Directive, although there are some minor technical modifications. This limits the possibilities for reform in key areas such as Digital Rights Management.

4. These very limited proposals are a wasted opportunity, given the past two years of pre legislative discussions about comprehensive copyright reform. The EU is about to throw away the first chance in over a decade to adapt copyright to the digital world, instead choosing classic protectionism for incumbent creative and media industries. These measures will not promote the creation of a vibrant digital industry in Europe capable of standing up to Silicon Valley - as EU policymakers ostensibly want.

5. We are broadly supportive of the limited mix of initiatives included elsewhere in the Directive that include some mandatory limited exceptions for culture and education and measures to help improve remunerations for creators, but in the main are concerned over such a transparent and unbalanced effort at supporting right holders.

6. Whatever shape Brexit eventually takes, this is an issue for people in the UK. If the UK remains in the European Economic Area like Norway, the DSM Directive will apply in full. Even in the event of a very hard Brexit, it is almost certain that UK citizens will be affected, as officials from the Intellectual Property Office have informed us that they intend to make sure that the Directive becomes UK law before the completion of the Article 50 process. The IPO should fully engage with this reform and support the removal of articles 11 and 13.

7. There are other initiatives in the wider package, including: a Regulation for online broadcasting, implementation of the Marrakesh treaty on accessibility for the visually impaired, a broad package on copyright enforcement and more provisions to promote European works. We are not discussing those in this submission.

Article 13: Filtering

What is being proposed

8. Proposals in Article 13 would force online service providers that store and provide access to large amounts of content to monitor and filter user uploads identified by rightsholders as infringing copyright. Service providers will have to give the owners of the copyrighted materials - such as the music and film industries - detailed information on the functioning and deployment of content recognition technologies or other similar measures. Unprecedentedly, now record labels and movie studios will have a say in the internal technical and business processes of online service providers.

9. This means that any websites where users can upload a file that can then be watched or listened to will have to put in place some technical filter to check that the files being uploaded do not breach copyright. The proposed measures in the DSM Directive are aimed squarely at Youtube but will affect any online service providing similar facilities, large or small. Internet communities such as Reddit, Soundcloud or Tumblr where users can upload certain types of media would be forced to implement *content recognition technologies*, which automatically check files against known databases of images, music and films.

10. Teenagers will see their dance routines and holiday videos taken down, campaigners parodying popular culture to get their messages across and even news organisations will see their content automatically blocked. The European consumer association BEUC carried out a survey in 2015 that showed that copyright experts could not agree whether an online remix or mashup was legal or not.[1]

11. Open Rights Group finds these proposals extremely concerning and would recommend their deletion.

The value gap

12. The reforms have been preceded by a lobbying effort by rightsholder groups to create the policy justification for these measures. This has been achieved through

[1] http://www.beuc.eu/publications/beuc-x-2015-063_consumer_use_of_copyrighted_material.pdf

the successful introduction of a new concept in the analysis of the digital market: the "*v*alue gap*".* This is defined as the difference between the income generated for rightsholders from subscription based streaming services such as Spotify Premium and the income generated from media being distributed through sharing platforms such as Youtube and ad-based services such as the free tier of Spotify. The basic argument is that ad-based streaming displaces sales of subscriptions and does not a similar level of revenue. More broadly the value gap is defined as the mismatch between the media enjoyed by consumers and the revenues returned.

13. The music industry has been the main proponent of the idea of the "value gap", through open letters[2] and interviews with high profile artists, such as Nelly Furtado and Taylor Swift.[3] Since the fall in online piracy, to outside observers it would seem that the media industry is recovering from the impact of the digital world. In 2016 global music revenues are up 3.2% with streaming accounting for 43% of revenues.[4] However, we have seen a renewed campaign, with the concept of the "value gap" becoming the main argument for why media industries are harmed by the internet and need politicians' support. Lobbying in the EU is complemented by similar pressure in the US as part of a global concerted effort.

14. The "value gap" has been criticised by the technology industry as a commercial problem[5] rather than one of copyright: simply that it takes a lot more ad-based revenue to reach the figures generated by subscriptions, and removing free frictionless services will drive people back to piracy. Others propose that the mismatch could be fixed by improving the information available to rightsholders in order to calculate the royalties owned by ad-funded services.[6] Google, the owner of Youtube, strenuously denies that creators are not paid, claiming that it shared $2bn of revenues in user uploaded content through their rights management software *Content-ID*.[7] Industry in turn argues that Content-ID is limited in scope and imperfect, with up 20-40% of media being missed[8].

15. Consumer advocates see different online access models as reflecting various levels of commitment to artists, from casual listeners to fans, and warn of the potential harms to flourishing innovative streaming services of any attempts to force a single model based on premium subscriptions.[9]

---

2 http://impalamusic.org/sites/default/files/pictures/attachedfiles/Recording%20Artists%20calling%20for%20a%20Solution%20to%20the%20Value%20Gap%20-%2018%20July%202016.pdf

3 http://edition.cnn.com/2016/06/21/entertainment/taylor-swift-dmca-youtube/

4 IFPI Global Music Report 2016

5 https://medium.com/@joelennon/the-real-value-gap-in-the-music-business-5361d03b8f7a#.sffzmoijt

6 http://www.project-disco.org/intellectual-property/080116-value-gap-rhetoric-endangers-whole-tech-sector/

7 https://publicpolicy.googleblog.com/2016/07/continuing-to-create-value-while.html

8 http://www.musicbusinessworldwide.com/youtubes-content-id-fails-spot-20-40/

16. Some independent voices in the media industry agree that there is a disparity between what is being collected from advertising and subscription services and that technology companies could do more; while also arguing that music companies need to give creators a stronger voice and that transparency is required.[10]

17. The shift towards free streaming services for music consumption, particularly among younger people, is undeniable. Most under 16 will instinctively open Youtube when they are want to listen to a new song. The distribution of revenues in this new environment is undeniably complex, but ORG believes that copyright law may not be the best avenue to solve such issues.

Filtering systems

18. The draft Directive understandably does not prescribe a particular model for how these filtering mechanisms should work. It does though give some important indicators. The measures could have two aims, either to *ensure the functioning of agreements* with rightsholders, or to *prevent the availability on their services of works or other subject-matter* ***identified by rightsholders.*** This means that affected internet companies will operate on the basis of closed lists of materials. The Directive prescribes that internet companies must work with rightsholders, with transparency and reporting on the effectiveness of the measures.

19. The Directive goes in more detail, with the term *content recognition technologies.* This points to the best known such system, Content-ID, operated by Google in their YouTube platform since 2008. The expectation appears to be that every internet company will implement similar tools.

20. In Content-ID, artists or rightsholders upload their music to a database, the music is analysed and third party uploads are analysed as well to look for a match. If one is identified, the rightsholder can choose whether to monetise the upload with ads, simply track it or block the user uploaded content. Independent artists complain the system is hard to use and that in cases record companies have already uploaded their music and they cannot find the terms of the deal[11].

21. The automated nature of the system has been criticised by various group affected by blocks or demands for royalties. Gaming communities, where people upload their gameplay with commentary, have seen thousands of users receiving copyright claims[12].

---

9 https://www.techdirt.com/articles/20160803/15263735147/ridiculous-concept-value-gap-music-services-how-it-could-harm-both-tech-industry-music-industry.shtml

10 https://www.openrightsgroup.org/blog/2016/a-fair-way-to-close-the-value-gap

11 http://www.hypebot.com/hypebot/2016/05/how-to-get-your-music-into-content-id-draft.html

22. Other registries for media protection, such as Entertainment Identifier Registry (EIDR)[13] are less well known but they may grow if these provisions become law.

Our main concerns

23. The situation has been portrayed throughout the reform discussions as a conflict between beleaguered European creative industries and Silicon Valley behemoths that abuse their dominant position online to get content for free.

24. Unfortunately the reality is more complex and while everyone understands that musicians and filmmakers need to make a living, the proposals would have very negative consequences and may not even deliver on their supposed objective to *achieve a well-functioning marketplace for copyright.*

The proposals ignore end users

25. The draft Directive says that service providers must work with industry over these filters, but there is nothing there of the need to involve consumer groups and the users themselves to ensure they are not negatively affected.

26. The proposals are the product of years of deliberations, studies and a formal consultation by the European Commission. Throughout this process, there has been a stated aim to produce a balanced copyright framework that took into account the needs of rightsholders but also of citizens as ordinary users of services in the Digital Single Market.

27. These proposals are instead completely one-sided and at best ignore citizens, or treat them as collateral in an economic war between industrial sectors. Internet users ultimately generate the added economic value everyone is fighting over by spending millions of hours remixing, curating and uploading materials.

28. The European Commission has included requirements for *complaints and redress mechanisms,* showing an awareness of the troubles to come. Unfortunately, the mechanism proposed will not really help as it will all be internal to the companies involved, based on their own terms and conditions, and cannot be appealed in a proper court. European rights groups have severely criticised these provisions as weak[14] and inadequate.

---

[12] http://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/#646931846247

[13] http://eidr.org

[14] https://edri.org/eu-copyright-directive-privatised-censorship-and-filtering-of-free-speech/

Impacts on freedom of speech

29. The discussions about a balanced approach to copyright reforms are typically framed in terms of balancing stronger tools for rightsholders to enforce their rights with exceptions and limitations that allow for specific uses of copyrighted material without the need for a licence. Invariably, these exceptions rely on context and a certain level of analysis to establish that are completely legitimate uses and are are not infringing copyright. These exceptions are also critical for the exercise of fundamental human rights, such as access to science, culture and freedom of expression.

30. The proposed measures will have a negative impact on human rights, because automated filters are not good at distinguishing between a spoof - a parody protected by exception - and a bootleg. Filters cannot tell if a video or song is being copied in the context of a critical review - another legitimate use protected by law. Automatic filtering does not strike a fair balance between the protection of the fundamental right to property, "intellectual property" in this case, and the protection of other fundamental rights (freedom to conduct business and to receive or impart information.[15]

31. The draft Directive says that the filters must be *appropriate and proportionate* while also saying that rightsholders and service providers will be jointly responsible for defining best practices. This is not very hopeful for citizens, whose interests apparently come last for the European Commission.

Intermediary liability

32. The proposed measures also make a mess of established internet regulations designed to ensure that the online environment was not unduly hampered by the need to perform exactly the kind of checks proposed in the DSM Directive.

33. The European E-Commerce Directive provides liability protections for internet service providers so they are not responsible for the content they host unless they are fully aware. Without this *intermediary liability protection* the internet would grind to a halt, as every layer of the operations would be forced to police what the next one is doing over their systems. The same way that phone companies are not responsible for kidnappers using their networks to call for ransom, internet companies are not supposed to be liable for their users' actions.

34. Internet providers have to take action if told about copyright infringement and should prevent further abuse, for example by removing the accounts involved or related items, but calls to proactively monitor their users in a blanket form with

[15] Angelopoulos, C., 2015. Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third party liability *info*, 17(6), pp.72–96.

general filtering systems have been rebuffed by the Court of Justice of the European Union (CJEU).

35. The DSM Directive torpedoes existing internet regulation by defining a special group of internet service providers that happen to store content but also provide it to the public, which would be seen as publishers and not neutral intermediaries. This definition would bring thousands of internet providers under this provision and out of liability protections. Most web hosting aims to be publicly available and even services dedicated to private hosting - e.g. file lockers or back ups - can also generally be used for public delivery, making them also liable.

36. These measures will have very negative impacts on the internet and the European Digital Single Market in particular. We do not want to sound hysterical with cliches of breaking the internet, but if these measures had been in place in the 1990s it is hard to see how the public internet and world wide web would have flourished in such a way.

Effectiveness and costs

37. These proposals will likely not deliver the expected results and will almost certainly harm the development of a European digital industry that can provide a strong counterpart to Silicon Valley. The costs for a small internet start up of implementing a filtering system can be quite high. In addition, and almost more crippling, there are many associated costs in dealing with industry, takedowns and complaints. European tech startups could become collateral damage to attempts by regulators to force incumbent large internet companies to share their revenues with the creative industries.

38. Sadly, it is far from clear that wholesale filtering of user uploads will help European creators. The perceived main culprit of benefiting from user uploaded content, Youtube, already deploys such systems and if a service with the might of Google behind it cannot make them sufficiently effective it is hard to see how smaller companies can make this work. More likely this will only mean an expensive game of cat and mouse.

39. The Directive will force online companies to collaborate with media groups in an attempt to improve the functioning of these measures, but this seems based on the idea that efficiency is a problem of willingness, rather than inherently complex technological issues holding back automated content recognition.

40. There are some separate measures in the Directive to help ensure a fair remuneration in contracts of authors and performers, such as transparency over sales and being able to adjust contracts if the terms are too low. Stronger powers for creators in their dealings with companies are a good thing and could go further, with use it or lose it reversion of contracted out rights.

Article 11: Publishers' Right

What is being proposed

41. Article 11 of the Draft Directive creates a completely new intellectual property right specific for news publishers that lasts for 20 years, which adds a new layer of complexity to internet regulation. This right is meant to stop internet news aggregators simply copying a portion of the news article and stopping revenues flowing to the original site. The new right has the same scope as rights of reproduction and making available and it is covered by the same exceptions, including criticism or review.

42. Open Rights Group agrees with the underlying aims of the Directive of promoting a free and pluralist press, but we believe that the current proposals are not the right answer.

43. We are concerned about the impact of a new publisher right on citizens and consumers and would recommend that the UK government requests the removal of the relevant text from the Directive: Articles 2(4) and 11 and Recitals 31 to 36.

44. We believe that the proposed right is not well defined and creates uncertainty rather than clarity and will have disproportionate negative impacts; while possibly not even achieving its stated objective of *protecting press publications concerning digital uses.*

45. The proposed right has been almost unanimously criticised by legal scholars in quite severe terms during public[16] events[17], where indeed most of the arguments we bring up in this submission have been previously made. We particularly recommend that the IPO consult Dr Richard Danbury, who has carried out a two year research project on precisely the topic of *"Appraising Potential Legal Responses to Threats to the Production of News in the Digital Environment".*[18]

Our main concerns

Issues with the right

46. There are some problems with the way the right has been defined that make it very difficult to establish its exact scope, generating uncertainty and confusion.

[16] http://www.ivir.nl/conference-copyright-related-rights-and-the-news-in-the-eu-assessing-potential-new-laws/
[17] http://www.blaca.org/past-meetings.html
[18] http://www.cipil.law.cam.ac.uk/peoplemembers/dr-richard-danbury

Definition of the right

Lack of clarity on what is being protected

47. The publishers' right is based on definition of press publication as a collection of works:

48. 2(4) 'press publication' means a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.

49. This definition makes it unclear whether a single article is covered as part of the collection or it is the choice and arrangement that is protected here, similarly to the distinction between the protection of records in a database and the various rights invested in the database itself.

Lack of clarity on who is affected

50. The definition tries to refer to traditional printed media, but it could cover many other types of online publications.

51. The EU is open in aiming to support the financial sustainability of news publishers, and Recital 33 explicitly states that the right is not meant to cover scientific or academic publishers. Unfortunately, while the Recital should aid interpretation, the actual Article 2(4) is more ambiguous and could well cover those types of publications.

52. We are not completely clear on the situation of blogs, where content reuse and curation are an integral part of the medium and the definition of publisher is less clear. The right is meant to cover only publications by a "service provider" and here it is unclear whether the curator of a blog could be considered a service provider and claim the publisher right; or a blogging platform - such as Medium, Wordpress or Blogger - would have the right in exchange for providing free infrastructure for their users.

53. It is worth remembering that Twitter styles itself as a "micro-blogging platform" and many of its specialised topic feeds could well fall under this new right. Copying tweets - which would remain the copyright of the authors - instead of

embedding Twitter's own code, might now engage an additional publisher right for Twitter.

Excessive duration

54. The proposed twenty year duration of the right seems excessive and disproportionate to the objective of protecting economic interest of the publishers. Newspapers have a lifecycle measure in days, if not hours in the current 24 hour news cycle. Most paper based publications are destined for the recycling bin in weeks or at a push months after publication, except precisely those the Directive is not meant to cover such as academic journals.

55. It is also unclear whether the new right would cover existing publications.

How does it relate to copyright

Unclear impact on authors' copyright

56. The Directive tries to ensure that the new right for publishers will not affect authors, by making clear that it in no way changes existing copyright and even explicitly saying in Recital 35 and Article 11(2) that it cannot be invoked against the authors or other rightsholders who can exploit their work independently.

57. In practice unfortunately this may not work so smoothly. It would be important to understand in more detail how writers, editors and others involved may interact with the new right. In many cases they will have assigned their copyright to the publishers. In other cases they will retain their ownership, while yet in other cases there could be complex syndication deals in place. These different scenarios need explanations from the Commission.

58. The fact that in most cases publishers already have legal rights and mechanisms to control the copying or making available of content has led to criticisms that the new provisions may not have any practical relevance.[19]

59. Even if it does not generate expected income, a new neighbouring right for publishers means adding an extra layer of rights clearances to any project. This is already a major cost in many cultural industries. Neighbouring (or related) rights at EU level are currently confined to four categories: performing artists, record producers, film producers and broadcasters.

Unclear impact on exceptions

[19] http://ipkitten.blogspot.co.uk/2016/10/the-proposed-press-publishers-right-is.html#

60. The new right is modelled on the rights of reproduction and making available included in the Infosoc Directive, and explicitly excludes the right of communication to the public. This seems designed to avoid hyperlinking being included, which would have set this right in frontal collision with the internet.

61. The new right is also meant to be covered by the exceptions regime, including quotation and archiving in certain circumstances, but again in practice this may not be so smooth.

62. The restrictions could affect the Right to Culture, as many cultural institutions such as libraries, archives and museums and publishers of online catalogues and portals, could unintentionally be caught up in such measures.

63. The impact of the new right on the maintenance of the internet as a cultural artefact is not clear. Despite the widespread view that the internet is a permanent record, the opposite is true, with the average life of a web page being about a hundred days.[20] In many cases, important information remains online only because it has somehow been archived, or it can only be found thanks to alternative paths, such as directories which could be endangered by the new publishers' right.

Database right

64. Some scholars, such as Bernt Huggenholz from the University of Amsterdam's IVIR centre, have pointed at the similarities between the new right and the existing database right. It appears that publishers would like to create a completely new protected act based on the processing, arrangement and display of information that in itself would not be covered by copyright. As such it sounds very similar to the EU Database Directive, and the obvious question is why that should not be used instead.

65. We agree with the analysis, but would also like to point out at an alternative conclusion. The review of the Database Directive in 2005[21] found that despite being widely supported by industry the right "has had no proven impact on the production of databases". The Commission nevertheless found it impossible to remove the right from the statute, and this should give some pause on the introduction of a new right.

Negative impacts

66. In addition to the issues inherent in the right itself, we believe that the proposal could have severe negative impacts on media diversity, innovation and access to information.

[20] http://www.newyorker.com/magazine/2015/01/26/cobweb
[21] http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf

Reduction media diversity

67. While we sympathise with the difficulties faced by news organisations, particularly in their reduced ability to sustain quality investigative journalism, we believe that creating a new neighbouring right would be negative and very likely would not solve the problems faced by media organisations.

68. Indeed from the available evidence, the new right could well have the opposite effect and reduce media diversity by consolidating the position of large well known players while smaller publications lose alternative routes to reach new audiences.

Reduced availability of content and impact on rights and innovation

69. Similar initiatives in Germany and Spain had a disastrous effect on media access. We understand that the European Commission has gone to pains to stress that this proposed new right will work differently, but so far has not provided convincing evidence.

70. German groups concerned about the previous measures see the new right as even worse for the availability of information, being broader and removing[22] the safeguards introduced in Germany, where for example it only covered making available and excluded snippets.

71. There is now evidence that these experiences in Spain and Germany have had a very negative impact on the availability of content to consumers:

72. 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, Beegeeinfo. [EDiMA, The impact of ancillary rights in news products. edima-eu.org[23]]. Google has stopped its news aggregator service in Spain altogether.

The experience from Spain

73. Spain's ancillary copyright law came into effect on January 1, 2015 in Article 32.2 of the Spanish Intellectual Property Act. The clause does not explicitly cover news portals. It forces any 'electronic content aggregation providers' that are 'regularly updated' to pay a copyright fee to publishers of the materials they collate. This can include a normal blog. Publishers cannot opt out of being paid this fee that is paid

[22] http://ancillarycopyright.eu/news/2016-08-31/it-could-not-be-worse-draft-proposal-copyright-directive-leaked

[23] http://edima-eu.org/pdfs/EDIMA%20-%20Impact%20of%20ancillary%20rights%20in%20news%20products.pdf

through a collecting society. This is in response to the German situation, where opt outs have derailed the system, as we discuss below. There is an exception for providing minimum results for general search results responding to “isolated words”, but not “for commercial purposes”.

74. The critical departure from normal copyright here is that aggregators have to pay to use ‘non-significant fragments’ of content, which normally are allowed under copyright.

75. The effects of the new right have been studied in detail by researchers at NERA.[24] Researchers found that the new legislation is detrimental to consumers because it reduces content variety and impedes the ability of innovative new services to enter the market.

76. “Based on comScore data for the first 3 months of 2015 the study finds that the closing of Google News (and a number of smaller news aggregation services) that followed the introduction of the new law has led to a (predictable) decline of internet traffic directed at Spanish newspapers: Traffic to newspaper sites has dropped more than 6% on average and 14% for small publications.”(NERA)

77. Smaller online publications without brand recognition are particularly affected as these rely on aggregators more than large media operations. This skews competition in news publishing towards well known companies, particularly those with established print presence. The study found that news aggregators generally have a positive effect by expanding the market, which outweighs any cannibalisation of their sources.

Implications for freedom of information

78. The new restrictions mean that Spanish citizens have less access to information, to new products and services from aggregators, and to content from media outlets. These reductions in available media negatively impact the human right to impart and receive information, enshrined in Art.10 of the European Convention on Human Rights [ECHR] and Art.11 of the Charter of Fundamental Rights of the EU of 20007 [EU Charter].

79. Social media platforms would logically be the next target of any new neighbouring publishers’ right. According to Pew Research, Facebook is now the main source for political news among US Millennials, almost twice that of Google News (61% to 33%).[25] It is likely that a similar situation can be found in the EU.

[24] Posada de la Concha, P., Gutierrez Garcia, A. & Hernandez Cobos, H., 2015. Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual . nera.com

[25] http://www.journalism.org/2015/06/01/facebook-top-source-for-political-news-among-millennials/

Facebook has extensive deals with publishers, but a newcomer social network may not be able to do the same.

80. It is very possible that a new neighbouring right could end up becoming a fee paid by media groups in order to be included in the aggregators. Larger organisations would afford to pay, while small independent media would be excluded from Google or Facebook.

Innovation and the web

81. The impact of the proposed new restrictions on basic linking and search engines are clear and concerning enough, but there are other worrying aspects that are less frequently discussed.

82. Innovative services are also particularly affected. This impacts customised services based on social media usage, specialist communities and projects using machine learning and algorithmic tailoring of news feeds. This clearly has a negative impact on the Digital Single Market and the EU economy.

83. Much internet traffic nowadays takes place without human intervention - machine to machine - as information is recycled and repurposed in myriad ways. The web has grown in complexity to a point that a purely human based approach to managing it as an information system is not viable. The modern internet and all the social and economic constructs that depend on it rely not just on Google, search engines and traditional content aggregators but increasingly on other less known services and systems that are constantly processing and classifying information. The new restrictions being proposed by the Commission could have huge implications, as the modern web depends not just on the ability to provide basic links, excluded from the Directive, but on the automated organisation of knowledge through the use of additional information describing the links, of the kind potentially being restricted here: summaries, snippets, keywords, etc.

84. One example is the Open Calais[26] system run by Thomson Reuters, which uses Natural Language Processing (NLP) and machine learning algorithms to analyse content - much of it news - in order to tag people, places, companies, facts, and events. Thomson Reuters sells this service to both content providers and aggregators. Similar knowledge management tools are in operation in many areas [e.g. http://www.mygrid.org.uk] and many such so-called semantic systems are interlinked in the Linked Open Data cloud.[27] Introducing a new layer of permissions and royalties into the processing of online content could have unforeseen consequences as it would affect not just Google but many other re-users of information.

[26] http://www.opencalais.com
[27] http://lod-cloud.net/versions/2014-08-30/lod-cloud.svg

Economic impact on consumers

85. In addition to the above detrimental effects, NERA looked at how the loss of aggregators in Spain after the introduction of the new levy meant that end users had to spend more time looking for news, and this has an economic cost in loss of opportunity. They saw a reduction of 6.1% on visits since the act came into force, so we assume that the extra time is spent looking for news instead of reading them.

86. Although these figures may seem insignificant, when the number of hours spent are aggregated at the country level, the loss in the so-called "customer surplus" amounts to a staggering €1.85 billion per year in Spain. A proper calculation at the EU level would require adjustments for national internet use, media consumption and wages, but even on a very rough projection based on a EU population of 508 million, following the NERA model the new restriction could involve up to €20 billion.

87. This is a very large amount, but even if we do not fully accept NERA's model and calculations, clearly removing convenience in finding information will have some economic effect.

88. If alternatively, publishers managed to maintain the existing system of aggregators and curated sources of news through some licensing regime, these costs almost certainly would have to be passed on to consumers of those services.

89. It is clear that one way or another the introduction of the proposed new restrictions would have some important economic costs to citizens.

Impact on open content

90. Legal scholar Raquel Xalabander has found additional negative impacts of the Spanish legislation on open content[28], such as Creative Commons (CC) licences.

91. The worst aspects of the Spanish legislation seem to have been removed in the European proposals, but we would like to see greater assurances. The main issue in Spain is the impossibility to waive the fees for CC licensed contents, making these licenses ineffective.

92. The Draft Directive operates under a different premise, but it is still unclear how open licensed content can be restricted by publishers despite a copyright notice expressly authorising the reproduction, distribution and making available online for free.

---

[28] Xalabarder, R., 2014. The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law. SSRN Electronic Journal.

93. The new right could even be a problem for many publishers of free materials, who may now involuntarily incur associated transactional costs in order to manage it. In some cases this could be a deterrent to publishing free or open licensed information.

Unclear delivery of objectives

94. The experience from Germany shows that there is no evidence that the new right has improved the situation for publishers.

95. Germany introduced a compensation regime for news publishers in August 2013, quite openly targeted at Google. This was quickly predicted as unworkable by legal scholars, who argued that the internet company could simply choose not to index news that didn't agree to waive the fees.[29]

96. The predictions proved correct, and newspapers scrambled to get Google on side by renouncing their fees. The copyright collecting society VG Media took Google to the German competition regulator, the Bundeskartellamt, arguing that that Google was abusing its dominant position in the search and news aggregation markets by not displaying news snippets unless the fees were waived. The regulator sided with Google, who argued that they risked being sued otherwise.[30] According to the Bundeskartellamt, even a dominant company cannot be compelled under competition law to take on a considerable risk of damages where the legal situation is unclear.

97. VG Media also complained to the Copyright Arbitration Board of the German Patent and Trademark Office (GPTO), arguing that its members were entitled to 11% of the revenue of search engine operators that provide internet users with a way to find their content. The GPTO rejected the calculations of the collecting society.

98. To this day German ancillary copyright has not generated any substantial income for German publishers.

---

[29] Kersting, C. & Dworschak, S., 2013. Ancillary Copyright for News Publishers: Would Google Really Have to Pay?–A Competition Law Analysis. NZKart - Neue Zeitschrift für Kartellrecht (New Journal of Competition Law), (46).

[30] Bundeskartellamt, 2015. Bundeskartellamt takes decision in ancillary copyright dispute. bundeskartellamt.de. (Available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html)

Other measures in the DSM Directive

New mandatory exceptions

99. The proposed new exceptions are positive but in all cases limited when compared to the initial demands of libraries, educators and cultural institutions. They do not include many of the more far fetching reforms proposed by civil society and even the European Parliament.

100. The call for a mandatory exception for “freedom of panorama” campaigned for by many civil society groups including ORG fell on deaf ears. The Commission has simply stated in their documents that the status quo works fine, while politely asking all countries to implement the exception.

Text and Data Mining exception

101. This exception allows the making of copies to perform analysis for scientific research by non-profit or public interest organisations. There is no compensation for rightsholders and an explicit ban on contractual clauses overriding the exception. Technical measures to restrict access or copying are allowed but should not affect the exception.

102. This is a positive move, although many research organisations and libraries had been asking for a broader scope as they feared that a lot of important research may be excluded.

Online Teaching exception

103. The rationale for this exception is the lack of clarity on whether existing exceptions in the Infosoc and Database Directive apply to online education, particularly cross border access. The exception covers only “educational establishments”, which must control access to the resources, and will likely exclude many online educational initiatives. The exception allows for licensing schemes to take precedence over the exception and this could be used to weaken the provisions.

Digital Preservation

104. Libraries, archives and similar cultural heritage institutions will be allowed to make necessary copies of works for preservation, but only of works in their

permanent collections. The exception is only for internal copies and not for online libraries.

Out-of-commerce works

105. Libraries have been lobbying for a long time to be allowed to engage in collective licensing deals to digitise and distribute out-of-commerce works. They see this as both an extension of their mission and an opportunity to generate funds, although in principle this is framed as non-commercial cost recovery of the costs of mass digitisation. The exception only applies to works first published in the EU. This is not a full free copying exception, but the option to enter extended collective licensing deals without the need to get approval from every author. There is a six month compulsory notice in case authors are around and object.

106. ORG does not oppose this provision, but libraries need to be respectful of public domain works, which can be dragged into such deals.